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## Q&A With Sutherland's Cynthia Krus

*Law360, New York (September 24, 2009)* -- Cynthia M. Krus, who serves as the co-practice group leader of Sutherland Asbill & Brennan LLP's corporate practice group, has been involved in numerous public and private securities offerings and has advised clients in connection with a variety of corporate transactions including mergers and acquisitions, proxy contests, exchange and rights offerings, going-private transactions and reorganizations.

Krus counsels public companies in a broad range of corporate and securities matters, such as the Sarbanes-Oxley Act of 2002, corporate governance, disclosure, executive compensation and shareholder matters. She also advises companies on the structure and formation of various entities and the establishment and operation of private and public venture equity, including business development companies (BDCs), special purpose acquisition companies (SPACs) and structured trust acquisition companies (STACs).

### **Q: What attracted you to your practice area?**

A: Between undergrad and law school, I worked for two years in Washington at a research bureau that monitored filings made at the U.S. Securities and Exchange Commission — a time when you had to be at the SEC to get access to the filings.

This was during the heyday of the corporate LBO/takeover wars of the mid- to late-1980s, fueled by the junk bond craze, as well as the advent of corporate anti-takeover measures.

Being part of this watershed period for corporate and securities law helped me develop an understanding of the public marketplace vis a vis the SEC filings, and how the law, particularly with disclosure, framed business decision-making. This attracted me to the law, and I wanted to become more a part of this world.

### **Q: What is the most challenging deal you've worked on, and why?**

Although I began my career in the banking industry, I have been working with business development companies or BDCs for more than 10 years. Working with this industry and developing ways to access the markets in an effective and efficient manner has been the most rewarding and challenging part of my practice.

BDCs are essentially a hybrid between an operating company and an investment company. BDCs effectively operate as the funding source to middle-market companies.

Since they are linked to the financial services industry, they have struggled in the last year, but because of the entrepreneurial nature of the management teams, they have survived the downturn. This business model is more reasonably leveraged and regulated than some of the other specialty finance companies that have evaporated overnight.

Although many have downsized to deleverage, they have been able to access the market in the past month — with about five BDCs conducting follow-on offerings. BDCs allow retail investors to invest in a pool of investments of middle-market companies. They are attractive to these investors because they are generally yield-based products.

You may have not heard of BDCs since they are a small industry —about 25 of them are actively traded. However, BDCs make up over half of the mezzanines' funding that was accomplished in 2008, and they employ through portfolio companies more than 1.5 million employees.

Since many of the large financial institutions have abandoned the middle-market, and CLOs and securitizations are in question, BDCs may be one of the solutions to invigorating middle-market companies and moving our economy forward. I hope that this is one of the answers to our economic challenges, and that I am a part of it.

**Q: What are the most challenging legal problems currently facing clients in your practice area?**

The most challenging aspect of a securities and corporate practice today is understanding how the government will react to the variety of economic crises we are facing.

Traversing the corporate landscape today takes significant planning, especially in trying to anticipate the regulatory environment a company will have to operate under in the future — the wrong decision can have significant ramifications on a corporation.

Although it is clear that there needs to be regulatory reform, especially in the financial services area, the concern is that the government goes too far and destabilizes the underlying tenets that corporations have been built on.

Our system works because we have in the past reasonably rewarded risk-taking and entrepreneurship. To the extent that we do not reward this type of behavior, we may

destroy some of the most productive ideas. I believe that if we cap compensation or limit a company's ability to grow, we are on the verge of altering our system. But, this does not mean that we cannot regulate companies and their risk profiles. The most significant challenge is guiding companies through this challenging environment.

**Q: Where do you see the next wave of activity in your practice area coming from?**

To the extent there is another trough or downturn in the economy as a result of real estate or the jobs outlook, there may be another legislative stampede. Risk and the assessment thereof may become the next regulatory holy grail.

The issue though is how to measure risk and how to regulate it. The question is whether the regulation will be thoughtfully created or reactionary. A company must build a corporate culture that identifies and monitors risks throughout the organization. There is no one-size-fits-all approach to accessing risk.

The board must be the heart of this effort, whether it is through a risk committee or the full board. The board must understand the threats posed, and it must integrate it in management and reinforce it through the compensation structure.

**Q: Outside your own firm, name one lawyer who's impressed you and tell us why.**

Andrew D. Christie, Chief Justice of the Delaware Supreme Court (1985-1992), presided over a period of intense activity in corporate law. Piloting the court through numerous shareholder derivative suits, Justice Christie and the court issued seminal decisions and raised the national consciousness of corporate responsibilities, particularly a board of directors' responsibilities of good faith and the duties of care and loyalty.

One significant decision was *Smith v. Van Gorkom* (1985), which expanded the modern doctrine of the business judgment rule wherein a Delaware court will not second-guess the decisions of a board of directors absent a breach of one of their fiduciary duties.

Although the court upheld the board's decision-making authority, it required the board to have more information before it made a decision and built a process for approving M&A transactions. In a world where corporate governance is being redefined and the authority of the boards is being questioned, we have to uphold the fiduciary duties that are the underpinnings of our corporate structure. If we do not, the corporate structure could collapse under its own weight.

**Q: What advice would you give to a young lawyer interested in getting into your practice area?**

Join a firm that will allow you to learn about the deals from a holistic perspective. Some firms only utilize younger attorneys generically without giving them context for a deal or transaction. This only gives associates a small picture of the whole transaction. Choose

a firm based on where you will be mentored and how much hands-on experience will be given.

Try to find situations that will challenge you and make you think. This is what will make you a valued attorney. Whatever the path, focus on your own development as a business adviser or counselor because you need to understand how to arrive at solutions, not just recite the law. Regardless of the economy, you will be needed.