

# p f m

private funds management

## SHOW ME THE CARRY

WORK BEGINS ON STANDARDIZING  
FEE REPORTING

### CYBERSECURITY INSURANCE

Are the policies worth  
the cost in PE?

### KNOWN UNKNOWNNS

A special report on  
risk management

### HELLO CUBA

Is the island state  
ready for PE?

Editor, *pfm*  
**Nicholas Donato**  
Tel: +1 212 937 0385  
nicholas.d@peimedia.com

Reporter, *pfm*  
**Katherine Buccaccio**  
Tel: +1 646 545 4430  
katherine.b@peimedia.com

Contributors  
**Anna Devine**  
**Matthew Goodburn**  
**Rob Kotecki**

Design and Production Manager  
**Ethan Byun**  
Tel: +1 212 633 2906  
ethan.b@peimedia.com

Head of Advertising  
**Alistair Robinson**

Advertising Manager  
**Anthony Hackett**  
Tel: +44 207 566 4273  
anthony.h@peimedia.com

Subscription Sales  
EMEA  
**Alexis Savvides**  
Tel: +44 207 566 5458  
alexis.s@peimedia.com

Asia Pacific  
**Ryan Ng**  
Tel: +852 2153 3140  
ryan.n@peimedia.com

Americas  
**Andre Anderson**  
Tel: +1 646 545 6296  
andre.a@peimedia.com

Customer Services  
**Fran Hobson**  
Tel: +44 207 566 5444  
fran.h@peimedia.com

**An Nguyeng**  
Tel: +1 212 645 1919  
an.n@peimedia.com

For subscription information please visit  
[www.privatefundsmanagement.net](http://www.privatefundsmanagement.net).

Editorial Director  
**Philip Borel**  
philip.b@peimedia.com

Head of Research & Analytics  
**Dan Gunner**  
dan.g@peimedia.com

Publishing Director  
**Paul McLean**  
paul.m@peimedia.com

Group Managing Director  
**Tim McLoughlin**  
tim.m@peimedia.com

Managing Director – Americas  
**Colm Gilmore**  
colm.g@peimedia.com

Managing Director – Asia  
**Chris Petersen**  
chris.p@peimedia.com

Co-founders  
**David Hawkins**  
david.h@peimedia.com

**Richard O'Donohoe**  
richard.o@peimedia.com

## editor's letter



# Risky behavior

Risk is always a fun topic to explore when we put together our August issue, in part because we can take the topic in so many different directions.

Really the process starts with asking CFOs, COOs, lawyers and accountants a pretty simple question: what's the single biggest risk facing your profession in the next 12 months? We get all sorts of interesting answers that help shape our coverage, but this time around we noticed one common denominator in the responses we received: cybersecurity.

I can't say that I'm surprised, given the amount of attention given to cybersecurity by lawmakers, regulators and investors in the last two years. In the past we've covered what types of IT best practices private fund managers are pursuing now that cybersecurity has become so entrenched as a hot-button issue – but for this, our annual risk special, we took things in a slightly different direction by asking about cybersecurity insurance.

From what we gathered, many private fund CFOs and COOs are in the process of shopping for cybersecurity insurance policies, but some are finding the coverage on offer not worth the cost. Nonetheless, CFOs are attuned to the fact that purchasing cybersecurity insurance is likely to win points with LPs and regulators. See p. 20 for all

the details.

Speaking of insurance, over the last year there has been a huge surge of interest in reps and warranties insurance in the M&A markets. The problem, however, is that these policies take time and skill to acquire, with lingering questions as to how much insurers will pay on a claim. It's an area of risk GPs are still feeling out. See p. 24 for more.

Elsewhere in the issue, we tackle investor reporting, specifically carried interest, which has become a major point of contention ever since CalPERS, the bellwether LP, took media heat for not knowing how many dollars in carry its GPs receive. It's a complex area filled with mixed opinions. On p. 35, we walk you through the issue, and ask what it all means for fee reporting in the time ahead. Allow me now to predict that carried interest reporting is an administrative challenge more CFOs will mention when I ask them about their biggest fears or risk areas in 2016.

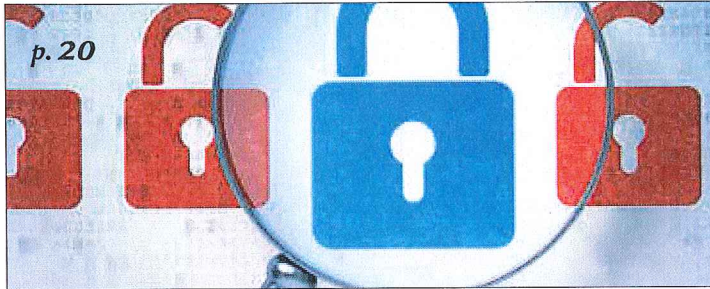
Enjoy the issue,

Nicholas Donato  
Editor, *pfm*  
nicholas.d@peimedia.com

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As GPs consider purchasing cybersecurity insurance, we ask the question: are these policies worth it?



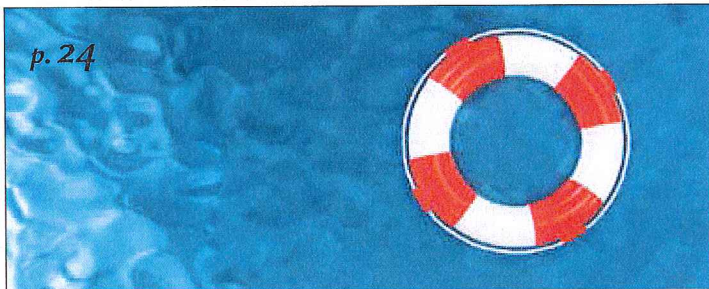
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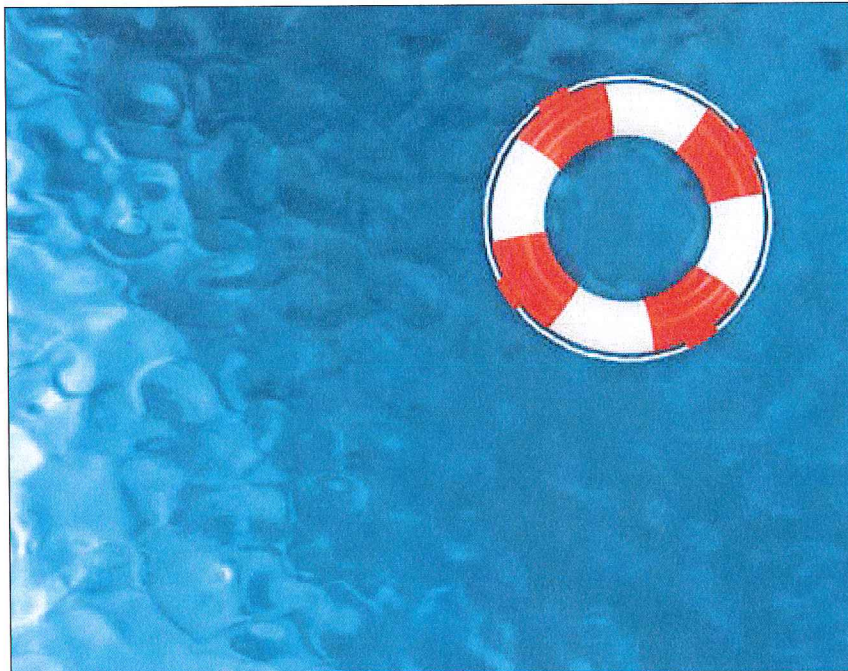
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New York: 16 West 46th Street, 4th Floor / New York, NY 10036-4503 / +1 212 633 1919 / Fax: +1 212 633 2904 • London: 140 London Wall / London EC2Y 5DN / +44 20 7566 5444 / Fax: +44 20 7566 5455 • Hong Kong: 14/F, Onfem Tower / 29 Wyndham Street / Central, Hong Kong / +852 2153 3240 / Fax: +852 2110 0372 • PFM is published 12 times a year. To find out more about PEI please visit: [www.thisisPEI.com](http://www.thisisPEI.com) • Printed by Hobbs the Printers Ltd / [www.hobbs.uk.com](http://www.hobbs.uk.com) • © PEI 2015 • No statement in this magazine is to be construed as a recommendation to buy or sell securities. Neither this publication nor any part of it may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without the prior permission of the publisher. Whilst every effort has been made to ensure its accuracy, the publisher and contributors accept no responsibility for the accuracy of the content in this magazine. Readers should also be aware that external contributors may represent firms that may have an interest in companies and/or their securities mentioned in their contributions herein. • Cancellation policy: you can cancel your subscription at any time during the first three months of subscribing and you will receive a refund of 70 per cent of the total annual subscription fee. Thereafter, no refund is available. Any cancellation request needs to be sent in writing (fax, mail or email) to the subscriptions departments in either our London or New York offices.





Reps and warranties insurance: how much are you really saving?

## An unproven lifesaver

Reps and warranties insurance may be more popular than ever, but these policies take time and skill to acquire, with lingering questions as to how much will be paid on any claim

by ROB KOTECKI

According to a recent joint report from the law firm Dechert and the insurer Marsh, the number of reps and warranty policies has quadrupled from 2012 to 2014, with an additional 20 to 30 percent growth this year. The popularity of such policies is easy to understand. Representation and warranties insurance (RWI) can be acquired by either the buyer or seller in an M&A transaction and acts to replace some, if not most, of a seller's indemnification obligations in the event of a breach of any reps or warranties.

For example, a seller might have to put 10 percent of the deal's value in

escrow to cover breaches in reps and warranties, but with such a policy in place, they may need only 1 percent as a "retention amount." No policy covers the first dollars of loss. Naturally, sellers might find the premium worth paying, but these days, nearly 80 percent of policies are on the buy-side, with many bidders purchasing these policies to sweeten their offers, and many sellers requiring RWI as part of any bid.

But the big question is whether the carriers will pay out any major claims. Several market participants cite that so far, 20 percent of such policies have seen claims filed, but often below the retention amounts, so the insurers haven't been forced to make any major payments yet. Skeptics of RWI suggest

that after a few credible claims are rejected, this boom might go bust. But the boom might prove to be the rationale for the claims to be paid out in the end.

Given the popularity of RWI policies, some experts suggest it would make more sense for insurers to pay on credible claims for no other reason than to protect such a substantial line of business. Whether carriers act in such enlightened self-interest remains to be seen, but in the near term, buyers might have little recourse but to rely on the kindness of the insurance companies, since sellers have little desire to back up their reps and warranties by escrow alone.

### Give yourself time

The other major factor involved in assessing the value of RWI is the amount of time and effort it requires to purchase a policy.

Buyers should check with brokers early to make sure it's available for that particular transaction. Insurers review all the diligence materials before offering a "bindable" quote for the policy. RWI policies can be hard to get for certain situations and there's a chance that due to surging demand, applications can take longer to process, and be less competitively priced. The larger issue is how much any such policies will pay out, with some skeptics thinking that RWI has yet to prove itself worthy of its current popularity.

Experts suggest that RWI is important in distressed deals, where buyers aren't certain they could be compensated for any breaches in bankruptcy court. In cross border transactions, RWI can protect a buyer concerned that foreign jurisdictions wouldn't rule in their favor in case of a breach. "We've had some situations

where there are doubts about either local courts enforcing contractual obligations or US courts respecting foreign judgments,” says George Wang of the law firm Haynes & Boone. However, the real surge in RWI policies can be linked to a seller’s market, where competitive auctions tilt the advantage away from the buy-side of the table.

But RWI doesn’t make sense for every deal, no matter how willing a buyer may be. Most policy coverage limits vary between \$10 million and \$350 million worth of coverage, falling well in the range of middle market deals. In most cases, premiums will amount to 3.2 percent to 4 percent of the coverage limit, though there are cases where it’s been available for as low as 2 percent. Policies are available with limits under \$10 million, but are increasingly expensive and difficult to obtain. However, that may be changing. “In just the last few months we’re seeing some carriers offer minimum premiums as low as \$50,000,” says Alex Jezerski, Jr. of the wholesale insurance broker RT ProExec.

If an RWI policy makes sense, GPs should start shopping early. Brokers don’t see a lot of success with

eleventh hour searches for a policy. It can take several weeks in the best of circumstances, and while insurers are willing to speed up the process, there’s no guarantee they can.

The process begins with an indication period, where the buyer shares deal documents, financials and the core facts of the transaction with a broker, who then hunts for potential policies. That hunt usually takes two weeks. The broker will then return with options for coverage.

Once the buyer selects a potential policy, that insurer will then tap their own counsel, and will do their own diligence on the transaction, reviewing the documents in the digital data room and examine the quality of the buyer’s initial diligence. “It’s my sense that in issuing coverage, insurers can gain comfort by knowing who is participating in a deal and the quality of the due diligence done in connection with the deal,” says Mark Hersh of the law firm Reed Smith.

As RWI has evolved, so has the talent involved in these diligence efforts. “Ten years ago, you’d be talking with an insurance guy, but nowadays, you’ll be talking with a former M&A deal lawyer who really understands the nature and language of these deal agreements,” says Wang. And that can mean a tougher diligence review process, but a policy that might better serve the terms of the agreement.

One firm’s in-house counsel pointed out that private equity firms should look at any non-disclosure agreements (NDAs) and revise them to include insurers among the parties covered by an NDA. They noted it might be a stretch to consider these insurance diligence teams as advisors, traditionally covered by NDAs.

The insurers diligence period can take a week or longer, ending with

“If an RWI policy makes sense, buyers should start shopping early. Brokers don’t see a lot of success with eleventh hour searches for a policy”

a conference call between the deal team and the insurer’s diligence staff where they’ll discuss any questions or concerns they may have. Then the policy buyer will have a “bindable” quote to take to the negotiating table. At best, the entire process could take three weeks in total, maybe less, but in today’s market, buyers shouldn’t expect a swift turnaround.

A number of market participants said that as RWI policies have surged in popularity, there remain only about a dozen or so insurers who offer them. That means staffs are overwhelmed with deal flow, and that can lead to delays. At times, brokers go looking for five or six bids for a transaction, but can only find two, and sometimes, none at all.

“Your broker has to really understand the deal in question and know how to talk about it with the carriers,” says Jezerski. “With staffs so overworked, they’ll appreciate a deal that’s explained in clear and concise terms.” Easier said than done. ■

700

Number of R&W policies issued in 2014 (double the amount of policies issued in 2013), according to Dechert and Marsh research

30%

Upper-bound growth estimate of R&W insurance by end of 2015