

# Weil Private Equity Sponsor Sync

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STAY AHEAD.

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## FROM THE EDITORS

As we close the books on 2024 and look forward to 2025, we are pleased to bring you the latest edition of Sponsor Sync, packed with insights, updates, and expert perspectives on the ever-evolving landscape of private equity, legal challenges, and market trends. This issue offers a deep dive into critical topics, including the latest developments in the leveraged finance market and emerging trends in transaction insurance. We also explore some key developments that every PE professional should be aware of in the coming months.

### MARKET INSIGHTS

We review 2024 through the lens of our new Weil DealVision360 platform and look at trends for the year ahead. Our Finance Market Update provides an essential snapshot of the leveraged finance market, offering key takeaways for navigating this volatile space. We also highlight the return of early termination in HSR and other important changes to the antitrust regime.

### LEGAL EXPERTISE

In this issue's *Glenn's Corner*, Glenn West reminds us of the risks of aiding a disloyal corporate officer. Meanwhile, our *Legal Lens* feature delves into how courts continue to challenge the certainty around the CTA.

### STRATEGIC PERSPECTIVES

We are excited to present two engaging *Partner Perspectives* pieces. The first focuses on the unique role transaction insurance brokers like Atlantic play in risk mitigation, while the second offers insights from Aviditi Advisors, the private capital advisory group of Piper Sandler & Co., on the strategies that help navigate the complex world of fund-raising.

### PRIVATE EQUITY CONSIDERATIONS

If you're a private equity investor or board member, you'll want to check out our feature on PE Dual Hat Board Member Considerations. This article offers practical advice for those balancing fiduciary duties with investment protections – an essential read for every decision-maker.

### SPECIAL FEATURE

All that, and so much more. As always, we hope you find this issue informative and thought-provoking. Whether you're navigating legal challenges, seeking market insights, or tackling strategic decisions, we aim to provide you with the tools and knowledge needed to stay ahead of the curve.

*Wishing you a productive and insightful start to 2025.*

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## LETTER FROM THE SPECIAL EDITOR

Weil's private funds practice has long been a trusted partner to sponsors seeking to navigate the challenges and seize the opportunities of today's dynamic market. In this special section, we showcase our insights into the business of private capital sponsorship, focusing on transformative topics like continuation funds, asset management M&A, and strategies for emerging managers. With the depth and breadth of our experience, we are proud to help sponsors stay ahead of the curve and unlock new avenues for growth.



**WEIL LOAN TRACKER**

Q4'24

Average First-Lien Broadly Syndicated Spread for Single B Rated Borrowers:

 **S + 354**  
(down 20 bps Q over Q)

Average First-Lien Broadly Syndicated Spread for B-Minus Rated Borrowers:

 **S + 397**  
(down 27 bps from Q3)

YTD Average Annual Spread Differential for Private Credit:

 **~178 bps higher than BSL**

YTD Volume of Refinancings of U.S. Private Credit Loans into Syndicated Loan Market:

 **\$29 billion**

YTD Volume of Repricings of U.S. Leveraged Loans:

 **\$757 billion**

# U.S. LEVERAGED FINANCE MARKET UPDATE

**Benton Lewis**Partner  
Banking & Finance**Danielle Cepelewicz**Associate  
Banking & Finance**Laura Ceitlin**Associate  
Banking & Finance

## SMART SUMMARY

- The year kicked off with a strong start, powered by a combination of robust investor demand, abundant liquidity and borrower-friendly conditions for the refinancing of existing debt. The second half of 2024 was marked by a shift towards M&A and acquisition financing, driven by private equity activity.
- Interest rates cuts in mid-September had a significant impact on the leveraged finance market. Lower interest rates boosted investor sentiment and encouraged borrowing activity.
- Q4 2024 was a particularly strong quarter for the leveraged finance market with record-breaking levels of CLO issuance and a surge in M&A activity. The continued strong demand for leveraged loans, coupled with a limited supply of new issues, led to a significant increase in repricing activity that will likely persist during the first months of 2025.

2024 was a strong year in the leveraged finance markets, backed by strong fundamentals and high demand. Q4 emerged as the second-busiest

quarter of the year, with focus shifting back to opportunistic deals. Given the persistent supply shortage, the market experienced a significant repricing wave with other opportunistic activities, like dividend recapitalizations, gaining momentum. Despite expectations for higher M&A volume in 2025, the year ended with a record \$192 billion supply shortage. Looking ahead to the first months of 2025, loan demand is expected to remain strong driven by another year of substantial CLO issuance. The supply outlook for 2025 appears more balanced, with a likely reduction in opportunistic issuance and an increase in LBO and M&A financing. In M&A, expectations of policies favorable to dealmaking under the new U.S. presidential administration could boost LBO activity.

## 2024 Recap

The U.S. leveraged finance market was vibrant in 2024, driven by repricings, refinancing activity and a modest resurgence of new-money transactions. The first week of December was the busiest week of the year, mirroring the first weeks of January,<sup>1</sup> as borrowers took advantage of favorable market conditions to refinance existing debt at lower rates and on more favorable terms.

## Broadly Syndicated Market Refinancing Frenzy

The year began with a surge in refinancing and repricing activity, fueled by robust investor demand and capital liquidity. Borrowers capitalized on these favorable conditions by securing lower spreads. Repricing was dominant after the first half of the year, and, given the dearth of new money transactions, lenders showed increased willingness to revisit pricing on existing deals and accept riskier borrower profiles. Notably, nearly 40% of the refinancing volume in 2024 involved B- companies.<sup>2</sup>

The reopening of the broadly syndicated loan market to lower-rated borrowers in 2024 lured some deals away from the private credit market, as the more attractive spreads offered in the BSL market were difficult to resist.<sup>3</sup> The increased competition between broadly syndicated and private credit markets empowered borrowers to negotiate more favorable terms, such as fewer financial covenants and lower interest rates. These trends were driven by strong investor demand and limited deal flow, which pushed spreads to multi-year lows.

The opportunistic deal-making that began in Q1 persisted throughout the year. Nearly half of outstanding loans in the syndicated market at the start of 2024 were either repriced, extended, or paid off, reflecting record activity levels.<sup>4</sup> Indeed, there was a staggering \$757 billion in refinancing activity in 2024.<sup>5</sup> U.S. leveraged loan volume reached its peak in October 2024, topping \$1 trillion for the first time<sup>6</sup> and the repricing surge in December pushed the total for the fourth quarter to a record-breaking \$279 billion.<sup>7</sup>

**New Money Financings**

M&A activity began to pick up in the first few months of 2024, with \$29.2 billion in loan volume tied to buyouts and acquisitions.<sup>8</sup> But while

new-money volume was relatively modest in the first half of the year, the second half of 2024 marked a significant shift from a refinancing-dominated market to one characterized by increased M&A activity. Indeed, M&A-related loan volume surged to \$46 billion in Q3 alone.<sup>9</sup> This shift was also fueled by the September interest rate cut that provided a much-needed boost to investor sentiment and corporate dealmaking.

October set a new monthly record with \$45.4 billion in new-money issuance.<sup>10</sup> M&A-related activity contributed significantly to this surge, increasing from September's \$15.4 billion to \$19.3 billion in October.<sup>11</sup> Additionally, dividend recapitalizations became

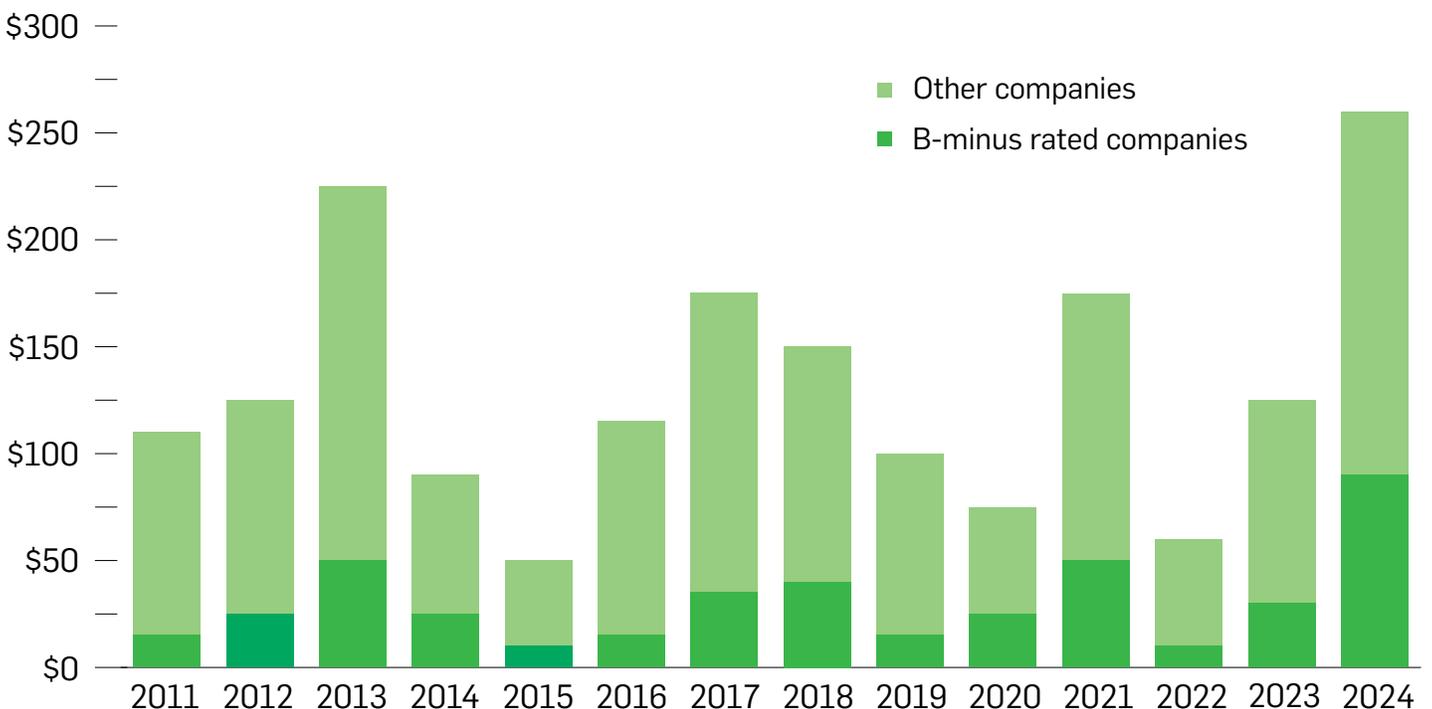
increasingly prevalent as sponsors extended their holding periods for portfolio companies, reaching their highest level in the past three years.

In contrast, syndicated loan issuance for LBOs, sponsored add-ons, and corporate M&A dropped to \$28 billion in the fourth quarter, returning to levels last seen in the first half of the year.<sup>12</sup> Nevertheless, optimism surrounding M&A is becoming evident in a growing pipeline of LBO deals.

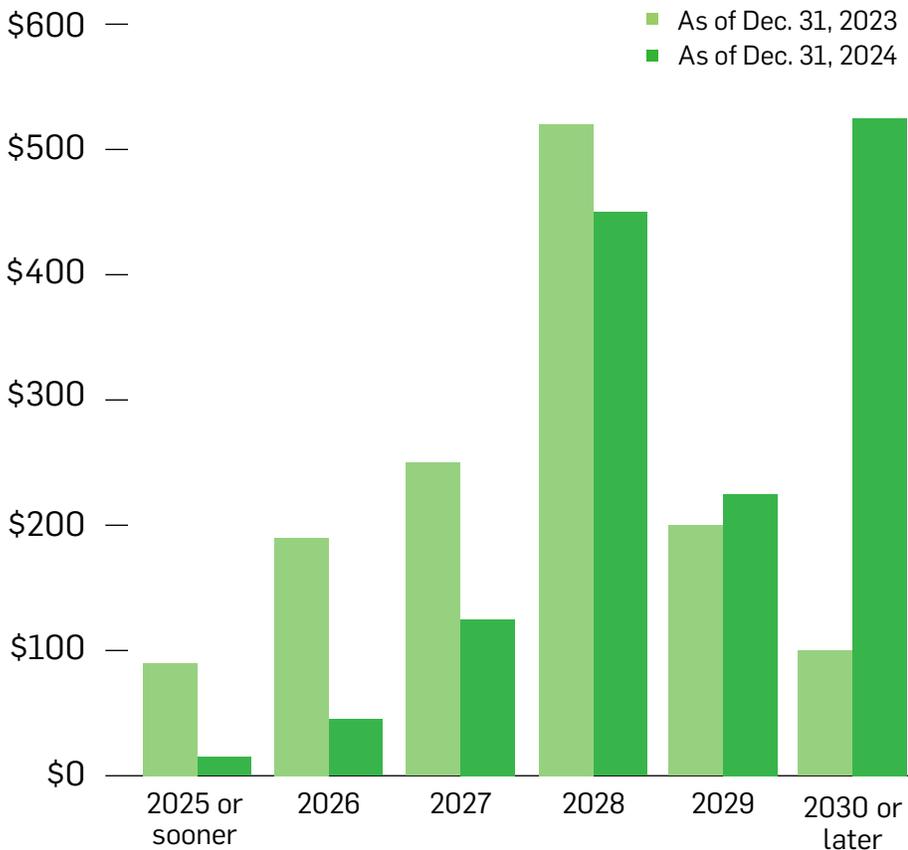
**Direct Lenders**

The strength of the syndicated loan market in 2024 did not seem to impair the “golden age” of private credit, in which direct lenders have continued to offer viable financing solutions for all but the largest M&A

**Added Loans Issued for Refinancing Purposes (\$B)**



**Added Loans Maturity Wall (\$B)**



**2025 Outlook**

The U.S. leveraged finance market's strong performance in 2024 sets the stage for continued growth in the coming year. Strong CLO issuance and private credit fundraising during the course of 2024 pave the way for strong market demand in 2025 such that tightening spreads and heightened competition among lenders are likely to continue defining market dynamics in the new year. And with election-driven uncertainty in the rearview mirror, a new administration that appears, at least on its face, to be business-friendly and additional interest rate cuts on the horizon, in the absence of a broad economic downturn or geopolitical conflict, conditions seem ripe for the debt financing markets to fuel going private activity in 2025. [W](#)

transactions. Private credit firms have raised record-setting funds, and the flood of money into the space, together with a competition with the syndicated market for deployment opportunities, have required direct lenders to offer increasingly favorable terms, making it an attractive financing alternative for many borrowers. This proved to be especially true where direct lenders were able to offer terms that aren't widely available in the syndicated market, like PIK interest and recurring revenue-based financial covenants.

The availability of more favorable terms in both the broadly syndicated and private credit markets gave borrowers negotiating leverage to facilitate repricing transactions under existing direct lender deals, compelling incumbent lenders to cut their interest rate or face a refinancing of the credit.

A number of other syndicated loan issuers who turned to the private credit market sought to address near term maturities.<sup>13</sup>

# PARTNER PERSPECTIVES

## Evolving Fraud



**David Haigh**  
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Atlantic



**Ido Mor-Chaim**  
Managing Director  
Atlantic



Representations & warranties insurance (“RWI”) is a firm feature of the deal landscape with “no indemnity” or “public style” deals commonplace. Even when structured as a public style deal, sellers retain the risk of fraudulent breaches of the representations & warranties. In other words, a buyer (or an insurer via subrogation) can still claim against a seller for fraud.

Because of this, sellers are seeking to narrow the definition of fraud under purchase agreements, including limiting it to actual (not constructive) knowledge of the inaccurate representation, made with intent to induce the other party to enter into

the agreement. Defining fraud in such a way, together with appropriate non-reliance provisions, avoids future claims premised on (i) alleged “reckless” or “equitable fraud”; or (ii) alleged fraud based on extra-contractual statements (e.g., statements made in meetings but not enshrined as representations in the contract).

While a seller-friendly definition of fraud is now common, the question of who should be liable for fraud in the making of the representations and warranties by the seller or the company remains an open question. This is of particular relevance for sponsors in the context of a portfolio company sale, and whether they

## ATLANTIC

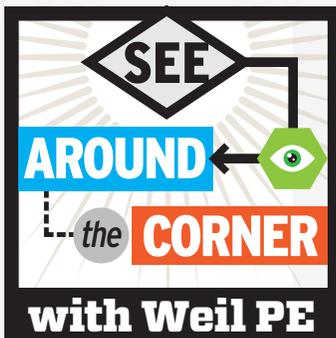
should be liable for fraud committed by the management team. Although Delaware law requires knowledge to commit fraud and not all fraud liability can be eliminated by a contract, a selling sponsor might want to include a provision that it is not responsible (even indirectly and economically) for fraud committed by the management team of which it is unaware. Conversely, a buyer will argue that it is inequitable for a sponsor to be shielded from a claim when it has financially benefited from management’s fraud. Agreements typically remained silent on this point although there are ways to mitigate the risk such as structuring the transaction as a merger where the stockholders of the seller do not sign the agreement. More recently, Atlantic has observed an increasing number of agreements expressly stating that a claim for fraud can only be made against the person that committed the fraud, showing that sellers are demanding belt-and-suspenders type clarity.

Given most RWI carriers are already willing to limit their subrogation rights to the parties with knowledge of the fraud (and not all sellers), they have been happy to follow the express fraud-limiting provision described above. In recent years, insurers have even extended the

subrogation waiver beyond the seller and its affiliates (i.e., to include the seller's agents and representatives) and in some instances it is possible to obtain an absolute waiver against such persons. This said, the RWI market is likely to "harden" going into 2025, with favorable policy terms (such as absolute subrogation waivers) harder to secure, but we expect carriers will continue to limit subrogation rights to the fraudulent party.

While carriers are willing to limit their rights to the fraudulent party, the same cannot be said of buyers, with Atlantic supporting several transactions where the buyer's contractual inability to recover from the sponsor for management's fraud has resulted in a deadlock. Atlantic provided perspective and solutions on these deals by designing an innovative "fraud" excess policy (at a fraction of the cost of a full policy) to protect the buyer above the standard RWI policy limit

for claims arising from fraud, irrespective of whether committed by the sponsor or management. Whether this becomes a more common way to bridge the gap and keep expectations on fraud "crystal clear" between buyers and sellers on this specific issue remains to be seen but it is certain that the focus on the fraud definition and how it applies to seller parties isn't going anywhere. [W](#)



## PREDICTIONS FOR NEW SEC LEADERSHIP



**Chris Mulligan**  
Partner  
Private Equity

President-elect Trump selected Paul Atkins to Chair the Securities and Exchange Commission ("SEC"). Mr. Atkins served on the SEC staff in the 1990s and was a Republican SEC Commissioner between 2002 and 2008. Mr. Atkins is well-known and respected within the SEC and we expect a very different posture from the SEC under Mr. Atkin's leadership compared to Chair Gensler, particularly with respect to rulemaking and enforcement.

With respect to rulemaking, we expect that the SEC will abandon virtually all of Chair Gensler's rule proposals and focus on streamlining existing rules, particularly in areas that may facilitate capital formation. We also predict less "regulation-by-enforcement" and expect that SEC enforcement staff will focus on issues involving investor harm and SEC policy divisions will provide additional guidance around technical issues. And of course the SEC will be significantly friendlier to crypto assets and managers – a change we likely will see immediately through reduced enforcement actions and crypto-friendly guidance and rulemaking.

One area where we are not predicting significant change is with respect to SEC examinations. We expect examinations likely will continue in a similar manner, as they did during President Trump's first term, perhaps with greater emphasis on efficiency and increasing examination coverage of investment advisers.

# WEIL DealVision 360 2024 IN REVIEW

Weil Private Equity recently launched DealVision 360 – a proprietary, data-driven platform that aggregates and analyzes more than 200,000 deal data points drawn from a broad spectrum of transactions – throughout the firm. With DealVision 360, we have a broad range of data at our fingertips for our clients’ exclusive benefit. Below is a snapshot of a few key data points across 2024 deals.\*



**Brittany Butwin**  
Counsel  
Private Equity

## TRANSACTION TYPES

Sponsors continue to diversify across transaction types as a means to deploy capital. This diversification has increased over past recent years.

Control Deals:

**71%**

Minority Investments:

**12%**

Secondaries:

**10%**

Take Privates:

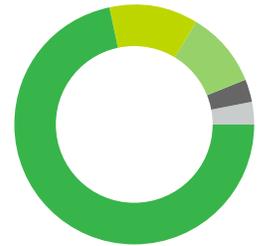
**3%**

PIPEs:

**3%**

SPACs:

**0%**



## BUY-SIDE VS SELL-SIDE

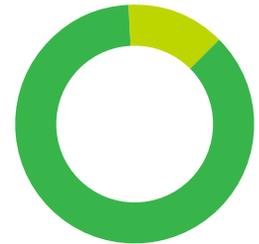
In 2024, Weil buy-side representations far surpassed Weil sell-side representations. This is not too surprising, as private equity exit activity slowed significantly over the past few years due to a number of headwinds impacting the overall M&A markets. That said, we expect sell-side representations to increase as sponsor exit activity is picking up in 2025 (and beyond).

Buy-side:

**78%**

Sell-side:

**22%**



## AUCTION PROCESSES

**27%** ↓↓

**31% in 2023 | 41% in 2022**

Auction processes have generally decreased since 2022. However, we have started to see an uptick in auction processes, and expect that to continue through 2025.

## EXCLUSIVITY

**78%** ↑↑

**59% in 2023 | 69% in 2022**

Buyers are more commonly obtaining exclusivity. While not uncommon for buyers to ultimately obtain exclusivity in the final stages of an auction process, this year over year increase in exclusivity likely coincides with the increase in proprietary deals (where buyers typically have more leverage as compared to auction processes).

## DEBT FINANCING

**27%** ↓↓

**33% in 2023 | 47% in 2022**

The use of debt financing by buyers has declined over the past two years. This is somewhat surprising, as the debt financing markets have generally improved in 2024 (both with respect to availability and cost as compared to 2023 and 2022). This decrease may be due, in part, to record high levels of dry powder available for deployment, allowing sponsors to more frequently finance deals with all equity.

\* The data discussed herein relates to transactions that signed in 2024 with a transaction party represented by Weil. All of the data (other than the breakdown across transaction types) relates to control deals where a buyer acquired more than 50% of a private target company.

**SPECIFIC PERFORMANCE / REMEDIES**

In 70% of deals, sellers/target companies negotiated for full specific performance – the right to seek to force buyers to close (assuming all conditions to buyer’s obligations to close are satisfied or waived), regardless of the availability of buyer’s debt financing. This syncs with what we’ve seen in recent years – a general uptick across control deals in full equity backstopped deals (and full specific performance), even where buyer obtains debt financing (which you will commonly see in competitive auction processes).

Relatedly, reverse termination fees (RTFs) – which typically serve as seller’s/target’s remedy for buyer’s failure to close due to a debt financing failure in “specific performance lite” deals – continue to be widely used in sponsor-backed control acquisitions, especially where the sponsor acquirer is obtaining new debt financing to finance the transaction. However, RTFs were used in less than half of control deals in 2024. This syncs with the prevalence of full specific performance (discussed above), where we often see damages caps in excess of RTFs, together with the general decrease in buyers’ use of debt financing across these transactions.



In almost all cases, the RTF capped buyer’s money damages (except for willful breach and/or fraud).



**Full Specific Performance:**  
70%

**Specific Performance Lite:**  
30%



**RTFs:**  
38%

**No RTFs:**  
62%

**Average RTF as a percentage of enterprise value was 6.26%; median RTF was 5.71%**

**SELLER INDEMNITIES AND RWI**



**Seller Indemnities :**  
52%

**Walk-Away Deals:**  
38%

**No Seller Indemnity but Reps/Warranties Survive:**  
10%

We were somewhat surprised to see that slightly more than half of deals included a seller indemnity, as we expected more walk-away deals. Notably, such seller indemnities were not limited to stand-alone indemnities (i.e., seller indemnification for a specific issue, usually something identified by buyer in diligence). The frequency of seller indemnities across these transactions may be due in part to the overall decrease in auction processes (the idea being that in competitive auction processes, buyers generally have little to no leverage to propose a seller indemnity) together with an increase in carve-out deals (where indemnities are more common) and a decrease in buyers’ use of RWI (discussed below).

**RWI**



In only 48% of deals buyers obtained RWI. The decrease in RWI obtained by buyers may be a sign that the costs of RWI are outweighing the benefit sponsors attribute to likelihood of a claim and/or recovery for claims under policies.

**Indemnification Escrows**



Of the deals with seller indemnities, 40% included a separate indemnity escrow (compared to 67% of 2023 deals; 75% of 2022 deals).

The average escrow amount was 8% of enterprise value (compared to 7% in 2023; 3% in 2022).

**Indemnification Caps**



Of the deals with seller indemnities, 92% included an indemnification cap (compared to 95% of 2023 deals; 82% of 2022 deals), most of which were capped at an amount less than purchase price.

The average indemnification cap was 17% of enterprise value (compared to 11% in 2023; 5% in 2022).

# “CO-OP AGREEMENTS” IN LIABILITY MANAGEMENT EXERCISES



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## SMART SUMMARY

- In response to increased liability management exercise (“LME”) activity, we have seen a significant increase in the use of co-operation agreements (“Co-Op agreements”) among creditors, including high profile transactions pursued by DISH, Altice, iHeart and Weight Watchers.
- Co-Op agreements seek to unify creditors in negotiations with borrowers and prevent subsets of creditors from participating in LME transactions other than as members of the ad hoc group.
- While Co-Op agreements have been successfully implemented in various high profile transactions, they are not a panacea for all creditors or in all situations given, among other things, the use of NDAs that may seek to prevent communication amongst creditors, complex capital structures that may naturally create disparate motivations for various creditors and/or transaction structures that do not require creditor consent.

In the wake of the Great Recession, a prolonged era of low interest rates and voracious appetite for high-yield assets gave private equity sponsors and borrowers the upper hand in negotiating credit documentation.



Borrowers capitalized on this shift to secure credit documentation light on creditor protections. Now, as interest rates have ticked higher and financial pressures for many companies mount, these terms have armed distressed borrowers and their sponsors with a critical edge, enabling them to exploit divisions among creditors in what has been termed by some as “creditor on creditor violence.” In an effort to level the playing field, some creditors have turned to cooperation agreements (“Co-Op agreements”) as a defensive measure aimed at preventing distressed borrowers from fracturing the creditor group and pursuing non-pro rata liability management transactions.

Co-Op agreements are not a new concept, but they gained significant traction among creditor groups in

2024 in response to a surge in liability management transactions, including in high profile situations faced by DISH, Altice, iHeart and Weight Watchers. While a “market standard” Co-Op Agreement is yet to emerge, the following provides a brief overview of the key features common amongst Co-Ops and the limitations of such agreements.

Co-Op agreements are formal agreements among creditors that seek to proactively unify an existing creditor group in reaction to a specific transaction or in anticipation of a liability management exercise. Though the details of each Co-Op agreement will be unique to the financial circumstances of the borrower and its relationship with its creditors, they typically reflect a number of key features:

- **Prohibition on Communications and Sales:** Covenants within the Co-Op agreement outline the rules of engagement and are primarily aimed at preventing subsets of creditors from engaging or participating in any financings, extension, liability management or restructuring transaction other than through its participation as a member of the ad hoc group. The covenants will often also restrict a creditor from selling or transferring their debt outside of the ad hoc group, unless such sale or transfer is to a subsequent holder who agrees to be bound by the terms of the Co-Op agreement. Generally, acquisitions of additional debt of the borrower are allowed, provided that such debt is automatically deemed bound by the terms of the Co-Op agreement.
- **Decision-Making:** Co-Op agreements will also generally include covenants that restrict the ability of participating creditors from taking any action that would be inconsistent with the Co-Op agreement, such as supporting or voting for alternative transactions unless all members of the ad hoc group are provided the same opportunity on a pro rata basis. Importantly, Co-Op agreements set forth the requisite decision-making thresholds of participating creditors for any action, including settlement of the creditors' claims and amending or extending the Co-Op agreement. Under the terms of the Co-Op agreement, all participating creditors will be bound by the decision of the requisite threshold of creditors. However, even though participating

creditors are ultimately bound by the decision of the requisite threshold, Co-Op agreements do not obligate those creditors to participate in whichever approach was approved by the ad hoc group. Consequently, achieving the proposed resolution will still depend on securing the necessary creditor participation for the proposed transaction.

- **Effectiveness Thresholds:** Typically Co-Op agreements contain an effectiveness section, which provides that parties will not be bound by the terms of the Co-Op agreement unless and until the requisite

consent of a necessary threshold of participating creditors. Among the covenants will typically be a restriction on disclosing this time limit to prevent the borrower from waiting out the duration of the agreement. Individual termination rights are notably absent from strong Co-Op agreements, as such rights weaken the leverage the participating creditors hold with their blocking position. However, the agreement will usually terminate automatically if the participating creditors no longer represent a majority of the applicable creditor group.

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**“Despite the increasing proliferation of Co-Op agreements, these agreements remain susceptible to an array of both formal and informal challenges and do not guarantee that a distressed borrower will be prevented from consummating a transaction at the expense of a subset of creditors.”**



amount of creditors execute the Co-Op agreement. The consent threshold for Co-Op agreements tends to be a simple majority, and may require a simple majority from each of the tranches of debt covered by the agreement.

- **Termination:** Given the restrictive terms of Co-Op agreements, they generally provide for automatic termination after six months, with extension optionality upon the

- **Remedies:** Co-Op agreements will almost always provide for specific performance and injunctive relief as the exclusive remedy sought in response to a breach of the agreement by a defecting creditor, which would aim to prevent the borrower from obtaining the requisite consent threshold to effectuate the transaction.

Despite the increasing proliferation of Co-Op agreements, these

agreements remain susceptible to an array of both formal and informal challenges and do not guarantee that a distressed borrower will be prevented from consummating a transaction at the expense of a subset of creditors. Notable limitations associated with Co-Op agreements remain, including:

- **NDAs:** Borrowers often employ non-disclosure agreements (“NDAs”) with subsets of their existing creditors in preparation for a liability management exercise. These NDAs are an offensive strategy designed to prevent creditors from communicating with one another, creating an information asymmetry that borrowers can use to their advantage to preempt blocking position through creditor coalitions and to ensure flexibility in side deals with subsets of creditors.
- **Complex Capital Structures and Crossholdings:** Companies with complex capital structures, including multiple classes of secured and unsecured debt with staggered maturities and varying lien priorities can complicate the strategic use of Co-Op agreements by proactive creditors. Creditors who hold tranches of the borrower’s debt across the capital structure may have motivations and incentives different from creditors concentrated in other parts of the borrower’s capital structure. Such differences may in turn drive tension within the broader creditor group seeking to unify under a Co-Op agreement. Creditors with significant crossholdings may be unable

or unwilling to remain bound by the terms of a Co-Op agreement, and may even look for opportunities to pursue their individual interests by working together with the borrower to ensure favorable economic terms at the expense of the creditor group attempting to unify.

- **Narrow Application:** Co-Op agreements are less effective at preventing transactions that do not require the borrower to obtain a requisite number of consents. For example, dropdown transactions—in which a borrower transfers assets out of the restricted group and then uses these newly-unencumbered assets as credit support for new debt—are typically enabled within the existing covenants. Such transactions can circumvent some of the protections sought by the Co-Op agreement and could leave subsets of creditors stripped of their collateral.
- **Untested Enforceability:** Although the use of Co-Op agreements is becoming more prevalent, their enforceability remains uncertain in the absence of judicial scrutiny. For example, under the terms of a Co-Op agreement, a court will generally be entitled to award relief in the form of specific performance where monetary damages are otherwise inadequate to protect the interests of the injured party or parties. But without any judicial scrutiny as interpretive guidance, it is unclear whether a court would find monetary damages inadequate in the event of a creditor defection from the Co-Op agreement. Given the uncertainty about how enforceable Co-Op agreements can be,

creditors should carefully consider the components of the agreement that can cause disputes over enforceability, which in addition to specific performance as a remedy, may include the amount of time the parties to the Co-Op agreement remain restricted or the imposition of additional negative covenants on individual creditors beyond the broader set applicable to the entire group.

As liability management strategies gain momentum among distressed borrowers, sponsors and creditors are increasingly focused on understanding the flexibility embedded in credit documentation, and the potential roadblocks and/or benefits provided by Co-Op agreements. Sponsors, borrowers and creditors alike should seek the advice of experts early on to help them anticipate and develop strategies to facilitate or counteract, as applicable, actions that may impact their ability to engage in selective negotiations. 

# RIDING THE RISING ARBITRATION TIDE MAY KEEP PRIVATE INVESTMENT DISPUTES PRIVATE



**Yehudah Buchweitz**  
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**Michelle Berardino**  
Associate  
Complex Commercial Litigation

■ As private equity (“PE”) activity has trended upwards in value, a recent surge of litigation involving PE disputes has followed, bringing company information, sensitive agreements, and financial documents directly into the public eye.<sup>1</sup> Litigation issues range from claims of breach of contract to corporate mismanagement and valuation disputes. Amid these disputes, other cases thrust into the public spotlight involve spurned founders against investors who pursue claims that may lack merit but still

create reputational risks for the company sued.

- Where courts continue to favor the public right of access and have made it increasingly difficult for parties to seal records<sup>2</sup> it is important to consider arbitration as another tool to resolve disputes. To that end, it may be fruitful to incorporate arbitration provisions in the parties’ agreements to help keep private investment disputes out of the public eye.
- Arbitration offers an alternative to long-drawn litigation battles and may prove to be more

advantageous for companies to accomplish certain objectives, like preserving the parties’ existing business relationships, maintaining confidentiality and avoiding certain litigation costs. Careful assessment of the different arbitration forums and organizational rules with counsel will help ensure that the parties adopt effective arbitration provisions.

- Key features that make arbitration an attractive proposition for private investment clients to leverage include the following:

## Arbitration v. Litigation Key Facts

	Arbitration	Litigation
<b>Resolution Time</b>	<ul style="list-style-type: none"> <li>• Can be within months after the parties select an arbitrator if a deadline is built in to the clause</li> <li>• Discovery requests can be limited to expedite the process.</li> </ul>	<ul style="list-style-type: none"> <li>• Years; depending on length of discovery and court schedule.</li> <li>• Discovery can be lengthy and expensive.</li> </ul>
<b>Confidentiality</b>	<ul style="list-style-type: none"> <li>• Preserves confidentiality of the parties’ financial affairs, investments, and business relationships.</li> <li>• Shields the parties from potential reputational consequences that may otherwise affect their competitive standing within the marketplace.<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Public courtroom where courts have been more reluctant to grant sealing orders, allowing competitors and other current and future counterparties to sometimes see sensitive information.</li> </ul>
<b>Atmosphere</b>	<ul style="list-style-type: none"> <li>• Cooperative, with goal of preserving business relationship.</li> </ul>	<ul style="list-style-type: none"> <li>• Often hostile, especially if it is followed by the press.</li> </ul>
<b>Remote Proceedings</b>	<ul style="list-style-type: none"> <li>• Parties can opt for remote hearings or work out a hybrid approach.</li> </ul>	<ul style="list-style-type: none"> <li>• In-person court appearances are required, but some courts may allow for remote hearings.</li> </ul>
<b>Judge</b>	<ul style="list-style-type: none"> <li>• Parties can appoint arbitrators of their choosing and select arbitrators based on their qualifications and industry-specific business experience.</li> </ul>	<ul style="list-style-type: none"> <li>• Level of business experience varies by court.</li> </ul>
<b>Binding</b>	<ul style="list-style-type: none"> <li>• Decisions are binding; arbitration decisions do not have precedential value.</li> <li>• Major institutions have appeal mechanisms if preferred.</li> </ul>	<ul style="list-style-type: none"> <li>• Decisions are binding; the court rulings have precedential value.</li> <li>• Appeal available.</li> </ul>

# GENERATIVE AI AT WEIL – TRANSACTIONAL LAWYERS’ PERSPECTIVE



**Arnie Fridhandler**  
Partner  
Private Equity



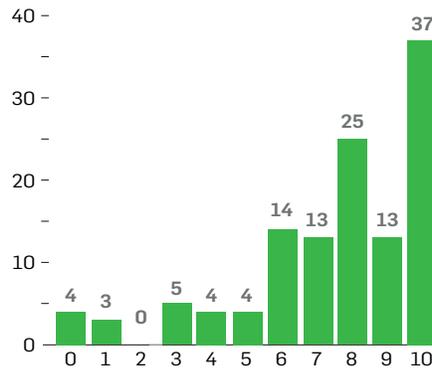
**Parker Lawter**  
Associate  
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In Sponsor Sync's Summer Issue, we focused on how our financial sponsor clients have been leveraging generative AI. In this issue, we give insight into Weil transactional lawyers' perspectives on generative AI.

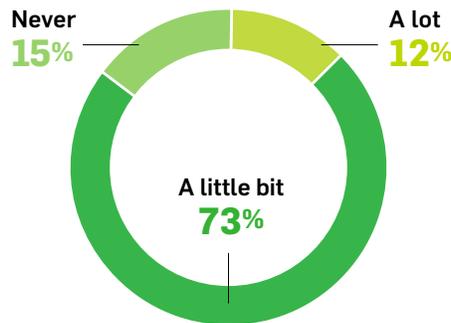
Weil's entrepreneurial spirit encourages our lawyers to think creatively when it comes to generative AI. Like many of our clients, we are striving to balance the efficiency gains generative AI may provide with concerns including our ethical obligations, client confidentiality, client consent and limitations of current generative AI models. We are actively engaged in the generative AI ecosystem, exploring potential applications within the Firm. A recent Corporate Department survey reflected a deliberate consideration of how we expect generative AI might enhance our excellent client service while maintaining the integrity and quality Weil is known for.

The survey reveals that Weil lawyers are cautiously optimistic about generative AI. On the positive side, 85% of respondents indicated they used generative AI for personal matters, which is approximately 30% higher than the results of an industry-wide survey conducted last year.<sup>3</sup> Additionally, a slight majority of respondents are excited about generative AI, and a significant group is still skeptical about its usefulness, even with all the hype. Perhaps these statistics show where

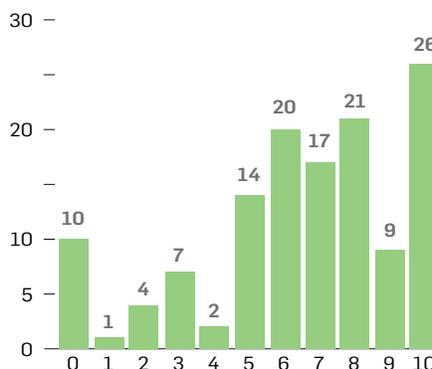
## Do you hope to implement AI in your practice in the future?



## Have you used AI for personal matters?



## How excited are you about AI?



we, as a firm, are on the “technology hype cycle”—cognizant of both the benefits of generative AI and its drawbacks. Some sentiments are echoed in a 2024 Bain & Company report, which found that using generative AI for legal work was the most disappointing out of 14 potential applications.<sup>1</sup>

Looking ahead, Weil’s transactional lawyers have identified five key areas where generative AI might provide advantages and opportunities: (1) summarizing documents, (2) drafting initial versions of documents or emails, (3) conducting research, (4) handling administrative tasks and (5) performing due diligence. These insights are optimistic but also align with the views of professionals across the United States, who identified the same tasks as ones where generative AI could boost productivity.<sup>2</sup> This data marks a significant shift in attitudes towards generative AI—just a few years ago, many feared generative AI would replace white-collar jobs. Now, lawyers and other professionals see generative AI as a tool in the toolkit (and not a “brain in the box”) that can incrementally boost productivity and allow humans to focus on more complex tasks. As a firm, we will continue to monitor advancements in generative AI technology, seeking solutions that will benefit our clients. We will also navigate risks and never compromise our ethos of quality advice and impeccable client service. 

# PREPARING FOR THE NEW, EXPANDED HSR REPORTING REQUIREMENTS

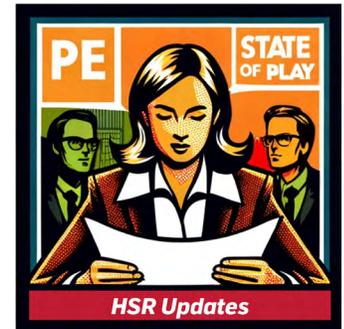
EFFECTIVE FEBRUARY 10, 2025



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On February 10, 2025, new reporting requirements will become effective for all filings made pursuant to the Hart-Scott-Rodino (“HSR”) Antitrust Improvements Act. Also on the Effective Date, the Federal Trade Commission (“FTC”) will lift its suspension of early termination of the HSR waiting period. The new rules will impose meaningful additional burdens on most filing parties by requiring a much broader swath of internal documents and detailed information about the relevant businesses, ownership structure, governance, and acquisition history. By the FTC’s (inherently conservative) estimates, it will take three times the number of hours on average to prepare each HSR filing.

There are a few potential paths by which the new HSR rules may be thwarted, including private challenges, a regulatory freeze by the incoming administration,

or a Congressional Joint Resolution of Disapproval invalidating the rules. (Please see our November 14, 2024 [alert](#) for additional commentary.) However, we advise parties to continue preparing for the new rules, assuming that the rules will become effective as scheduled.

The key changes, which are summarized below, break down into three broad categories: (1) expanded document requirements; (2) newly required “descriptions”; and (3) additional information requirements.

**There are steps that you can take now to prepare for the new rules – for example:**

- undertaking more systematic and regular collection of certain data to keep “on the shelf” (e.g., officer and director slates, revenues by NAICS code, subsidy information, subsidiary information, prior acquisitions, etc.);

- strategizing with counsel about how to update internal deal planning processes to capture required information and documents on a deal-by-deal basis (including document management protocols).

Given the amount of time it will likely require to prepare filings under the new rules, transaction agreements – at least in the short term – will need to provide parties with additional time post-signing to submit filings (e.g., “as promptly as practicable” rather than “[x] business days”). Because of the expanded disclosure requirements, early planning will be critical not just for the filing itself, but more broadly for understanding the scope of potential antitrust risk. Early engagement and preparation, besides being critical to the overall deal timeline, may also advantage parties in competitive bidding situations. [w](#)

Documents	Descriptions	Information
<ul style="list-style-type: none"> <li>• Must search “Supervisory Deal Team Lead” in addition to Officers and Directors for “Competition Documents”</li> <li>• Must produce draft “Transaction Related Documents” shared with ANY Director of ANY entity within the filing person and its controlled entities (even if entity is unrelated to the transaction)</li> <li>• Must produce ordinary course “Plans and Reports” for filings that identify overlapping product or service</li> <li>• Must produce additional deal documentation for all deals; deals filed on LOI must also include a “dated document with sufficient detail about the scope of the entire transaction”</li> <li>• Buyers need to identify certain commercial agreements with Target existing within year of filing</li> </ul>	<ul style="list-style-type: none"> <li>• Must provide description of transaction rationale (with cites to documents included with filing)</li> <li>• Must provide overlap Descriptions, including identification of certain top customers</li> <li>• Must identify supply Relationship Descriptions, including related sales to target (and its competitors) and related purchases (by target and its competitors), and identification of certain top suppliers and customers</li> </ul>	<ul style="list-style-type: none"> <li>• Identification of Certain Officers and Directors</li> <li>• Expanded Disclosures of Certain Limited Partners</li> <li>• Expanded disclosures of prior acquisitions</li> <li>• Notification of other jurisdictions in which the transaction has been or will be notified</li> <li>• Information regarding subsidies from foreign entities or governments of concern</li> <li>• Information regarding certain defense and intelligence contracts</li> </ul>

# The Business of Sponsors

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# Earn-outs in Alternative Asset Management M&A



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## SMART SUMMARY

- Earn-outs are a common tool used in asset management M&A transactions to incentivize employee retention and create alignment among the buyer and sellers to profitably grow the combined business.
- In crafting an earn-out, the parties – who will be partners during and hopefully after the earn-out period – should aim for clarity around calculation principles and governance rules of the road.
- Failure to do so amplifies the risk of a dispute and costly litigation; this is best avoided by active collaboration amongst principals, lawyers and accountants from both sides.

Earn-outs have long been a tool used by participants in M&A transactions to bridge valuation gaps and share the risks and rewards of future performance of the business being acquired. Most commonly, earn-outs have been used in transactions that involve businesses with unpredictable future earnings—for example, pharmaceutical and life sciences companies where the success of the business is largely predicated upon a future event that is unknown as of the closing of the transaction. For those companies, the future prospects of their business can be highly reliant on a single product, and the risk associated with each stage of product development is often a binary determination—it either passes or fails a critical milestone, and with it the

ability to generate revenue from that product.

Earn-outs have also become prevalent in transactions involving human capital businesses which includes alternative asset management firms. These firms are subject to a number of market forces that can make the inclusion of an earn-out appropriate, including uncertainty over future fundraises, future investment performance and their ability to retain talent—all of which are necessary to drive growth in assets under management (“AUM”) and the firm’s bottom line. In these businesses, the most important assets are not property, plant or equipment, but the people who ride up and down the elevator each day (and with them, their professional expertise, reputations and business relationships). However, unlike the success or failure of a drug or medical device, the drivers of expected future financial performance in asset management firms can rarely ever be narrowed to a binary determination, but rather its ability to accumulate AUM over time and oftentimes across multiple products and strategies. This ability is closely linked to the people who are managing its investments. Accordingly, the best approach to drafting the terms of an earn-out for an alternative asset management business will look much different

than the approach used for other kinds of businesses.

In this article, we will briefly highlight some of the key terms of earn-outs, legal principles and common themes arising under Delaware case law and, in each case, their applicability to M&A involving an alternative asset management business.

### Key Terms

Following are some of the key considerations for buyers and sellers when negotiating an earn-out in an alternative asset management M&A transaction:

the business? Given the importance of retaining key talent, vesting and forfeiture terms may apply and, in such cases, are often heavily negotiated.

- **Forms of consideration** – Will the earn-out be paid in all cash or will there be an equity or other non-cash component? Will the relative mix of consideration differ from the mix paid at closing? If equity is paid, the parties will need to decide how those shares will be valued, whether they will be subject to vesting or forfeiture and whether they will be freely tradeable upon

and methods will be employed to calculate the applicable metric? Will certain categories of revenue be excluded from the calculation (for e.g., non-recurring items or ancillary revenue like monitoring or transactions fees)? Will revenue be counted only when actually received or will it be credited immediately at the time a capital commitment is made (for closed-end funds where near-term liquidity is not provided, the latter approach may be more appropriate)?

- **Scope** – Will the financial metric cover all of the target's fund products, including future funds, or only a sub-set (for e.g., sometimes only certain "significant" or material strategies are used to calculate the target thresholds for achieving the earn-out)?
- **Measurement period** – What is the appropriate time period to measure the earn-out following closing? How will that timing dovetail with the expected timing for future fund launches or some other period such as when equity issued as part of upfront consideration is due to vest? A shorter period may be less representative of longer-term performance, but easier to calculate, and a longer period may require the buyer to agree to be constrained by protective covenants for longer than it would prefer.
- **All or none vs. linear** – Will 100% of the earn-out be payable upon achievement of a single target, or will the amount of the

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## **“If equity is paid, the parties will need to decide how those shares will be valued, whether they will be subject to vesting or forfeiture and whether they will be freely tradeable upon issuance or subject to lockup.”**

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- **Who receives the earn-out** – Should all sellers of the target firm be entitled to participate (which may include inactive or retired former employees, or minority investors) or only those who are continuing to actively provide services? Should the proceeds of the earn-out be allocated in the same relative proportions as other sale proceeds or should certain individuals be rewarded with a greater allocation to reflect their expected future contributions to

issuance or subject to lockup. In the context of an acquirer with a publicly traded acquisition currency, attention should be paid to whether equity will be registered, have registration rights or rely on an exemption from registration in order to be sold (for e.g., pursuant to Rule 144).

- **Calculation of the earn-out**
  - **Financial metrics** – Will the earn-out be measured on the basis of fee-related revenue or assets under management? What accounting standards

payment scale linearly between a minimum and maximum threshold?

#### ■ **Governance and Protective Covenants**

- **Efforts standard** – What level of efforts (for e.g., “commercially reasonable efforts”, “best efforts”) is the buyer obligated to undertake to achieve the earn-out? The relevance of this standard may depend in part on the extent to which the buyer is expected to actually operate or influence the day-to-day of the business post-closing (for e.g., sometimes the incumbent leadership of an acquired firm will continue to oversee and run the day-to-day subject to ultimate authority of the buyer and its legal and compliance functions).
- **Affirmative and negative covenants of the buyer** – Are there specific actions the buyer should be obligated to take in furtherance of achieving the earn-out (for e.g., maintaining consistent record keeping practices, or actions in support of target’s business plan upon which the earn-out projections were based)? Can the buyer reasonably make those commitments and are there any limits to its ability to do so? Will the target need to rely on the buyer’s distribution channels, relationship managers or other synergies to achieve the earn-out targets? What actions (if any) is the buyer prohibited from taking (i.e., that would deprive the target of its

ability to achieve the earn-out)? For example, during the earn-out measurement period can the buyer terminate personnel of the target who manage the funds that would be instrumental in delivering the value necessary to achieve the earn-out? Would certain prohibitions unduly restrain the buyer’s ability to operate the business to maximize its long term value?

- **Timing / control of fund launches and fund terms** – If the projections underlying the earn-out contemplate the launch of particular future funds, who gets to determine the terms of those funds and the timing of launch? Appropriate guardrails should be considered to avoid manipulation.
- **Impact of buyer acquiring other competing or adjacent businesses or launching competing or adjacent strategies (or announcing the same)** – Should launching or acquiring a competing business during the earn-out period require the target’s consent? Or can the buyer take these actions but incur consequences under the earnout, such as acceleration of payment or providing credit for the revenue (or AUM) contributed by the competing business? The parties should precisely define what counts as a “competing” business or strategy for purposes of the covenants (for e.g., if the strategy represents a non-core or immaterial portion of an acquired business).

- **Impact of a buyer change of control** – In certain instances, a post-closing “change of control” of either the target or the buyer results in acceleration of payment of the earn-out. If so, the parties should be careful to specify whether that means the maximum potential amount of the earn-out becomes payable, or just the amount actually earned to date, and what types of transactions should trigger a “change of control”.

### Legal Principles and Common Themes from Delaware Case Law

Vice Chancellor Laster wrote in his Delaware Chancery Court decision for *Airborne Health, Inc. v. Squid Soap, LP*<sup>1</sup>: “... since value is frequently debatable and the causes of under-performance equally so, an earn-out often converts today’s disagreement over price into tomorrow’s litigation over the outcome.” As further evidence of Vice Chancellor Laster’s sentiment, since *Airborne* there have been many reported cases litigated in Delaware involving disputes over earn-outs. Many of these disputes arise from a disagreement over how the buyer operated the acquired business post-closing and the misalignment between a seller’s interest in maximizing the earn-out in the short term and the buyer’s interest in having flexibility to run the business as it sees fit to maximize value in the long term. Though none of the cases cited below involved asset managers, the relevant legal principles and themes raised by those cases can be applied to them, also.

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**“The moral here is that parties should clearly specify what obligations (if any) the buyer has to support achievement of the earn-out and sellers should not assume that the common law will act as a safety net.”**

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- ***Delaware courts observe the general principle that clear and unambiguous language should be given its plain meaning.***<sup>2</sup>

Precise and well thought-out drafting is critical to avoid leaving terms open for interpretation or, worse, the wrong interpretation. For example, given the potential complexity and nuance in how fee related revenues can be calculated (or manipulated), defined terms should be carefully vetted by deal teams and their advisors. The use of illustrative detailed examples should also be considered.

- ***Absent clear contractual language to the contrary, Buyers do not have an obligation to run the acquired business to maximize an earn-out and Delaware courts will not impose affirmative obligations on the buyer where none are otherwise bargained for.***<sup>3</sup> Accordingly, parties should be explicit about what actions (if any) a Buyer is required to affirmatively take during the earn-out period. For example, if the target firm is relying on launching new funds during the earn-out period that are expected to factor into the earn-out calculation, the parties may consider agreeing up front on

what support the buyer is required to provide in connection with that process.

- ***Although Delaware law recognizes an implied covenant of good faith and fair dealing in every contract, applicability of the implied covenant is subject to important limitations and caveats and parties who assume otherwise do so at their own peril.*** Plaintiffs in earn-out disputes have frequently included claims that the buyer breached the implied covenant of good faith and fair dealing in addition to breaching its express covenants.<sup>4</sup> However, Delaware courts have generally limited applicability of the implied covenant to a gap-filling function “to infer contract terms to handle developments or contractual gaps that ... neither party anticipated”.<sup>5</sup> In fact, courts have previously rejected application of the implied covenant where the parties did in fact consider in negotiations, but ultimately rejected, inclusion of an express obligation to use good faith efforts to achieve an earn-out on the mistaken belief that Delaware automatically recognized such obligation by default.<sup>6</sup> The implied covenant does not obligate a buyer to conduct its business to maximize

the amount of an earn-out.<sup>7</sup> Additionally, the Delaware courts have rejected attempts to apply the implied covenant where the contract already provides for clear express obligations, rather than grant the plaintiff additional rights they did not bargain for.<sup>8</sup> The moral here is that parties should clearly specify what obligations (if any) the buyer has to support achievement of the earn-out and sellers should not assume that the common law will act as a safety net. Specificity may even assist buyers by foreclosing the possibility of a seller being able to successfully bring an implied covenant claim.

- ***Negative covenants that prohibit buyers from taking action with the intent or purpose of avoiding an earn-out can potentially impose a high bar to recourse by sellers.*** Purchase agreements frequently include some variation of a negative covenant that restricts the Buyer from taking actions with the “intent” or “purpose” of frustrating or avoiding the earn-out. While these types of general statements about intent or purpose may seem to at least cover the most egregious forms of misconduct (for e.g., redirecting revenues to an affiliate simply

to lower the earn-out; intentionally pushing revenues out of the earn-out period or accelerating payables into the earn-out period), some cases have shown that – depending on the exact language used – such provisions can prove difficult for sellers to enforce especially when it comes to conduct that could have a plausible alternative motivation.<sup>9</sup> Given the inherent evidentiary challenges in proving a buyer's intent and their ability to raise plausible alternative explanations for their conduct, sellers may want to consider negotiating specific consent or veto rights during the earn-out period to get additional comfort (for *e.g.*, the composition/operation of the investment committee, compensation and hiring/firing of key employees, and pre-agreeing to future fund terms).

- **Consider alternative dispute resolution.** Given the dynamic of an asset management firm having to potentially sue or defend against its own employees (i.e. employees who join the firm from the target in connection with an acquisition), firms may consider providing for any potential earn-out disputes to be resolved via confidential arbitration,<sup>10</sup> rather than in courts, even if the purchase agreement otherwise provides for resolution by the courts for other provisions of the purchase agreement. Public disputes could make negotiation with potential acquisition targets more contentious if they view the buyer as litigious or as having a history of disputing its

earn-out obligations. Additionally, the parties can identify potential arbitrators who are likely to have significantly greater experience in understanding the complex terms of an earn-out than the average judge who may be assigned to hear a case.

### Practical Tips

The Weil team has deep experience in negotiating earn-outs in asset management M&A transactions, and can offer practical advice in structuring such earn-outs. A few of the more important tips include:

- Simplify as much as practicable the structure and terms of any earn-out. The buyer and the management team of the sellers will become partners, and neither party benefits from the erosion of trust that an overly complicated negotiation can cause.
- Clarity is critical. A buyer may win a dispute over whether the targets for an earn-out were achieved, but if the decision is open to doubt, the trust of the management team of the seller may be lost.
- Collaboration between the principals, lawyers and accountants is critical. The terms of an earn-out often rely upon cross-discipline expertise, and the team must over-communicate to avoid important terms falling through the gaps or lack of clarity.
- Disputes are best settled by an industry expert (usually an investment bank or valuation firm) with experience in the alternative asset management industry.

### Conclusion

As the alternative asset management industry continues trending towards consolidation and M&A transactions have become more commonplace, so too will instances of those transactions involving earn-outs, and accordingly the potential likelihood for future disputes over earn-outs involving asset management firms. In order to minimize the chances of a post-closing dispute, parties to these transactions would be wise to devote significant time and attention of their business team, as well as legal and accounting teams, to the terms of any earn-out, and seek to memorialize as much commercial alignment at the deal signing stage as possible. We hope this article will serve as a helpful introduction and starting point on the questions parties should consider and navigate as they think through potential deal terms with this goal in mind.

Weil has an active practice representing alternative asset managers and investors in purchases and sales of interests in alternative asset funds or the managers of such funds. Weil's market leading private equity, private funds, investment management, structured credit, regulatory and tax practices collaborate seamlessly to provide this highly specialized set of inter-disciplinary practice skills and experience to its clients. 

# When Equity Incentive Plans and Continuation Funds Meet



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## SMART SUMMARY

- Continuation funds are becoming popular in private equity as a way to manage portfolio assets beyond the initial fund's life, raising key questions about how they interact with management incentive plans.
- The primary concerns include whether management can transfer its equity, whether vesting under the incentive plan is triggered, as well as how to align the interests of management with new investors.
- As continuation funds evolve, sponsors are increasingly addressing these issues in governance and incentive plan documents at the time of the sponsor's initial investment, but balancing flexibility and the need for alignment remains critical for future negotiations.

A key question in any continuation fund transaction is how it will interact with the existing portfolio company's management incentive plan, and how to re-align the interests of investors and the management team going forward. There are two primary questions in the governing and incentive plan documents that drive the interplay of a continuation fund and the management incentive scheme. (1) Does management have the right to transfer its equity (i.e., can they tag in the sale)? And (2) Does the transaction trigger vesting under the incentive plan? Beyond the answer to these two questions lies an even more important question – how to maximize the value of the enterprise following the consummation of the continuation fund transfer.

## The Basic Economic Deal of Continuation Funds

In a continuation fund deal, the sponsor typically raises a new fund that will acquire selected portfolio asset(s) from the original fund. This transaction allows existing investors to choose between two options: they can either cash out, realizing the value of their investment, or "roll" all or a portion of their investment into the continuation fund, maintaining their stake in the asset(s). For new investors, this presents an opportunity to invest in a known asset with a proven track record, rather than committing to a blind pool of new investments.

## Typical Base Case Structure

Prior to the rise in utilization of continuation funds over the past few years as a fund liquidity option, few

governance and incentive plan documents expressly addressed continuation funds. In those circumstances, the structure of the continuation fund transaction and the terms of the existing documentation can lead to divergent outcomes. However, many continuation fund transactions that are implemented without a true third party sale can be consummated without triggering tag along rights (as transfers to affiliates are often carved out of tag along rights) and do not automatically trigger vesting (as vesting is often connected with a change of control or majority sale to a third party).

*However, this is not the end of the story.*

### How are Management Incentive Schemes Treated in Continuation Fund Transactions?

Management incentive schemes are established to maximize the value of the enterprise by aligning interests and driving performance toward a shared collective goal. Thus, the treatment of the management incentive scheme is often not a documentation question at its core but a factual and business question.

Principals and advisors need to ask themselves a number of questions:

- Is the performance criteria a vesting condition or a waterfall issue?
- How has performance compared to the goals in the incentive plan?
- Is the incentive plan still incentivizing the growth the investors are seeking?

of the sponsor, existing investors, and new continuation fund investors. Depending on the time since the initial investment, it may also more faithfully match the compensation expectations.

However, even this management-friendly approach can have

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**“... the treatment of the management incentive scheme is often not a documentation question at its core but a factual and business question.”**

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- Note: the plan may no longer be properly incentivizing management in both downside and upside scenarios. If the performance criteria and hurdle are either too far out of reach or too easy to achieve, then the incentive mechanism is no longer doing its job.

Given this backdrop, many sponsors elect to provide some liquidity to the management team members in a continuation sale and/or introduce a new incentive plan to ensure that the management team is properly incentivized during the life of the investment by the continuation fund. This helps align the interests of the management team with those

complications. In a multi-asset continuation fund, the various portfolio companies may have inconsistent governing documents and management incentive plans, making a unified approach unworkable. Those assets are also likely to have different answers to key factual questions such as those noted above – suggesting varying approaches may be the optimal outcome.

Further, replacing an existing management incentive plan with a new one in a scenario where the management incentive plan on its face does not wind-up or vest may not be possible without the consent of the participants where the incentive goals have not been achieved.

Refreshing the traditional management-sponsor alignment of incentives may involve not only a refreshed equity incentive plan but also a rollover that is material to the individual participants.

Taking a step back and considering again the fund level arrangements on a continuation fund transfer, advisors have estimated that in the majority of recent continuation fund transactions, sponsors reinvested 100% of their crystallized carried interest. This is certainly more than what a sponsor would expect to reinvest in a subsequent vintage fund. Similarly, when viewed as a percentage of an executive's pre-tax proceeds, the

"rollover" by management in connection with a transfer to a continuation fund tends to be higher than what one would see in a true third party sale.

### Path Forward

As the continuation fund market evolves and the performance of historical continuation fund transactions are evaluated, the negotiations over the treatment of the management's equity incentive upon a transfer to a continuation fund will become a more prominent consideration when constructing the governance and incentive plan documentation at the time of a sponsor's the initial investment.

However, hardwiring these elements too early in the process can lead to challenges for all the reasons noted above, and may complicate future negotiations and restrict flexibility. It is often more prudent to address continuation funds in the governance and incentive documentation primarily by ensuring the company has sufficient flexibility at the time such a transfer is under consideration. 

**For more information on this topic, read our [Private Equity Alert – Incentive Equity in an Uncertain Deal Market](#).**



## CTA Reporting on Hold Once Again

On December 3, 2024, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction against the enforcement of the Corporate Transparency Act. The Fifth Circuit Court of Appeals briefly lifted the injunction before reversing its own order. As of this publication, the injunction remains in effect and FinCEN is accepting CTA filings on a voluntary basis. While the decision is being appealed, Weil's view is that private equity firms should be prepared to comply with the reporting requirements in case filings need to be made on a to-be-announced timeline. We do not recommend that our clients actually submit any CTA filings while the injunction remains in force and until there is clarity on the application of the CTA.

# Sharing Confidential Information – Considerations for Designated Directors



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Private equity sponsors use designated directors on portfolio company boards to facilitate a deeper level of investment oversight and informed exercise of approval and veto rights. While it is generally expected that designated directors will share information about the portfolio company with the sponsor, such directors and the sponsor should exercise caution when that information could be confidential and/or privileged. The circumstances in which a designated director can (and cannot) share confidential information with the sponsor have been discussed in detail by the Delaware Court of Chancery in two recent decisions (*Hyde Park Venture Partners Fund III, L.P. et al. v. FairXchange, LLC.* (Del. Ch. Mar. 9, 2023); *Icahn Partners LP et al. v.*

*deSouza et al.* (Del. Ch. Jan. 16, 2024; interlocutory appeal refused April 11, 2024). This article addresses high-level considerations for sponsors and designated directors in sharing confidential information.

## Overview

Generally, a director may share confidential information with a sponsor shareholder without an information sharing agreement if:

- The director (who may be an employee of the sponsor or independent of the sponsor) is designated to the board by the sponsor shareholder pursuant to contract and/or the shareholder's controlling voting power, or the director serves in a controlling and/or dual fiduciary capacity at the

sponsor, such as serving as fund manager. In this context, the director cannot avoid sharing information because he or she is a dual fiduciary and has only "one brain."

In contrast, absent an information sharing agreement, a designated director who is elected via a proxy contest would not be permitted to share confidential information with the sponsor where (a) that director is not a dual fiduciary, (b) the sponsor does not have a contractual right to appoint a director, and (c) the sponsor does not control the vote during the director's election.

Information cannot be shared, however, where doing so would be prohibited or limited by a confidentiality agreement.

## Considerations for Designated Directors, Sponsors and Portfolio Companies

### 1 Confirm that the Designated Director Has the Right to Share Confidential Information.

While a designated director has a right to share confidential information if the director acts as the sponsor's representative, sponsors, designated directors, and portfolio companies should consider entering into an information sharing agreement between the sponsor and the

portfolio company to avoid any doubt as to whether the director is permitted to share confidential information with the sponsor. An information sharing agreement also would be necessary in circumstances where the designated director is elected via a proxy contest and the designated director is not a dual fiduciary or the sponsor did not control the vote to elect the director.

- The portfolio company has formed a special committee that excludes the director, and that committee receives information including from counsel; and/or
- The director is put on notice that the director's interests are adverse to those of the portfolio company.

continues for the duration of the director's board service, unless the director has been put on notice that the director's interests are adverse to the portfolio company's interests, a special committee excluding the director has been appointed and/or the director's right to information has been limited by agreement.

- Under certain circumstances, such as when the director is a fiduciary or affiliate of the sponsor, the director may be permitted to share attorney-client privileged information with the sponsor in a manner that does not waive privilege and does not breach the director's fiduciary duty of confidentiality owed to the portfolio company, but a director should consult with legal counsel before disclosing privileged information to the sponsor to ensure that appropriate measures are taken to protect and preserve privilege.

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**“... portfolio companies should consider entering into an information sharing agreement between the sponsor and the portfolio company to avoid any doubt as to whether the director is permitted to share confidential information with the sponsor.”**

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## **2** Avoid Sharing Confidential Information in Situations Involving Adverse Interests.

Difficult situations arise when the interests of the portfolio company, sponsor and/or designated director come into conflict, because the director is a fiduciary required to act in the best interests of all of the portfolio company's shareholders (not just the sponsor) and must also comply with any fiduciary duties the director owes to the sponsor. Notwithstanding any right to share confidential information under the circumstances as described above, the Delaware Court of Chancery has made clear that a designated director cannot share confidential information with the sponsor when:

## **3** Understand Impact that Sharing Information May Have on Privilege.

Before sharing attorney-client privileged information with the sponsor, the designated director should obtain advice to ensure that any impacts on privilege are understood.

- The right of designated directors to information about the portfolio company is essentially unfettered and includes access to privileged material such as legal advice to the portfolio company. This is because a designated director is considered a “joint client” with the portfolio company and is within the circle of confidentiality and privilege. “Joint client” status

## **4** Review Portfolio Company Policies and Procedures Regarding Information Sharing.

The designated director should review and ensure compliance with portfolio company policies and procedures that apply to the director and that relate to the sharing of confidential information. These may include the code of conduct, corporate governance guidelines, insider trading policy and communication policy, as well as the D&O questionnaire. The designated director may need to obtain a waiver of a policy before sharing information. As a significant shareholder, the sponsor

may also need to comply with the portfolio company's insider trading policy including blackout periods and preclearance procedures, which could have implications for the sponsor's trading of portfolio company securities and related liquidity.

## 5 Ensure Compliance with Sponsor Policies and Procedures Relating to Appropriate Use of Confidential Information.

Information sharing may be more heavily scrutinized when the matter under consideration will disproportionately benefit the sponsor. Sponsors should implement and ensure compliance with policies and

procedures to help keep information confidential within the sponsor and avoid improper use such as insider trading. Information sharing policies and procedures should address, among other things:

- What information will be shared in the ordinary course (e.g., board meeting materials and discussions) and the need to maintain confidentiality of information;
- Who is authorized to request additional information from the portfolio company and under what circumstances;
- To whom information requests should be directed and who is authorized to respond to such requests;

- What information can be shared within the sponsor and with whom, and what information cannot be shared (e.g., due to legal or other business concerns); and
- A process for regular review and board-level oversight.

Establishing clear expectations and guidelines for designated directors around confidential information sharing is protective of directors and sponsors, and should be considered at the time rights to designate portfolio company directors are negotiated. [WV](#)

## WEIL MARCH MADNESS 2025

It's almost time to March into Madness with Weil for our Annual NYC March Madness Event. Once again we'll be hosting clients and friends, combining the excitement of the tournament with a chance to connect, relax and enjoy. Join us for an evening of mingling with the pros, live game screenings, delicious food and drinks, and exciting prizes. Whether you're a basketball fanatic or just here for the fun, it'll be an evening you won't want to miss. Mark your calendars before the shot clock runs out!

Full details to be announced early 2025.

[Please click here to request an invite.](#)



## PARTNER PERSPECTIVES

### Private Equity Emerging Manager Landscape

PIPER | SANDLER



**Colin Dinneen**

Managing Director, Private Capital Advisory  
Aviditi Advisors, Piper Sandler



**Paul Kuppich**

Managing Director, Private Capital Advisory  
Aviditi Advisors, Piper Sandler



In recent years there has been a demonstrable shift in portfolio management within the institutional investor market that is reshaping the landscape of private markets. Over the past 20 years the largest allocators in alternatives showed a strong bias toward more established fund managers, but as those groups have grown ever larger and the markets in which they invest have become more efficient, limited partners (“LP(s)”) have increasingly looked down market for opportunities to allocate capital and generate alpha. The result has been a proliferation of spinouts, independent sponsors and new private equity first-time fund managers.

Until a couple years ago, there was a strong two-decade trend of new sponsors setting sail. Notably, North American first-time private equity funds grew from 111 in 2001 to 564 in 2021<sup>1</sup> as the barriers to launching a firm had gradually lessened combined with increasing demand of investors for both sector specialists and a ‘bar bell’ approach to portfolio diversification. While the absolute number of general partners (“GP(s)”) also meaningfully scaled over this same time period, the percentage of North American first-time private equity funds held steady, with representation of 19.1% post-GFC in 2009 to 18.1% a decade later in 2019.<sup>2</sup>

#### Elements Behind the Rise in First-Time Funds

- 1** Institutionalization of anchor and seed programs within the LP system
- 2** Expansion of direct and co-investment programs have increased LP sophistication
- 3** Maturity of the private equity market led to generational shift in new market entrants
- 4** Sector specialization outperformance drove the uncoupling of strategies and multiplication of funds
- 5** Increased pool of trained talent provided access to once scarcer resources
- 6** Early success stories provided encouragement to those considering independent path

All of a sudden, this solid state of new entrants experienced a notable retrenchment – in 2022, the first-time fund group accounted for only 11.4% of active North American private equity funds.<sup>3</sup> It is our belief that many, if not more reasons than the aforementioned still exist, so what is potentially behind the downward trend?

Part of the explanation might reside in the fact that the first waves of new entrants have since grown into a solid, middle ground option

for allocators – no longer is it a binary choice between the experienced and consistent upper middle-market manager and the sub-scaled but potentially promising new brand. There is undoubtedly increased competition as a result of this gradual layering of the private equity pyramid. For example, those who made their maiden voyages around a decade ago, are likely approaching their third fund vintage and are still defined with many of the elements they touted to initially distinguish themselves from the firms where many of them started their careers – lower middle-market, sector focus, meaningful areas for value creation, proprietary sourcing and a large capital overhang in which to exit.

Another likely culprit is the rise in the independent sponsor pathway towards raising a dedicated fund. Independent sponsors are frequently trafficking in the same \$2 million to \$10 million EBITDA sweet spot<sup>4</sup> that often overlaps with early-stage lower middle-market fund managers. From 2020 to 2023 there has been a 34% increase in the number of independent sponsors actively sourcing potential investments.<sup>5</sup> The independent sponsor route offers a few key benefits in serving as an alternative step prior to the dedicated fund model.

### Independent Sponsor Route Benefits

- 1** Eases start-up costs by bringing fees into the NewCo earlier through transaction related economics
- 2** Mitigates uncertainty of raising blind pool capital in an elongated fundraising process
- 3** Provides ability to build investor relationships across a broad cross section of the LP market with identified transactions
- 4** Better enables the sponsor to mature through demonstration of strategy, team and fully-attributable track record in the form of a portfolio under the NewCo's brand

As of December 2024, there has been a historically low number of North American first-time private equity funds representing only 10.7% of 2024 vintage North American private equity funds combined with a notably high decrease in such managers' abilities to raise a successor fund with over 50% of vintage 2018 first-time GPs unable to raise a subsequent second fund.<sup>6</sup>

The recent fundraising climate also likely placed a slight chill on the confidence of new managers. For example, 2022 represented the first-time the target sizes of Hamilton Lane's vintage class of buyout managers were not exceeded in aggregate in over a decade with the broader market likely falling even shorter.<sup>7</sup> In addition to serving as a means of de-risking their potential foray into the fund world, the route similarly enables investors a means towards

de-risking potential fund commitments through a live case study that can meaningfully impact conviction and alignment – studying how deals come together, how managers deal with issues in real time and how they interact with equity partners.<sup>8</sup>

The key considerations that LPs take into account when performing due diligence on first-time fund managers are diverse, but three of the most important are: track record, team composition and deal sourcing.

#### TRACK RECORD

In Buyouts' 2024 Emerging Manager Survey, 76% of LP respondents cited track record as their top consideration when reviewing emerging managers; in light of the difficulty that many departing professionals face in terms of demonstrating their prior investment experience, track record due diligence can become a large early diligence hurdle

#### TEAM COMPOSITION

Team composition may also pose difficulties given attracting other talented professionals to a start-up platform without investor backing, and in some cases, a limited financial runway can be challenging

#### DEAL SOURCING

LPs are often wary about whether new firms will be able to source a similar quality of deal flow without the brand and business development resources of their prior firm

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**“Launching a fund is more than just raising capital – it’s building a foundation for long-term success. Emerging managers who work with a top firm gain a competitive edge with market-leading insights and a framework designed to grow with them. At Weil, our platform transforms ambition into strategy, offering managers the tools and confidence to succeed along every step.”**



**Jonathon Soler**  
Co-Head  
U.S. Private Equity

Interestingly, some of the windows of opportunity for emerging managers are also being captured by established sponsors launching additional product offerings / extensions to their platforms as they seek to capitalize on deal flow, further leverage scale and brand while providing meaningful pathways to retain and incentivize their talented industry teams. As economic splits between founding partners and all-star talent create pressures internally, the expansion of internal opportunities and the ability to generate additional avenues of fees are one important playbook that established sponsors are leveraging to insulate their firms from risk of key departures.

Such managers are in essence creating a win-win scenario of providing investors emerging access in the form of trusted brands. While it may not have been directly aimed at the independents, it has certainly had an effect as larger brands have

leveraged scale across the board in areas like co-investment, fees, efficiencies in the form of reduced GP touchpoints, capabilities around reporting and compliance and the ability to attract specialized talent and develop resources, which can be deployed across the firm.

Navigating the choppy waters of launching a first-time fund poses a series of challenges for even the most seasoned private equity professionals. Many of these entrepreneurial founders find themselves in a ‘Field of Dreams’ scenario whereby they need to demonstrate enough to the LP community in terms of track record, team build-out and deal opportunities to validate the investor support for fund commitments with limited resources and guidance at their disposal. From our experience, we find that founders that prudently pursue relationships with a team of like-minded and experienced advisors will find

a path to their first committed pool of capital faster and with more certainty. Investing in a strong law firm with a demonstrable track record of working with emerging managers is a key step in this process and can be a very strong gateway to the broader ecosystem of service providers and private capital advisors that will support the early effort.

The positive news for nascent fund managers or those considering a spinout is that the private ecosystem has never been more prepared and excited about new entrants. That being said, competition has become intense and the path to success is littered with high quality failures, so it is prudent to seek guidance from trusted advisors early and often as you embark on this journey. [w](#)

# So You Say You Want to Start a Private Equity Fund:

## A Guide for First-Time Private Fund Sponsors



**Brittany Burnham**

Partner  
Private Funds



**Stephanie Srulowitz**

Partner  
Private Funds



We regularly counsel clients with respect to the unique issues facing private funds sponsors as they launch a new firm and/or raise a first-time fund. Laid out in this article are some of the key considerations to be mindful of in connection with a first-time fund launch by a new sponsor. While this list is not exhaustive, the following are high-level key considerations most newer sponsors should consider in advance of and throughout the process of launching their first private fund.

### Preparing for Launch

#### Start-Up Capital

There will be a period of time before a first-time sponsor starts receiving management fees, which can make it difficult for you to cover upfront

costs – for example, office space and equipment, employee salaries, etc. Some new sponsors will seek third-party capital either in the form of a loan or a seed investment in the management company.

#### Fundless Sponsor Transactions

Some new sponsors will opt to make a few individual investments (i.e., as a sponsor without a fund) and fund-raise on an ad hoc basis in order to build a disclosable track record prior to raising a blind-pooled fund. This can demonstrate an ability to independently put capital to work and help nurture relationships before launching a full fundraise. As a practical matter, depending on the circumstances (including timing), it may also make sense to focus on

raising capital for live deals instead of rushing into raising a fund.

#### Regulatory Considerations

While there are other regulatory-related considerations that new sponsors will need to be mindful of, determining whether required and when to register as an investment adviser with the SEC is a critical step in launching a U.S. based private funds business.

#### Selection of Advisers

■ **Legal Counsel** – It is important to engage sophisticated legal counsel early in the process to help you navigate regulatory issues, assist with drafting governance and fund documentation and review service contracts. In addition, legal counsel that has experience with first-time sponsors – i.e., Weil – will be helpful to provide valuable commercial insight on market terms for new sponsors. We note that the time to engage counsel is not when you start drafting legal documents, but when you start ideating on what your firm will look like, who you will be targeting for capital, etc.

■ **Placement Agent** – A placement agent with experience in your strategy can provide a nuanced understanding of the current

market, assist in boosting your targeted investor pool and help manage the process of preparing fund documentation. While a placement agent can help increase your potential targeted investors, you will have to pay fees to the placement agent on capital that they bring to the table (which fees generally are the sole responsibility of the sponsor). In some cases, you will need to pay fees on your entire fundraising.

- **Administrator** – For many organizations, hiring an administrator to help with certain back-office responsibilities (e.g., preparing the books and records, financial statements, tax preparation, etc.) can provide critical support and mitigate the need to “staff up” quickly. Administrators can also be very useful in facilitating compliance with applicable anti-money laundering / know-your-customer diligence on investors.
- **Compliance Consultant** – Many small to mid-size private funds firms hire a third party compliance consultant to assist in preparing required registration documents under the Advisers Act and in building, administering and annual testing of the firm’s compliance program.
- **Accounting Firm** – One or more accounting firms will be required to assist in connection with audit of the fund’s financial statements, as well as preparation of tax returns and tax structuring for the organization and the fund’s investments.

## Launching Your Fundraise

### Identity

Prior to speaking with potential investors, it is helpful to formulate and be able to articulate a strong narrative around your firm’s identity, its investment thesis and where and why it fits into the marketplace (e.g., why there is a need for your firm and your new fund). In the competitive fund-raising environment that we are currently in, not being able to distinguish yourself on this front can create real roadblocks to creating momentum in your fundraising.

### Timing

It is important to be realistic about the amount of time it can take to get to a first closing of a fund. There is a significant amount of upfront work to position your organization to launch a fundraising, manage a fund, and line up a critical mass of investor capital commitments for a sizeable first closing.

### Scoping out Your Fund

- **Fund Terms** – While it may be appealing to agree to certain LP-favorable terms in order to raise more capital or accelerate a fundraising, it is important to remember that the terms agreed to in your first fund will likely have a long-term impact, as repeat investors will review documentation for any subsequent fund via a comparison to the documentation for the fund that precedes it.

### ■ **Investor Base** –

- Where feasible, it can be a useful tool to bring in an anchor investor for a sizable capital commitment, which can help with a fundraising’s momentum and may help bring other investors to the table. However, it is important to keep in mind that anchor investors often negotiate for extremely favorable terms.
- The composition of the investors in your fund will have a significant impact on the structuring of your fund from a tax and regulatory perspective. Soliciting investors in jurisdictions around the world can lead to costly regulatory and compliance burdens.

- **Target Fund Size** – While targeting a large amount of capital for your first fund may seem desirable, there can be real value to creating a market perception of scarcity. Meeting or surpassing a lower targeted fund size demonstrates a successful fundraising, which can help drive momentum for your next fund. This can also help minimize negotiations with investors and result in more attractive fund terms for your first fund and over the long-term.

Given an ever-evolving regulatory and commercial environment for raising a fund, a well-prepared and well-advised first-time fund sponsor can meaningfully increase the probability of a successful launch. [W](#)

## Glenn's Corner

# PE FIRMS LIABLE FOR AIDING & ABETTING BREACH OF CORPORATE OFFICERS' DUTY OF LOYALTY



**Glenn D. West**  
Retired Partner  
Private Equity



Two private equity firms have been subjected to the imposition of a constructive trust on a portion of the profits they may ultimately derive from a portfolio company. Why? Because according to Vice Chancellor Will in a recent Delaware Court of Chancery case, *Enhabit, Inc. v. Nautic Partners IX, L.P.*, 2024 WL 4929729 (Del. Ch. Dec. 2, 2024), they “knowingly participated” in corporate officers’ breach of their fiduciary duty of loyalty in the formation of that portfolio company and the acquisitions made by that portfolio company.

While the opinion runs some 114 pages (in its original form), what happened here is pretty straight forward and the result should surprise no one. Two private equity firms apparently became enamored with a “wildly

successful founder” of a healthcare company, April Anthony. Anthony was unhappy with the direction the company, Encompass Home Health & Hospice, had taken since it had been acquired “by a large public healthcare company.” She wanted to engage in a going private transaction assisted by the PE firms, but when that effort was rebuffed by the board, she apparently decided to form a brand new company, VitalCaring Group, with assistance and financing from the PE firms and the apparent involvement of other corporate officers of Encompass. Had she disclosed this intention to Encompass’s board and acted with appropriate candor, this might have turned out differently. Instead, according to Vice Chancellor Will, Anthony and the PE firms acted together to identify three acquisition targets for

her new company – while she was still the acting CEO of Encompass – and “used opportunities, resources, and information belonging to Encompass” to make those acquisitions for the benefit of the new company and at the expense of Encompass. And even after Anthony resigned, she apparently violated her non-compete and non-solicitation covenants in her employment agreement, again with the active involvement of the PE firms according to Vice Chancellor Will. And the evidence apparently showed that the PE firms undertook “stunning efforts to conceal their actions,” even code naming Anthony “Voldemort” (an apparent reference to Harry Potter’s Lord Voldemort, or “He-Who-Must-Not-Be-Named”).

As Vice Chancellor Will stated in her decision, holding that the PE firms were liable for “aiding and abetting” the corporate officers’ “breaches of the duty of loyalty” was “an easy call.” The remedy was a bit more challenging because the new company formed as a result of the breach of loyalty by the corporate officers and the PE firms was not yet profitable and was facing “headwinds” – and there was therefore no fruit of the breach of fiduciary duty that could be disgorged. So, recognizing that the PE firms “remain years away from an

anticipated exit[, and that] [t]hey may do so at a considerable profit – as they have in prior investments that initially faltered[.]” Vice Chancellor Will held that “Encompass is entitled to an equitable payment stream from any such future gains.” Vice Chancellor Will also awarded damages equal to the cost of certain retention payments made to existing employees to avoid their being recruited by Anthony to the new company.

The constructive trust imposed to create the payment stream is complicated and probably doesn’t add much to the cautionary tale this case tells. The important part of this case is the reminder that no matter how tempting it is to engage with a potential new operating partner while they are still employed by their current company

– stop and put in place appropriate guard rails to avoid participating in a breach of the duty of loyalty that corporate officers have as a matter of law – independent of any express obligations in their employment agreements. And observe those guard rails once they are in place.

This is not some example of a case where the Delaware courts are purportedly changing the rules or ignoring prior precedent – this is basic stuff that we all should know and is long standing law in most states – not just Delaware. Remember, as noted by Vice Chancellor Will:

*Delaware law demands that corporate officers act with the utmost loyalty to the entity they serve. They must avoid advantaging themselves*

*at the corporation’s expense. They cannot compete with the corporation or divert corporate opportunities from it without its consent. And they must undertake good faith efforts to advance the corporation’s best interests.*

And equally important to those in the private equity industry looking to attract new talent for a new platform, “[p]ersons who knowingly join a fiduciary in an enterprise which constitutes a breach of his fiduciary duty of trust are jointly and severally liable for any injury which results.”

Again there is nothing new here and we have successfully navigated these issues for PE firms many times in the past – something seems to have gone wrong here. 

## WEIL PRIVATE EQUITY BOOTCAMP 2025

Private Equity is a marathon, not a sprint – but we’ll make sure you’re running with the pros after Weil’s PE Bootcamp event.

Thank you to everyone that joined us in November (even if only for the burgers and wine from Burgers & Brunello), and next year’s event is primed to be even better. Weil’s PE Bootcamp is designed to provide a high-level overview of key topics necessary for private equity professionals, from juniors to partners. Led by seasoned industry experts, the Weil PE Bootcamp combines interactive discussions, case studies and real-world insights to provide a unique practical understanding of the private equity landscape.

Last years’ event focused on conversations surrounding acquisition agreements, management incentive plans, AI in PE, post-election HSR and SEC outlooks, Liability Management, and the implications of fund structure and tax in deals. This years’ event is going to be focused on the latest tricks of the trade in what is shaping up to be an incredibly busy 2025.

[Please click here to register your interest and be on the list for an invitation.](#)



# Sponsor SMART

Show off your Sponsor Smarts! Send the editor team your answers at [sponsor.sync@weil.com](mailto:sponsor.sync@weil.com) to the three quiz questions below and check our next issue for the correct answers. Ready, set, GO!

- 1 An equity commitment letter is:**
- A. a commitment by a private equity fund to provide a certain amount of the purchase price at closing
  - B. an agreement to mediate disputes in a way that is fair to both parties
  - C. a letter committing an investor to make certain investments in a private equity fund

- 2 Compared with 2023, were buyers in 2024 more or less likely to obtain exclusivity while negotiating a deal?**

(Hint: See *Weil Deal Vision360 2024 In Review*)

- 3 A merger may be a better structure than a stock purchase if:**
- A. the buyer and the target have similar operating businesses
  - B. the buyer and target are both corporations
  - C. the target has a large number of stockholders



You may also submit your response by scanning the QR code

## Autumn Issue Sponsor Smart Answers:

### A “tipping basket” is:

- A. a bucket of water
- B. a deductible that once met tips into indemnity obligations above the deductible
- C. a deductible that one met requires coverage from dollar-one

### Continuation vehicles are used as a way to:

- A. offer management a right to invest in a company
- B. complete add-ons
- C. roll ownership to another fund of the same sponsor

### True or False:

Reverse break-fees are paid by sellers to buyers for failing to close after signing a purchase agreement.

**False** – Reverse break-fees are paid by buyers to sellers for failing to close after signing a purchase agreement.

### When seller reps survive closing:

- A. the buyer can bring claims for breaches of a rep after closing even if there is no separate indemnity
- B. the buyer can bring claims for breaches of a rep after closing but only if there is a separate indemnity
- C. they send the seller a bill and hope to work together again on the next sell-side

### What percentage of Weil deals involve representation and warranty insurance?

- A. 20%
- B. 50%
- C. 75%

### Bonus Question:

#### What was the “Private Equity Deal of the Year” at the 2024 IFLR Americas Awards?

Weil has been recognized for its work advising Advent International on its \$6.4 billion acquisition of Maxar Technologies, which was named “Private Equity Deal of the Year” at the 2024 IFLR Americas Awards. The Weil team that advised Advent International was led by M&A partner James R. Griffin, Co-Head of U.S. Private Equity Ramona Nee and Co-Managing Partner of Weil’s London office Jonathan Wood.

## ENDNOTES

### U.S. LEVERAGED FINANCE MARKET UPDATE

- 1 GoldSheets, LSEG LPC (December 9, 2024)
- 2 US Credit Markets Quarterly Wrap: Leveraged loan market caps banner year with busy quarter, PitchBook (January 2, 2025)
- 3 Abby Latour and Zack Miller, "2025 US Private Credit Outlook: More M&A, larger lenders, bigger market", PitchBook (December 11, 2024)
- 4 Marina Lukatsky, "Monthly Wrap: Record demand fuels leveraged loan market", PitchBook (December 5, 2024)
- 5 US Credit Markets Quarterly Wrap: Leveraged loan market caps banner year with busy quarter, PitchBook (January 2, 2024)
- 6 Will Kubzansky and Jeannine Amodeo, "Leveraged Loan Market's \$64 Billion Day Smashes Record", Bloomberg Law (December 3, 2024)
- 7 US Credit Markets Quarterly Wrap: Leveraged loan market caps banner year with busy quarter, PitchBook (January 2, 2025)
- 8 Marina Lukatsky, "March Wrap: Leveraged loans gain 0.85%; Q1 return is 2.46% amid supply shortage", LCDNews (April 1, 2024).
- 9 US Credit Markets Quarterly Wrap: Leveraged loan market caps banner year with busy quarter, PitchBook (January 2, 2025)
- 10 Tyler Udland, Leveraged loan break prices ease in October, as robust issuance continues, PitchBook (November 13, 2024)
- 11 Tyler Udland, Leveraged loan break prices ease in October, as robust issuance continues, PitchBook (November 13, 2024)

- 12 US Credit Markets Quarterly Wrap: Leveraged loan market caps banner year with busy quarter, PitchBook (January 2, 2025)
- 13 US Credit Markets Quarterly Wrap: 2025 Research Outlook: Migration of leveraged loans from BSL to private credit, PitchBook (January 2, 2025)

### PARTNER PERSPECTIVES: PRIVATE EQUITY EMERGING MANAGER LANDSCAPE

- 1 Preqin (December 2024) – North American private equity and first-time funds with respective vintage year.
- 2 Citrin Cooperman (2024) – The Rise of an Asset Class, Independent Sponsor Report.
- 3 Axial (2023) – Independent Sponsor Report: Summary & Analysis.
- 4 Preqin (December 2023) – Ability to raise successor fund defined as number of first-time GPs in respective vintage year that successfully raise subsequent second fund divided by number of first-time GPs in respective vintage year.
- 5 Hamilton Lane (2024) – Market Overview.
- 6 TIFF Investment Management (2023) – Independent Sponsors: Rising Significance in the Lower Middle Market.

### GENERATIVE AI AT WEIL – TRANSACTIONAL LAWYERS' PERSPECTIVE

- 1 Bain and Company, AI Survey: Four Themes Emerging (June 20, 2024).
- 2 Thompson Reuters, Future of the Professions Report (July 2024).
- 3 Bloomberg Law, State of Practice #3, Money Matters and Evolution of the Workplace (October 2023).

### RIDING THE RISING ARBITRATION TIDE MAY KEEP PRIVATE INVESTMENT DISPUTES PRIVATE

- 1 See AG Mobile Holdings, L.P., et al., v. H.I.G. Mobile, LP, et al., Case No. 2023-1103-MTZ (Del. Ch. Nov. 3, 2023) (alleging in a public filing that company records were intentionally falsified and citing to emails and text messages of employees and executives mentioning "bogus billing" and incorrectly input target numbers); Benchmark Capital Partners VII, L.P., v. Travis Kalanick, et. al., Case No. 2017-0575-SG (Aug. 10, 2017) (alleging that former Uber CEO Travis Kalanick committed fraud, breach of contract, and breach of fiduciary duty including by purportedly concealing his involvement in causing Uber to acquire a self-driving vehicle, allegedly harboring trade secrets, and creating a pervasive culture of gender discrimination, among other things); R Fund IV Acq Inv, LLC, et al., v. Brightwood Capital Fund III-Institutional, LP, Index No. 651756/2024 (N.Y. Sup. Ct. Nov. 21, 2024) (holding that Plaintiffs' filing of the Transaction Agreement and related documents at issue was proper given New York's strong presumption of public access); see also Anoke v. Twitter, Inc., Case No. 3:23-cv-02217 (N.D. Cal. Aug. 20, 2024) (denying sealing of X Holdings Corporation's corporate disclosure statement and declaration because of the public's right of access to records in civil proceedings).
- 2 See Wasito v. City of San Diego, 2019 WL 6877554, at \*2 (S.D. Cal. Dec. 16, 2019) (denying sealing motion); Hadley v. Kellogg Sales Co., 2018 WL 11464608, at \*3 (N.D. Cal. Mar. 7, 2018) (same).

## ENDNOTES

3 Note that in subsequent federal confirmation actions, courts often reject sealing arbitral awards and supporting documents based on the parties' underlying confidentiality agreement related to their arbitration. See *General Re Life Corp. v. American General Life Insurance Co.*, No. 23-cv-05219 (ALC) (S.D.N.Y. Mar. 28, 2024) (refusing to grant parties' motion to seal arbitration position statements, the final arbitration award, petitioner's reply brief, and email correspondence discussing the final arbitration award absent countervailing privacy and business interests). However, as a practical matter, it is rare that a dispute in this space will get to this point, as opposed to litigations where everything from the first filing is at risk of being public.

### EARN-OUTS IN ALTERNATIVE ASSET MANAGEMENT M&A

- 1 984 A.2d 126 (Del. Ch. 2009).
- 2 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992)
- 3 *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)
- 4 See *Lazard Technology Partners, LLC v. Qinetiq North America Operations LLC* 2015, 114 A.3d 193 (Del. 2015); *American Capital Acquisition Partners, LLC v. LPL Holdings, Inc.*, 2014 WL 354496 (Del. Ch. 2014); *Fortis Advisors LLC v. Dialog Semiconductor PLC*, C.A. No. 9522-CB. (Del. Ch. Jan. 30, 2015)
- 5 *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017)

6 See *Trifecta Multimedia Holdings Inc. and Dave Young v. WCG Clinical Services LLC*, 318 A.3d 450 (Del. Ch. 2024)

7 See *Winshall* (Del. 2013).

8 See *Lazard* (Del. 2015).

9 See *Lazard* (Del. 2015); *Fortis Advisors LLC v. Medtronic Minimed, Inc.*, C.A. No. 2023-1055-MAA (Del. Ch. 2024) ("... not take any action intended for the primary purpose of frustrating ...")

10 The terms of arbitration, and even whether to use an arbitrator (versus an expert neutral party) subject to certain legal standards for conflicts and judicial review, is outside the scope of this article. A good summary of such issues can be found in ["Purchase Price Adjustments: Arbitrations, Expert Determinations, Stuff in Between, and the Spector of a "Malicious" Adjustment Claim", Glenn D. West (October 27, 2023)].

### PARTNER PERSPECTIVES—PRIVATE EQUITY EMERGING MANAGER LANDSCAPE

- 1 Preqin (December 2024) – North American private equity and first-time funds with respective vintage year.
- 2 *Id.*
- 3 *Id.*
- 4 *Citrin Cooperman* (2024) – The Rise of an Asset Class, Independent Sponsor Report.
- 5 *Axial* (2023) – Independent Sponsor Report: Summary & Analysis.

6 Preqin (December 2023) – Ability to raise successor fund defined as number of first-time GPs in respective vintage year that successfully raise subsequent second fund divided by number of first-time GPs in respective vintage year.

7 *Hamilton Lane* (2024) – Market Overview.

8 *TIFF Investment Management* (2023) – Independent Sponsors: Rising Significance in the Lower Middle Market.

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## RECENT HIGHLIGHTS

Weil Private Equity is proud of our broad representations and the successes of our clients. Below is a small sampling of our recent work:

- Weil is advising American Securities in its sale of AS Birch Grove LP to Third Point LLC
- Weil advised Astorg in its approximately \$282 million take-private acquisition of Hamilton Thorne, and simultaneous acquisition of Cook Medical's Reproductive Health business
- Weil advised Aterian Investment Partners in the acquisition by one of its affiliates of Outlook Group
- Weil advised an investor group led by Bain Capital and Pine Island Capital Partners in the sale of Precinmac to Centerbridge Partners
- Weil advised Blackstone Tactical Opportunities in its preferred equity investment in Inhabit
- Weil is advising CPP Investments in its approximately \$1 billion investment in support of the \$6.7 billion merger between Novolex and Pactiv Evergreen
- Weil advised DT Midstream, Inc. in its \$1.2 billion acquisition of a portfolio of three FERC-regulated natural gas transmission pipelines from ONEOK, Inc.
- Weil advised Goldman Sachs Alternatives in the acquisition by its private equity business of a majority stake in Sila Services
- Weil advised Private Equity at Goldman Sachs Alternatives and its portfolio company Omega Healthcare Management Services in an investment by OTPP
- Weil advised Graycliff Partners in its sale of Landmark Structures to Cerberus Capital Management, L.P.
- Weil advised PSG, alongside Golub Capital and others, in the group's \$800 million investment in LogicMonitor
- Weil advised PSP Investments in its strategic growth investment, alongside Investcorp, in PKF O'Connor Davies
- Weil advised Stripes and its portfolio company Siete Foods in its \$1.2 billion sale to PepsiCo, Inc.
- Weil advised TruArc Partners in its investment in DMI Personal Care

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