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Weil Private Equity Sponsor Sync

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FROM THE EDITORS

Is it just us, or are public-company boards starting to feel like the last ones at the party, hunting for a ride home? This quarter of *Sponsor Sync* goes full "cloak-and-ticker" with an issue-within-an-issue devoted to take-private deals, kicking off with a crash course (step away from the poison pill, please), followed by a graphical timeline that maps the whole dance from first flirt to closing embrace, DealVision360 data that gives you the receipts on valuation and break-fees, and a deep dive into REITs and their crossovers into M&A.

Beyond the take-private spotlight, we pack in a trans-Atlantic leveraged-finance market update (think of it as a spread forecast without the weather metaphors); a refresher on registration rights for when the IPO window creaks open; a survey of who's buying courtside in the fast-growing world of sports PE; Campbell Lutyens' perspective on continuation vehicles; an overview of the SEC's emerging stance on AI (paired with field notes on legal-tech robots drafting NDAs at 2 a.m.); a head-to-head look at US versus EU capital allocation; and, to cap it off, Glenn West's clinic on survival clauses (because some reps just refuse to die).

So grab your favorite reading glasses and dive in. Whether you're stalking the next take-private or just need a break from seller-friendly chatter, we promise insights as actionable as a 10-day go-shop and twice as fun.

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SPECIAL ISSUE

Take Private Deals

LETTER FROM THE SPECIAL EDITORS

We're pleased to bring you our focus on take-private transactions, a topic that continues to command attention in today's deal landscape. We designed this feature to guide you through the full arc of a take-private, from fundamental concepts to the latest market data and unique sector considerations, such as REIT transactions. Our aim was to create a resource that is as useful to seasoned practitioners as it is to those newer to the area. We look forward to continuing the dialogue in the trenches!

WEIL U.S. LOAN TRACKER

Q2'25

S + 344 Average First-Lien Broadly Syndicated Spread for Single B Rated Borrowers (up 10 bps from Q1)

S + 399 Average First-Lien Broadly Syndicated Spread for B-Minus Rated Borrowers (up 26 bps from Q1)

$16 billion **YTD** Volume of Refinancings of U.S. Private Credit Loans into Syndicated Loan Market

$214 billion **YTD** Volume of Repricings of U.S. Leveraged Loans

WEIL U.S. BOND TRACKER

Q2'25

$25.5 billion **YTD** Volume of Refinancings of U.S. institutional and pro rata loans into HY bonds (down from $45 billion at this point in 2024)

$98.8 billion **YTD** Volume of Refinancings of U.S. HY Bonds (down from $123.4 billion at this point in 2024)

GLOBAL LEVERAGED FINANCE MARKET UPDATE


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SMART SUMMARY

- The "Liberation Day" announcement on April 2nd brought a halt to the lively opportunistic transactions that held ground throughout 2024 and beginning of 2025. May and June of this year, however, showed welcome signs of recovery from the lulls that characterized the start of the second quarter.
- Due to the heightened volatility and uncertainty that has continued to cloud the market, new issuance related to M&A activity experienced considerable declines in Q2'2025. Although M&A-driven issuance surpasses the equivalent period in 2024, such activity remains well below historical norms.
- The high-yield bond market set new records in Q2'2025; however, even with the records set this quarter, issuances still remain below historic levels.

Q1 2025 Recap

What began as a promising start to the year for activity in the leveraged loan and high-yield bond markets quickly turned turbulent due to increasing political and macroeconomic uncertainty. The first quarter was marked by heightened volatility driven mostly by tariff threats along with fears of recession and stagflation.[1] January saw strong momentum, with narrowing spreads fueling robust repricing and dividend recapitalization activity and borrower-friendly covenant packages in the leveraged loan market. But that early optimism faded throughout the first few months of 2025.[2] Hopes for increased M&A activity, lower interest rates, and sustained economic growth were gradually overshadowed by persistent inflation pressures and broader market instability which, together, weighed heavily on the leveraged finance market by the end of the quarter.[3]

The sense of uncertainty that clouded the market in the early months of 2025 continued into the second quarter, as market participants continued to grapple with how best to navigate the ongoing volatility.

Q2 2025 Volatility

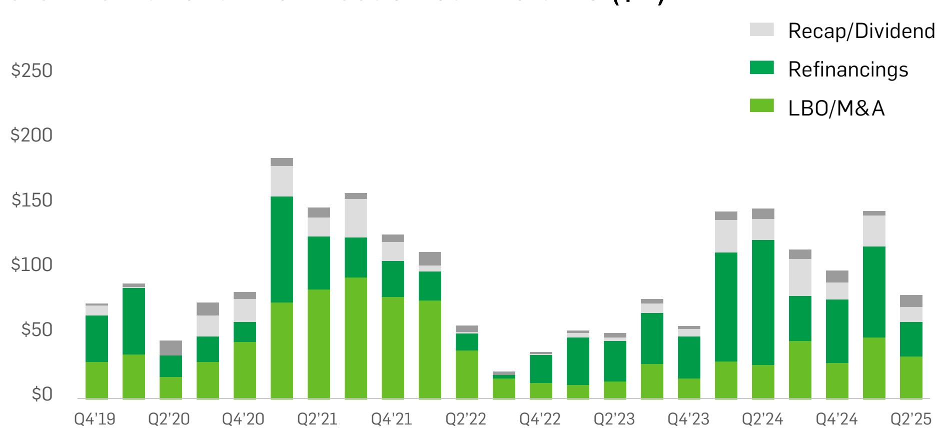
Q2'2025 began with President Trump's "Liberation Day" announcement on April 2nd, unveiling steep tariffs on imports from several countries. The announcement rattled investors, raising concerns about economic growth and corporate stability. The new tariffs introduced fresh uncertainty for dealmakers, who anticipated a chilling effect on exits and were pricing in elevated risks of inflation and recession.[4] The announcement of tariffs caused the new-issue loan and bond markets to virtually grind to a halt.[5] Momentum began to build gradually over the course of the second quarter, and by the end of the three-month period, market conditions for loans and bonds had almost completely rebounded, facilitating a vibrant level of activity.

Leveraged Finance Markets Awaken Following Months-Long Slumber

At the beginning of Q2'2025, the primary loan and high-yield bond markets felt the toll as investors, spooked by the potential economic fallout from the new tariffs, pulled back sharply. Appetite for loans collapsed, triggering a 15-day freeze in the issuance of new broadly syndicated loans – the longest drought in years outside of typical seasonal slowdowns or crisis periods like the COVID-19 pandemic.[6]

Modest signs of recovery – fueled largely by increased investor appetite following pauses in U.S. tariff implementation and easing geopolitical tensions – emerged in the first weeks of May as the broadly syndicated loan market began to rebound and launched 14 financings in the second week alone.[7] Market participants in the leveraged loan market focused on businesses that were U.S. based, had limited supply chain exposure or operated in service-oriented sectors, which would be insulated from the ripple effects of tariffs.[8] By late May, the U.S. leveraged loan market experienced its busiest days since early March as renewed confidence prompted borrowers to re-enter the market after lenders had pulled back in the wake of the tariff announcements on April 2nd.[9] Despite the accelerated momentum that continued into June, loan volume for Q2'2025 was only $113 billion, the lowest amount since Q4'2023 and down from $354 billion compared to the same period last year.[10]

U.S. Institutional New-Issue Loan Volume ($B)



Source: Pitchbook | LCD + Date through June 30, 2025 | Excludes repricings and other amendments

Repricings also rebounded with considerable momentum throughout June.[11] While the first post-"Liberation Day" repricing did not emerge until the final days of April, June alone saw 29 speculative-grade issuers amend their credit agreements to reduce the spreads on $28 billion in term loans.[12] The uptick, however, was not enough to overcome the hard hit opportunistic transactions had taken earlier in the quarter, with Q2'2025 repricings totaling at $28.5 billion, the lowest since Q3'2024 and down 85% from the first quarter of this year.[13]

Year-to-date leveraged loan issuance to support dividend recapitalizations reached $33.2 billion by the end of June, just slightly below the $35.4 billion recorded during the same period in 2024, the highest on record.[14] The resilience in issuance suggested that, even in turbulent times, firms increasingly pursue opportunistic strategies to generate portfolio returns.[15] As a comparison, only three dividend recap loans were launched during the entire month of March. Similarly, sponsor-backed companies have issued $6.5 billion of high-yield bonds in the first half of 2025 to support dividend recapitalizations (a high since 2011) with overall volume for dividend recapitalization bonds reaching $8.2 billion (more than the 2022-2024 totals combined).[16]

Post-"Liberation Day" Freeze Reignites Direct Lending

Direct lenders took advantage of the market dislocation in the early part of the second quarter to reverse recent pricing trends. Though early April surveys of market participants predicted widening spreads beyond 500 bps over SOFR, so far this year, 37% of direct lending transactions in the United States and Europe had spreads under 500 bps and only 18% had spreads of 600 bps or higher.[17] And, despite increased direct lending volume supporting buyout activity, the $121 billion of direct lending issuance in the first half of 2025 lags behind the $143 billion in the same period of last year.[18]

M&A Activity Faces Prolonged Halt, With Considerable Declines in Second Quarter

Despite the aforementioned renewal in investor confidence, M&A-related dealmaking has remained on hold – a far cry from the boom anticipated to result from the new administration.[19] New loan issuance financing M&A activity totaled $80.9 billion in the first half of 2025, an increase of 44% compared to the same period last year.[20] Although M&A activity has shown marketable improvement year-over-year, the comparisons are against a subdued base in 2024 and depict activity that is well beneath historical norms.[21] Conversely, high-yield bond issuances for M&A and LBO funds hit a four year high at $26.6 billion in the first half of 2025 with issuances for LBO funds making up 5% of the high-yield bonds issued thus far in 2025 (up from 3% in 2024 and 2.9% in the 2020 pandemic-era).[22]

Record Setting Resurgence in the High-Yield Bond Market

The high-yield bond market ended Q2'25 with a four-year volume high at $76.2 billion (up from $68.6 billion in Q1'25), with $36.6 billion issued in June alone – the busiest June since 2021.[23] Further, global high-yield bond issuances had the busiest quarter since Q3'21 with issuances soaring to $121.8 billion in Q2'25 up from $88.8 billion in Q1'25[24] – ending with the first triple C-rated deal in nearly a year, courtesy of sponsor-backed Flora Food Group BV.[25] As we predicted last quarter, the bond market saw an increase in "reverse Yankee" deals – where U.S. issuers raise money in the euro-dominated bond markets – with $45.1 billion issued in Q2'25 (up from $37.2 billion in Q1'25 and $39.2 billion in Q2'24), bringing the total for the first half of 2025 to $82.1 billion (up from $68.2 billion in the first half of 2024).[26]

More and more opportunistic bond issuances are reverse Yankee issuances, which have recently provided U.S. companies with lower borrowing costs and a chance to diversify its sources of funding.[27] Instead of waiting for maturities to come closer, issuers are choosing to opportunistically access markets and issue bonds to get ahead of their funding budget for the year.[28] For example, financial companies – some of the biggest sellers of corporate debt often accounting for more than 40% of annual volume of corporate debt – had already sold about 70% of their expected funding needs for 2025 at mid-June (compared to 45% in 2024).[29]

Despite the momentum at the end of Q2'25, high-yield bond volume in the first half of 2025 is down 11% from the first half of 2024 with issuers rated triple-C or lower representing only 2% of 2025 volume (half of the rate in 2024 and in line with the historic low in 2023) – while approximately 41% of all bonds issued in the first half of 2025 have been double-B rated.[30]

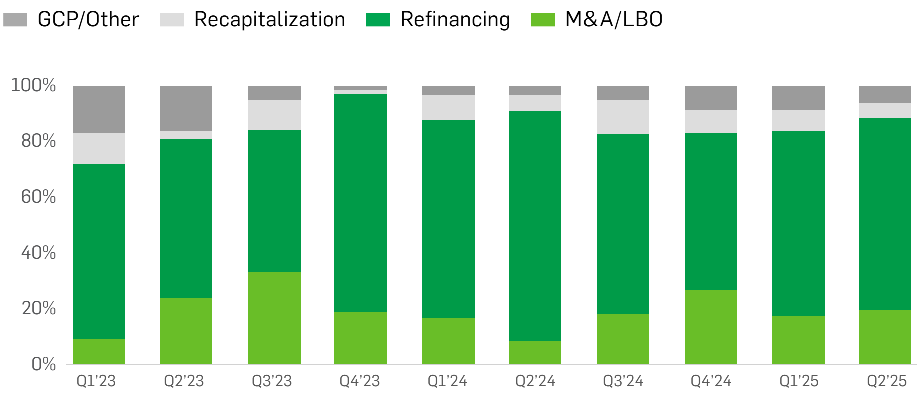
M&A/LBO Leveraged Finance Volume, YTD ($B)

Source: Pitchbook | LCD + Date through June 30, 2025

Q3 2025 Outlook

If the global trade landscape becomes clearer, volatility may ease, making way for a more reliable new issue market and normalized pricing behavior. Tariffs themselves may not be the core issue as borrowers and lenders can adapt and price accordingly, but

M&A/LBO Leveraged Finance Volume, YTD ($B)



Source: Pitchbook | LCD + Date through June 30, 2025

uncertainty must recede for investor confidence to return, even if spreads stay elevated. Bond issuances are expected to continue into July, so long as demand remains high and uncertainty in the markets remains relatively low; however, the bond market will likely slow down as we move further into 2025, as is typical but intensified as issuers have chosen to front-load their annual financing needs by opportunistically refinancing in the first half of 2025.[31] We anticipate that most issuers will be hesitant to commit to large M&A transactions until corporate taxes and tariffs are solidified; however, even if M&A transactions pick up later in 2025, those transactions will likely be financed in 2026 (rather than the remainder of 2025).[32] Conversely, we anticipate that the increased supply of reverse Yankee issuances will continue throughout 2025, especially as market conditions continue to offer cost savings for U.S. issuers. The momentum established at the end of the second quarter has created a favorable deal-making environment from a debt financing perspective, and private credit activity is expected to stay robust, offering flexibility and speed in exchange for slightly higher pricing.

WHAT'S THE DEAL WITH REGISTRATION RIGHTS?
5 THINGS TO CONSIDER AT INITIAL INVESTMENT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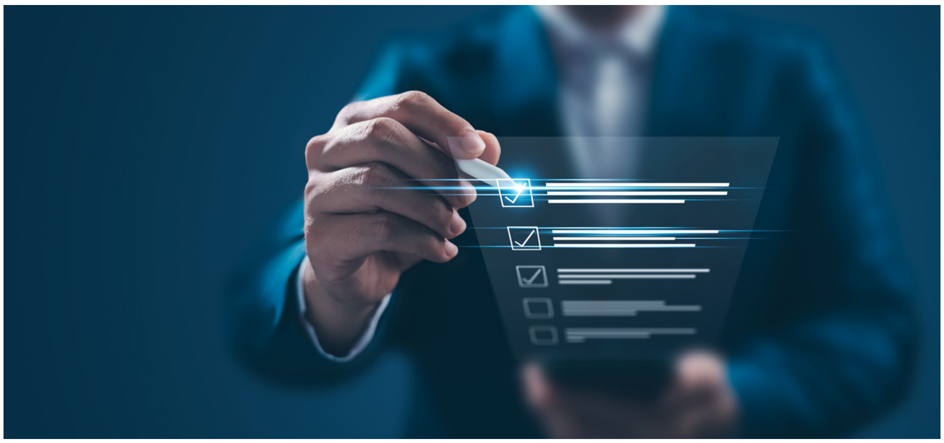

SMART SUMMARY

- Registration rights are contractual rights that facilitate share resales by sponsors and other pre-IPO shareholders once a company goes public
- These rights are often negotiated at initial investment, even when a public exit is unlikely or not in the near future, and include demand, shelf and piggyback rights

When investing in a private company or taking a public company private, you may see "Registration Rights" included as a line item in a term sheet or as a section in the governing agreement. Below we describe the what, why, who, how and one more what of registration rights. Registration rights tend to be highly technical and use a lot of jargon, but the bottom line is: well-negotiated registration rights provide you with the best flexibility and optionality to exit your investment through the public markets in an orderly fashion. While we generally discuss exits through IPOs below, registration rights also apply when companies go public via a direct listing or de-SPAC transaction.

1 What are registration rights?

A company's debut in the public markets with a stock exchange bell-ringing, while a significant milestone, does not result in all pre-IPO shares being "public," or freely tradeable. Under the Securities Act of 1933, any issuance of shares by the company or resale of shares by pre-IPO shareholders must be made pursuant to an effective registration statement or pursuant to an exemption from registration. Securities issued to sponsors pre-IPO are typically issued under an exemption to this requirement, in a private placement. As such, sponsors acquire "restricted securities," meaning they cannot be reoffered or resold to the public without either registration under the Securities Act or pursuant to another exemption. "Registration Rights" are contractual rights between a company and certain shareholders to obligate the company to file a registration statement and take other actions to facilitate the reoffer and resale of securities by such shareholders under the Securities Act.

2 Why do you need registration rights?

Absent a contractual obligation to do so, a company is not under any legal obligation to register the reoffer or resale of shares for its shareholders. Due to legal and market considerations, liquidating a substantial position can take years for large pre-IPO investors. Sponsors negotiate registration rights to enhance their liquidity options in the event of a public exit, and in some cases, to compel an IPO. Registration rights clearly define the rights and procedures related to registered resales by shareholders, including through underwritten offerings. Registration rights also delineate rights and obligations of pre-IPO shareholders (*e.g.*, lock-up requirements and provisions for notice or coordination of sales).

3 Who gets registration rights?

Typically, all pre-IPO shareholders receive registration rights in pre-IPO governing documents. In addition to sponsors, this includes founders, directors and management that own pre-IPO securities. However, the relative rights and obligations of such pre-IPO holders will vary depending on deal dynamics and impact negotiated terms.

4 How are shares registered?

Registration rights generally comprise three main rights: demand, piggyback and shelf registration rights. Demand rights allow shareholders to compel a company to facilitate registered offerings of shareholder securities by filing the requisite registration statement and undertaking other related actions. Piggyback rights provide shareholders the right to join in, or "piggyback" onto, registrations proposed by the company or other selling shareholders. Shelf registration rights allow shareholders to require the company to file a specific type of registration statement, called a shelf registration statement, which can be used from time to time for resales, including open market sales, underwritten offerings and block trades. Shelf rights also often include rights to compel an underwritten takedown. Generally, demand rights and underwritten takedowns are the most burdensome for the company and, as such, are subject to the most limits. For example, there may be a cap on the number and frequency of demands or underwritten takedown requests as well as requirements that an offering will have certain minimum expected proceeds.

5 What should you think about when negotiating registration rights?

The leverage you have in negotiating registration rights provisions frequently depends on your position in the cap table as well as whether you will be deemed an affiliate of the company. Registration rights provisions in pre-IPO governing documents require that similar provisions be included in any new registration rights agreements entered into post-IPO. The level of detail and negotiation of such provisions at the outset can impact your post-IPO rights, which means what you negotiate at investment can be applicable for a lengthy period of time if there is a public exit. Conversely, if an IPO exit is unlikely or you want to negotiate these rights at the time of an anticipated IPO, you may not want to spend a lot of time negotiating at the time of your investment and save your negotiating leverage for other deal terms. Deal dynamics and timing will often dictate the approach to registration rights at initial investment.

Key considerations at this stage, which your Weil deal team will be focused on and help you navigate, include:

- **How long will you have registration rights?** Registration rights may have a set term or may fall away when other exemptions for resales are more readily available or your ownership percentage dips below a certain threshold. If you expect to be an affiliate of the company post-IPO (which is a fact-specific inquiry), you will likely have registration rights for a longer period of time than non-affiliates given the nuances of the securities laws.
- **What are your demand or underwritten takedown rights?** The ability to make demands or request underwritten takedowns and the related limitations will often depend on such things as the timing of investment, ownership percentage and rights vis-à-vis other sponsors (if any).
- **What are the limitations on piggyback rights?** While common to carve out certain offerings and registration statements from piggyback rights, participation in the IPO or underwritten block trades for certain holders may be limited due to market and timing considerations.
- **What are the parameters to initiating an IPO?** Some registration rights provisions dictate which sponsors may be able to initiate an IPO. These rights may only kick in after a certain period of time and be subject to various parameters (e.g., require a certain estimated equity value of the company at IPO).
- **When are lock-ups required and are there shareholder coordination provisions?** In order to provide an orderly market, lock-up provisions obligate other registration rights holders to agree not to sell their shares for a period of time following offerings or block trades and certain shareholders may be required to coordinate with, or notify, other holders in connection with sales and distributions (even if not registered) for a specified period post-IPO. W

GAME CHANGERS: HOW PRIVATE EQUITY IS CONTINUING TO RESHAPE THE SPORTS INDUSTRY


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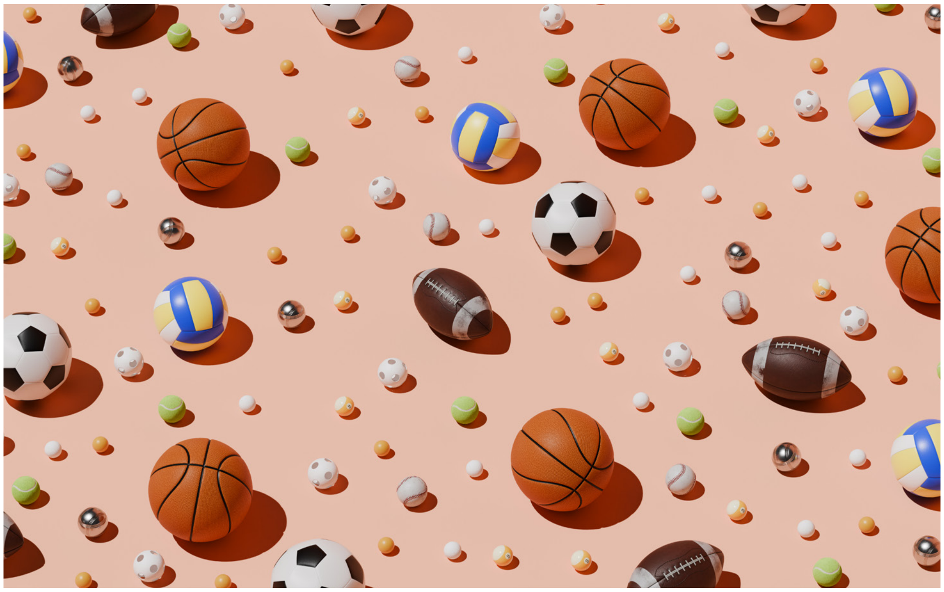

SMART SUMMARY

- Private equity is transforming sports ownership, with institutional capital reshaping team structures across the NFL, NBA, NHL, MLB, and global football.
- New league rules are unlocking investment opportunities, enabling sponsors, family offices, and high-net-worth individuals to take minority stakes in major franchises.
- Global markets are emerging as the next frontier, as U.S. investors pursue controlling interests in European and Latin American clubs amid rising valuations and media rights growth.

PE in the End Zone

We first discussed the NFL's ground-breaking decision to permit private equity investments into clubs in our Q4 2024 issue. Since then, the league has formalized its framework, requiring a minimum 3% stake, a six-year holding period, and strictly passive ownership with no voting or governance rights. These rules aim to preserve the NFL's traditional ownership model while enabling new capital inflows.

This regulatory clarity has catalyzed a wave of activity. Most recently, the league approved the purchase of an 8% stake in the Chargers by Arctos Partners, which also acquired a 10% stake in the Buffalo Bills in January, while Ares Management took a similar position in the Miami Dolphins and related assets. The New York Giants have announced a process to sell up to 10% of their equity, which is expected to attract significant sponsor interest. Behind the scenes, other franchises are believed to be fielding inbound inquiries as well.

Notably, these transactions have ushered in a new era of diversified ownership. Alongside institutional sponsors, family offices and high-net-worth individuals are increasingly participating as limited partners. The Bills' deal included nine individual investors – among them former NBA stars Tracy McGrady and Vince Carter, as well as US soccer legend Jozy Altidore – while the Dolphins welcomed Joe Tsai and Oliver Weisberg for a combined 3% stake. The Philadelphia Eagles reportedly sold an 8% stake to two family investment groups in late 2024, and just a few weeks ago, the San Francisco 49ers reached a deal to sell a 6.2% stake to three Bay Area families – the Khoslas, the Deeters and the Griffiths. This trend reflects a broader shift in NFL ownership dynamics, where estate planning and intergenerational transfers are now being complemented by strategic recapitalizations involving a wider range of capital sources.

PE's Full Court Press

Since the NBA changed its rules in 2020 to allow private equity investment, a growing number of teams have embraced institutional capital. Notable transactions include the Sacramento Kings (Arctos and Blue Owl), Atlanta Hawks (Blue Owl), Golden State Warriors (Arctos), Minnesota Timberwolves (Blue Owl), Philadelphia 76ers (Arctos), Phoenix Suns (Blue Owl, which exited with a 158% gain upon Matt Ishbia's February 2023 purchase of the team), San Antonio Spurs (Sixth Street), and Utah Jazz (Arctos).

Most recently, the NBA witnessed a historic transaction as the Los Angeles Lakers agreed to sell a majority stake to Mark Walter, co-founder and CEO of Guggenheim Partners and TWG Global, in a deal that values the franchise at $10 billion—the highest valuation ever for an NBA team. This follows the March 2025 sale of the Boston Celtics for $6.1 billion to a group led by private equity executive Bill Chisholm and Sixth Street, underscoring the astronomic rise in valuations, and the accelerating role of institutional capital in reshaping NBA ownership dynamics.

Meanwhile, the Portland Trail Blazers are officially in the process of being sold, with a transaction expected to close during or after the 2025–26 season. With Forbes' latest valuation putting the team at $3.5 billion, the sale is likely to involve a consortium of investors, potentially including private equity or family offices.

"Private equity is not just reshaping the business of sports – it's redefining who owns the game and how it's played, both on and off the field."

While the pace of private equity entry into the NBA has been measured, the league's relatively flexible governance structure – including roles like alternate governor – has made it easier for minority investors to gain meaningful involvement. As valuations climb and liquidity needs evolve, more teams may look to institutional capital as a strategic ownership solution.

PE's Power Play

The NHL joined other leagues in 2021 in allowing private equity investment. While such ownership is not always disclosed, known examples include the New Jersey Devils (Arctos), Minnesota Wild (Arctos), Pittsburgh Penguins (Arctos and RedBird), and Tampa Bay Lightning (Arctos and Blue Owl). The NHL permits up to 30% ownership by a single fund, offering more latitude than the NFL and contributing to a steady stream of sponsor interest.

PE's Home Run

Similarly, MLB does not require disclosure of private equity ownership, but public relationships include the Boston Red Sox (Arctos and RedBird), Los Angeles Dodgers (Arctos), Chicago Cubs (Arctos), San Francisco Giants (Arctos), Houston Astros (Arctos), and San Diego Padres (Arctos). MLB's 30% cap and relatively open governance model have made it a fertile ground for sponsor activity.

Global Goals – PE's Expanding Footprint in Global Football

While U.S. leagues like the NFL and NBA continue to impose tight restrictions on private equity ownership – limiting stake sizes, requiring passive roles, and capping the number of teams a fund can invest in – global football is moving in the opposite direction. Across Europe and Latin America, leagues are increasingly embracing institutional capital, often allowing controlling stakes and direct operational involvement.

Over a third of clubs in Europe's top five leagues now have private equity or venture capital backing, with U.S. investors leading the charge. Multi-club ownership models are on the rise, and valuations – still lower than U.S. franchises – are attracting opportunistic capital. Notable deals include Ares Management's $500 million investment into Chelsea FC and CVC Capital's $2.1 billion stake in La Liga's commercial rights. These moves reflect a growing appetite for global sports assets – especially in markets where media rights and brand value are rapidly expanding.

In Mexico, Liga MX – long one of the most-watched soccer leagues in the U.S. and Latin America – is also opening its doors to institutional capital, and in particular, allowing sponsors to own a control stake. The league is currently considering a $1.25 billion investment proposal from Apollo Global Management in exchange for a stake in a new commercial rights entity. Meanwhile, American investors have already entered the league: Al Tylis holds a stake in Club Necaxa, and a pending deal involving Querétaro FC is expected to bring in additional U.S. capital.

Back in the U.S., the NWSL is taking a more progressive stance on ownership. Last year, Sixth Street acquired a controlling interest in Bay FC, and Carlyle partnered with Seattle Sounders FC owner Adrian Hanauer to take majority control of Seattle Reign FC. These deals – along with those in Liga MX and European football – stand in stark contrast to the more cautious, control-preserving models in U.S. leagues like the NFL and NBA. They may signal a new model for how sports leagues can balance institutional investment with long-term growth and community engagement.

Conclusion

Private equity involvement is bound to continue to increase in sports as leagues, teams, and sponsors navigate new rules and changing landscapes. The influx of institutional capital is now being matched by growing participation from family offices and high net worth individuals, reshaping ownership structures across leagues. Sponsors continue to seek high returns in light of difficult markets, with sports organizations increasingly viewed as resilient and high-growth investment opportunities. Meanwhile, international markets – particularly in Europe – are emerging as the next frontier for private equity expansion. While private equity can drive growth, such investments require careful consideration and navigation of the new and complex regulations governing such relationships and stakeholder interests. Private equity is not just reshaping the business of sports – it's redefining who owns the game and how it's played, both on and off the field.

MIP Pool Size:

How are Tier 1 PE sponsors sizing MIPs?

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Our proprietary DealVision360 data says initial pool reserves are between 8% and 15% of fully-diluted equity.

Pool size is dependent on a number of factors including the overall size of the company, projections, vesting terms and the allocation between time and performance vesting.

BY DEAL TYPE / INDUSTRY (last-twelve-month subset)

Deal Category	Typical MIP pool (FD %)
Technology & Software Buy-outs	12 – 14 %
Consumer & Retail	10 – 12 %
Industrial / Manufacturing	8 – 10 %
Healthcare & Life Sciences	10 – 13 %

PARTNER PERSPECTIVES

Continuation Vehicles: Key Trends and Considerations for Sponsors

Insights for Navigating the Evolving Secondaries Market


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Continuation Vehicles ("CVs") are gaining more traction as general partners ("GPs") seek to retain exposure to high-performing assets while providing optional liquidity to generally distribution starved limited partners ("LPs"). Campbell Lutyens ("CL"), a leading global private capital advisory firm founded in 1988, has been active in the secondaries space since 2000 and advised on $23B in secondary volume in 2024.

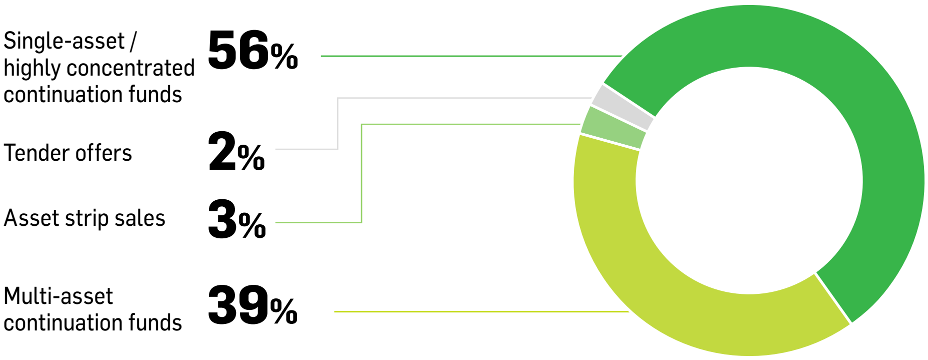
Further education at both GPs and LPs can significantly unlock the opportunity set, particularly in the middle market. We wanted to highlight the following key trends / takeaways that could be helpful as sponsors further evaluate CVs:

- **Be clear on the problem(s) you're solving for.** It's important to keep in mind that the LP is the lifeblood of the GP business and every decision should be centered around that belief. Does the business still have substantial runway, including M&A, which would support the operational and financial case for a CV? The rationale for a CV as the optimal approach must be clear and set out to LPs up front. Not all businesses are good CV candidates.
- **LPs are still largely opting for liquidity in CV roll / sell decisions.** While LPs are more familiar today with CVs, approximately 85-90% of LPs have recently opted for cash compared to rolling in a CV process.
- **GP-led volume grew by 41% in 2024 and remains robust to date in 2025.** According to CL's 2024 Secondary Market Report, we observed that GP-led transaction volume was

WEIL INSIGHTS

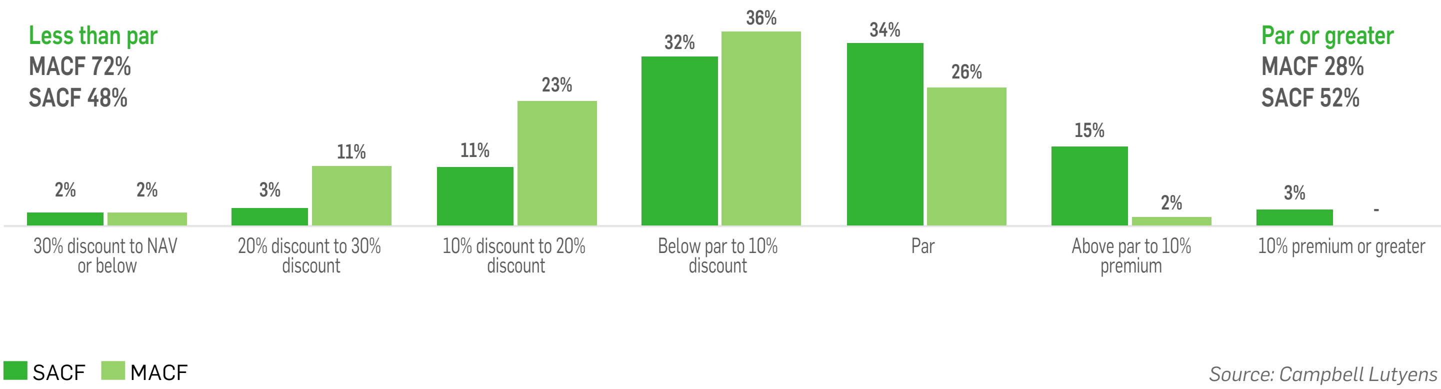
"The GP-led market continues to provide an effective pathway to liquidity for LPs. This consistency has drawn the attention of a diverse group of new market entrants on the buyside as well as GPs seeking alternative liquidity options for their investors in a deal market that continues to search for stability."

2024 GP-Led Transactions by Type



Source: Campbell Lutyens

2024 GP-Led Transaction Pricing



Source: Campbell Lutyens

driven by 1) continued emergence of dedicated, GP-led secondaries vehicles, 2) the entry of non-traditional secondary market participants investing in continuation vehicles, such as family offices, E&Fs, and public funds, and 3) a growing base of first-time CV sponsor users, reflecting broader adoption. These trends have continued into 2025.

- **Pricing trends remain strong for quality assets.** As shown above, 52% of single-asset GP-led transactions priced at par or better in 2024, with an average discount of 3.6%. Due to an abundance of supply in the market, only the highest quality companies are clearing in single asset transactions (typically at competitive pricing) whereas on multi-asset CVs we observe a wider mix of portfolio quality. While pricing for multi-asset continuation funds wasn't as strong as single-asset transactions, the average multi-asset price was in the 90s, with 64% of transactions pricing at a 10% discount or better.

WEIL INSIGHTS

"The signature assets of GPs are often brought to market, generating high interest among buyer groups. However, liquidity for existing LPs is not the sole goal of the GPs. Attracting new LPs through GP-led transactions is emerging as a creative fundraising tool as well in very challenging fundraising market."

- **Strategic fundraising benefits for sponsors.** CVs offer more than just liquidity – they are a strategic fundraising tool. In two recent CVs advised by CL ranging from $250MM to $1.5B, new LPs were secured; most of those new LPs were primary oriented. Both deals also had approximately 20% of follow-on capital for growth initiatives. How sponsors treat existing and new investors can weigh heavily on a primary fund commitment decision (both positively and negatively).
- **Robust secondary industry fundraising will support continued growth of the CV market.** Secondary capital formation remains robust, with $81B raised in 2024 compared to $57B in 2021. This growing pool of capital will likely ensure that quality CVs will continue to find support.

THE SEC & AI: EVOLVING OVERSIGHT OF PRIVATE EQUITY SPONSORS


John Bradshaw
Associate
Private Funds


Chris Scully
Partner
Private Funds

As previously reported, sponsors are rapidly embracing artificial intelligence ("AI") across their operations and businesses, betting big on the technology's promises of meaningful efficiency gains and competitive advantages. The SEC has taken notice.

Beginning in 2023 under former Chair Gary Gensler, the Commission adopted an aggressive stance on AI, citing concerns regarding conflicts of interest, opaque decision-making and privacy.[1] AI usage became a top examination priority,[2] and Gensler publicly warned that, without intervention, AI would trigger a financial crisis.[3]

More recently, however, the Commission's tone on AI has changed. Commissioner Mark Uyeda urged for the avoidance of AI regulation that might impede innovation,[4] and the SEC withdrew its proposed AI Rule.[5]

Still, AI remains squarely in the SEC's crosshairs. "AI-washing" and similar investor fraud continue to be key priorities for the Commission's Cyber and Emerging Technologies Unit.[6] Additionally, as previously reported, the SEC and DOJ jointly announced two AI-washing-related enforcement actions, the first such cases under the Trump administration.[7]

Under new Chair Paul Atkins, sponsors should expect SEC scrutiny of AI to continue, albeit with a focus on transparency and risk-based disclosure rather than sweeping deterrence.

To best prepare for this continuing scrutiny, sponsors should ensure their AI-related disclosures are accurate, consistent and clearly identify all associated risks and conflicts; implement governance, training and documentation procedures for AI usage; closely involve legal and compliance teams throughout the development and deployment of AI tools; and regularly test such tools for accuracy and bias.

AI IN PRACTICE: PROMISE, PITFALLS, AND WHAT COMES NEXT


Parker Lawter
Associate
Private Equity


Joseph Erdos
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Private Equity


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Private Equity

At Weil, we're not just watching the AI revolution, we're jumping in.

Every day, we are testing tools to determine how they would integrate into our workflows, and we are learning in real time what works and what doesn't. The experience so far? A mix of real promise and real friction. We see enormous potential but also real limitations. Some tools are already reshaping how we work. Others are still catching up to the realities of legal practice. Below are a few of the reasons why we're optimistic and a few of the reasons why we're cautious.

WHY WE'RE EXCITED:

AI as a creative catalyst: It helps us ask better questions, not just find faster answers.

Accelerated associate development:
Junior lawyers can explore ideas and iterate more quickly.

A smarter legal assistant:
AI can handle repetitive tasks, freeing up time for higher-level thinking.

Deep research:
AI tools with deep research can facilitate more accurate, expansive and faster research than ever before.

WHY WE'RE CAUTIOUS:

Workflow friction: Many tools don't yet fit naturally into how lawyers work. Moreover, productivity increases from AI are not always clear.[1]

False confidence:
Outputs can sound polished but be subtly wrong or misinformed.

Data security:
Confidentiality remains a gating issue for broader adoption in the legal field.

We believe AI will reshape legal practice – but not by replacing lawyers. Instead, it will elevate the way we think, collaborate, and deliver value. The challenge now is to bridge the gap between potential and practice – and we're committed to helping lead that evolution by actively engaging with AI.

SHIFTING TIDES: A REALLOCATION OF LP CAPITAL FROM THE U.S. TO EUROPE

Nick Roxburgh
Counsel
Private Funds – London

Bernard Mustafa
Associate
Private Funds – London

A growing proportion of limited partners ("LPs"), in particular large institutional investors, are redirecting capital from U.S.-focused private fund managers toward European managers. There has been a historical tendency for LPs to disproportionately weight allocations to "home markets" but this trend has begun to change. We have seen this with our own European sponsor clients' fundraises over the last 24 months but the trend is beginning to be more widely recognised in particular amongst U.S. LPs. A recent global survey[1] by placement agent Campbell Lutyens showed 12% of U.S. LPs indicating that they intend to reduce allocations to the U.S. in 2025 with 24% indicating they intend to increase exposure to Europe.

The US does however remain a significant and important market for most LPs – the global dominance of the U.S. economy and the depth of its capital markets mean it is unlikely to lose its crown as the premier destination for global investment any time soon. In this article, we take a look at the principal drivers behind this increased focus on European allocations and the key implications for U.S. and European managers.

Market Commentary: Reallocations from Key Players

New York City Retirement Systems' CIO, Steven Meier, recently told the Financial Times[2] that he was considering a "gut check" review of its asset allocation at the end of the year. He specifically referenced the uncertainty and volatility in the US-domestic market driven by changes in policy as the driver for this review as these may affect the underlying assumptions concerning GDP growth, inflation, productivity, government spending and private capital flows. He also noted that Europe's plans to increase spending on defence would assist in delivering a more vibrant economy in Europe.

Similarly, both CalPERS and CalSTRS have this year noted[3] that a major change spurred by market volatility will be a re-focussing of investment strategy away from U.S. products. The pension plans expect 'deglobalisation' to be a major theme which will contribute to a gradual rebalancing of portfolios away from the current exposure to U.S.-backed assets.

Key Drivers of LP Reallocation

1. US Macro Risk: Trade Wars & Debt Levels

Uncertain U.S. trade policies and increasing national debt levels, coupled with concerns that these will be exacerbated by the "One Big

Beautiful Bill Act", have contributed to a climate of heightened geopolitical and fiscal risk facing private fund managers looking to deploy capital into U.S. investments. LPs have taken note of this and many may view "Liberation Day" as a prompt to reconsider their regional allocations to the U.S., to which many LPs have been overweight in recent years.

2. Europe's Stable Policy Backdrop & Infrastructure Surge

A principal beneficiary of such rebalancing of allocations looks set to be European fund managers, particularly given the more predictable policy environment in Europe compared to the U.S. and where a €1 trillion German spending spree on defence and infrastructure is expected to boost growth. As a result, in addition to rebalancing of allocations by LPs, a number of large U.S. sponsors have been vocal about planned increases in investments in Europe – Apollo recently stated that it intends to invest as much as $100 billion in Germany, and Blackstone has indicated it plans to deploy $500 billion in Europe, over the next decade.[4]

There is therefore growing excitement for investments in Europe which factors in a gap in valuations between European companies and their U.S.-listed peers and falling financing costs.

Implications for Fund Managers

Opportunities for U.S. Fund Managers

Some US fund managers are viewing this as an opportunity, and are seeking to cater for the desire of such LPs to be less concentrated to the US and gain more exposure to the European market by expanding their non-U.S. and cross border pipelines. How this can be achieved remains to be seen – businesses with existing European platforms are likely to be the main beneficiaries, but the trend for manager consolidation through strategic M&A may play a greater role for US-domestic sponsors looking to add European capability quickly.

Preparations for European Fund Managers

European fund managers should make sure that they are prepared for the regulatory, legal, tax and structural requirements of U.S. LPs, which can impact how a fund is structured and how the fund and its investment operations are ultimately operated.

Conclusion

The increased focus of U.S. LPs on Europe is part of a wider trend of global LPs pursuing a strategic reallocation, not a wholesale shift – seeking European stability while retaining US exposure. For U.S.-focused private fund managers, this may act as the impetus to diversify and refine global positioning. For Europe, it's a moment of opportunity: a stable policy environment, comparatively low valuations compared to U.S. companies and the potential for focused government investment spending, offer a robust value proposition – and European managers should make sure that they are ready for it.

Don't Forget to Lock Your Pref Priority

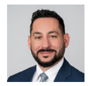
Stay tuned for a future issue of Sponsor Sync where we will discuss ways to avoid potential pitfalls in pref equity instruments and ensure pref equity is actually "preferred" – even in a Chapter 11 reorganization – and (alternatively) strategies for common equity holders to leverage gaps in existing pref equity documents. We will tell you about the "3 R's," what to look out for in waterfall, liquidation preference, and redemption provisions, and more ...

Restructuring
Reorganization
Recapitalization

THE REDBOX MEME STOCK SAGA: FROM DVDS TO DELAWARE CHANCERY COURT


Matt S. Barr
Co-Chair
Restructuring


Evert Christensen
Partner
Litigation


David J. Cohen
Partner
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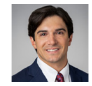
Alexander P. Cohen
Associate
Restructuring


Thomas Palisi, Jr.
Associate
Restructuring

SMART SUMMARY

- A recent decision from the Court of Chancery in Delaware highlights the importance of sponsors hiring independent counsel when approaching a restructuring.

In *Clement v. Apollo Glob. Mgmt., LLC*, C.A. No. 2023-0904-JTL (Del. Ch. 2023), a group of minority shareholders of Redbox Entertainment Inc. alleged that private equity sponsor Apollo breached its fiduciary duties as controlling shareholder of Redbox.

The lawsuit arose from the merger of Redbox with Chicken Soup for the Soul Entertainment, Inc. (CSE). Around the time of the merger, Redbox's stock price experienced abnormal volatility and began to surge, earning its place among other "meme stocks". Notwithstanding the merger price of $0.69 and that Redbox shares traded at around $1.28 per share prior to the merger being announced, Redbox's stock price ballooned up to $18.00 before the merger ultimately closed three months later.

After the merger, the minority shareholders alleged that Apollo received "unique benefits" not received by the minority shareholders. Such "unique benefits" allegedly included (i) the conversion of Apollo's outstanding $27 million loan into Redbox common shares and subsequent conversion of the Redbox shares into $2.8 million in CSE equity and (ii) a release of any potential claims against Apollo. The minority shareholders contended these alleged "unique benefits" subjected the merger to "entire fairness" review, which requires a higher level of scrutiny by the Court than the "business judgment" standard.

Apollo's Release of Claims

Prior to the merger, Redbox had formed a special committee of independent and disinterested directors and hired Weil to serve as independent counsel to assist in the exploration of strategic alternatives. As part of that strategic alternatives process, the independent directors conducted an independent investigation into any claims against Apollo. The investigation did not uncover any valuable claims against Apollo, and in connection with the merger, Redbox agreed to grant a release to Apollo. In its oral decision granting Apollo's motion to dismiss the lawsuit, the Court relied heavily on Weil's findings that there were no valuable litigation claims for the minority shareholders to assert.

Apollo's Debt to Equity Conversion

Apollo further argued that (i) the debt-to-equity conversion did not improperly divert merger consideration that would otherwise have been paid to the minority shareholders; (ii) under Delaware law, Apollo,

"The Court's decision highlights the importance of forming a special committee of disinterested fiduciaries and hiring independent counsel to advise on related-party transactions ..."

as controlling shareholder, was free to exercise its contractual rights; and (iii) Redbox's independent special committee, not Apollo, decided to enact the debt-to-equity conversion.

The Court ruled in Apollo's favor. The Court determined that the exchange was a "unique detriment [to Apollo] rather than a unique benefit" because, in bankruptcy, the common stock that Apollo converted into would have been "wiped out" since set behind both the Apollo loan and $440 million in debt secured.

Takeaways

The Court's decision highlights the importance of forming a special committee of disinterested fiduciaries and hiring independent counsel to advise on related-party transactions and conduct an independent investigation into strategic alternatives and potential legal claims when facing a potential bankruptcy filing.

Recent amendments to the Delaware General Corporation Law (DGCL) further underscore the benefits of hiring independent counsel when engaging in transactions in which a controlling stockholder receives a financial or other benefit not shared with the corporation's stockholders generally. Section 144(b) of the DGCL now provides for a "safe harbor" from liability for transactions involving a controlling stockholder in certain circumstances. Hiring independent counsel to assist the independent committee would evidence the committee's efforts to approve such transaction in good faith and without gross negligence, which is exactly what is required by the safe harbor in the new DGCL provision.

ASSET MANAGEMENT CORNER

With **Andrew Dean** and **Chris Mulligan**

Andrew Dean

Partner, White Collar Defense, Regulatory & Investigations
Former Co-Chief of the SEC Enforcement Division's Asset Management Unit

Chris Mulligan

Partner, Private Funds and SEC Investment Adviser Examinations
Former SEC Investment Adviser and Co-Coordinator, Private Funds Specialized Working Group

Weil is thrilled to launch the Asset Management Corner podcast, hosted by Andrew Dean and Christopher Mulligan.

This podcast dives deep into SEC examinations, enforcement actions, and regulatory trends impacting investment advisers, private fund managers, and other financial professionals.

In this inaugural episode, Andrew and Chris offer key insights and predictions about agency priorities of import to asset management professionals.

Listen to a preview of their insights below and enjoy the full episode: https://lnkd.in/eaBHzC3z

Apple Podcasts: https://lnkd.in/exzJzrRP

Spotify: https://lnkd.in/eC6ufqZx

ANTITRUST UNDER THE NEW ADMINISTRATION


Jeff Perry
Partner
Antitrust


Brianne Kucerik
Partner
Antitrust


Michael Moiseyev
Partner
Antitrust

New HSR Rules Are in Effect But No Big Waves Yet

0

0 enforcement actions for failure to comply with the new HSR rules

100+

100+ early terminations have been granted under the new HSR rules

KKR

The Trump administration continues to pursue a case brought by the Biden administration against KKR for alleged violations of the HSR filing requirements (under the previous HSR rules)

Merger Challenges Down - But Trump Administration Remains Active

2

2 new merger challenges have been brought by Trump administration to date; with one challenge (HPE/Juniper) settled on the eve of trial

4

4 merger challenges brought by the Biden administration continue

Capital One/Discover merger likely would have been subject to significant scrutiny in the Biden administration, but ended with no action by the Trump administration

What's to Come?

HSR EARLY TERMINATION

Trump enforcers have emphasized a "return to normal" for early termination and expect the number of early terminations to **increase**

MERGER CONSENT POLICY

6

6 merger consent orders have been entered by the Trump administration, including both structural remedies and behavioral remedies (with regulators expressing a preference for structural remedies)

2

2 merger consent orders entered by the Biden administration are now under review by the FTC with the goal to rescind both orders on the basis that the remedy in the order exceeded the scope of the merger investigation

Take Private Deals

Take-Privates: The Public Company Target Mindset


James R. Griffin
Partner
Mergers & Acquisitions


Claudia Lai
Partner
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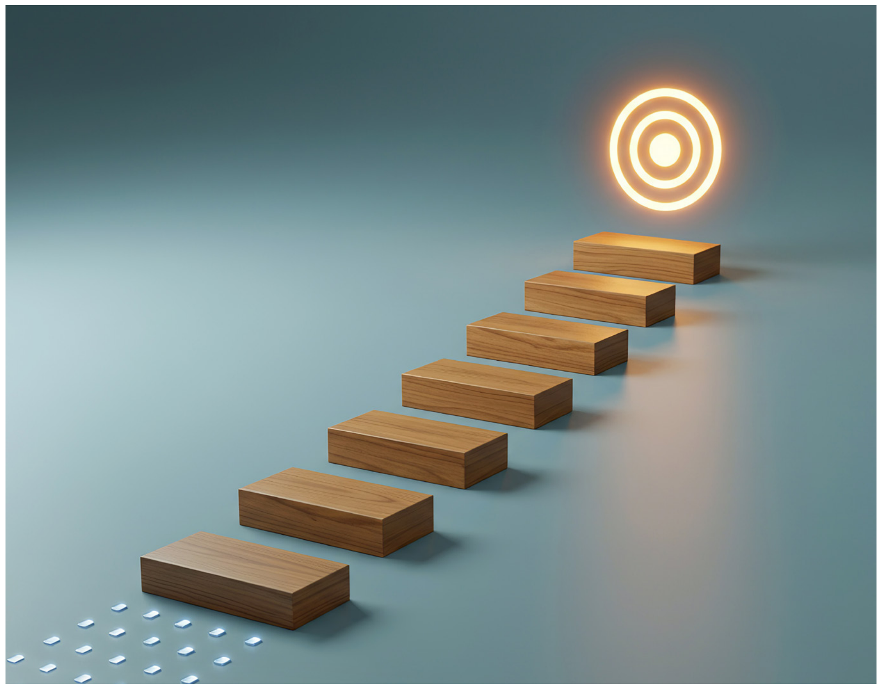
SMART SUMMARY

- In a take-private transaction involving a public company, the public company board is responsible for negotiating the transaction as a fiduciary of the target stockholders.
- The target board is necessarily guided by fiduciary duties that require the directors be fully and adequately informed and act in the best interests of the corporation and its stockholders, which have implications on interactions with the target.
- Sponsors undertaking a take-private have a vested interest in a well-run target process because the inevitable challenge to the board's action can delay closing and, in certain transactions, can arise on a post-closing basis.
- As a result, the negotiation of a public company transaction can take more time than a private company acquisition and results in public disclosure as to the process undertaken by the board.



Introduction

Several key legal and strategic considerations must guide the target's process in a take-private transaction. Central among these is the need to "create a record" of negotiating a transaction that evidences the target board's satisfaction of its fiduciary duties to the corporation and the target's stockholders. A flawed board process could delay the closing of the transaction and, in certain transactions, may expose the sponsor to post-closing stockholder litigation challenging the target board action. As a result, a sponsor looking to engage in a take-private has a vested interest in ensuring the target board action is supported by a well-run process that withstands judicial scrutiny.

The Target Board Controls Negotiations

In a public company acquisition, the board of directors of the target must be actively engaged and oversee the negotiations on behalf of the target. Public company stockholders—the real party in interest—are by their nature disperse and, unlike in many private company acquisitions, do not have a direct seat at the negotiating table. Instead, the board acts on behalf of the target stockholders, guided by their fiduciary duties. These duties have a significant impact on the negotiation of the transaction and the target's process.

Under Delaware law, directors of a corporation owe two core fiduciary duties: the duty of care, which requires directors to be fully and adequately informed and act with care for the corporation, and the duty of loyalty, which requires that directors act in the best interest of the corporation, disregarding their personal interests. These same duties apply to the boards of public and private companies alike. However, the impact of these duties on deal process is more pronounced with the heightened litigation risk that accompanies the public stockholder base of a public company.

"The same fiduciary duties apply to the boards of public and private companies alike. However, the impact of these duties on deal process is more pronounced with the heightened litigation risk that accompanies the public stockholder base of a public company."

The Target Board Process Takes More Time

A target board evaluating a take-private transaction must ensure its directors arrive at a fully and adequately informed decision that is in the best interests of the corporation and its stockholders. Although Delaware courts generally apply a presumption of validity to business decisions of a board, courts generally apply "heightened scrutiny" to determine if the board's actions were "reasonable" in the context of the sale of a target for cash. Accordingly, in a take-private transaction, the public company board will be keenly focused on developing a solid record that the board acted reasonably in making decisions regarding the sale process and took the sufficient amount of time to be adequately informed in making those decisions.

A well-run process that implements procedural mechanisms can support the validity of a target board's action. Although these mechanisms necessarily add time to negotiations, they are consistent with developing a strong record to support the board's determination to sell. These include:

- **Decisions Designed to Maximize Value.** In a take-private transaction where a target is being acquired for cash, a target board may be required to demonstrate that it acted reasonably to obtain "the best price reasonably available" to stockholders. Although there is no specific roadmap of actions that the board must take, the target board is required to choose a "reasonable route" to value maximization under the facts and circumstances.
- **Obtaining a Fairness Opinion.** Although not legally required, a target board's reliance on a fairness opinion can serve as evidence that the board exercised due care in being fully and adequately informed in evaluating a transaction. A board is "fully protected" under Delaware law in relying in good faith upon opinions by any person as to matters the director "reasonably believes are within such person's professional or expert competence and who has been selected with reasonable care." Accordingly, the target board must consider

"A sponsor looking to engage in a take-private has a vested interest in ensuring the target board action is supported by a well-run process that withstands judicial scrutiny."

the reputation, expertise as well as independence and potential conflicts in engaging a financial advisor and relying on a fairness opinion.

- **Delaying Negotiations with Management.** A take-private transaction in which directors or members of management may have a continuing role following the closing may raise the specter of an actual or perceived conflict of interest, and trigger additional procedural protections in conducting a sale process as well as additional disclosure requirements under SEC rules. A target board will often require that discussions with members of management regarding rollovers, future employment terms or compensation and benefits arrangements be postponed at the outset—until price and other material transaction terms have been finalized and, in certain circumstances, after receipt of stockholder approval of the transaction. Sponsors, as serial acquirors, often view relationships with management as key to a transaction, so complying with these restrictions at the outset can be frustrating, but are necessary to protect the transaction.

The Target Board Process will be Disclosed

The target is required to disclose its board process to the target's stockholders under SEC rules and Delaware law. Under Delaware law, the fully informed, uncoerced approval by the disinterested stockholders of a transaction with a non-controlling stockholder is outcome-determinative and cleanses the board's conduct, even in the event of a flawed board's process. As a result, both the target and the sponsor will have an interest in ensuring that the target's proxy solicitation materials and public disclosures include robust disclosure of the target board process.

Conclusion

A sponsor looking to undertake a take-private transaction should be mindful that interactions with the target are driven by the board's fiduciary considerations. A sponsor has a vested interest in ensuring that the target board has a well-run process that substantiates a fully and adequately informed decision in the best interests of the corporation and its stockholders, as well as robust public disclosures that support a fully informed, uncoerced approval by the disinterested stockholders of a transaction.

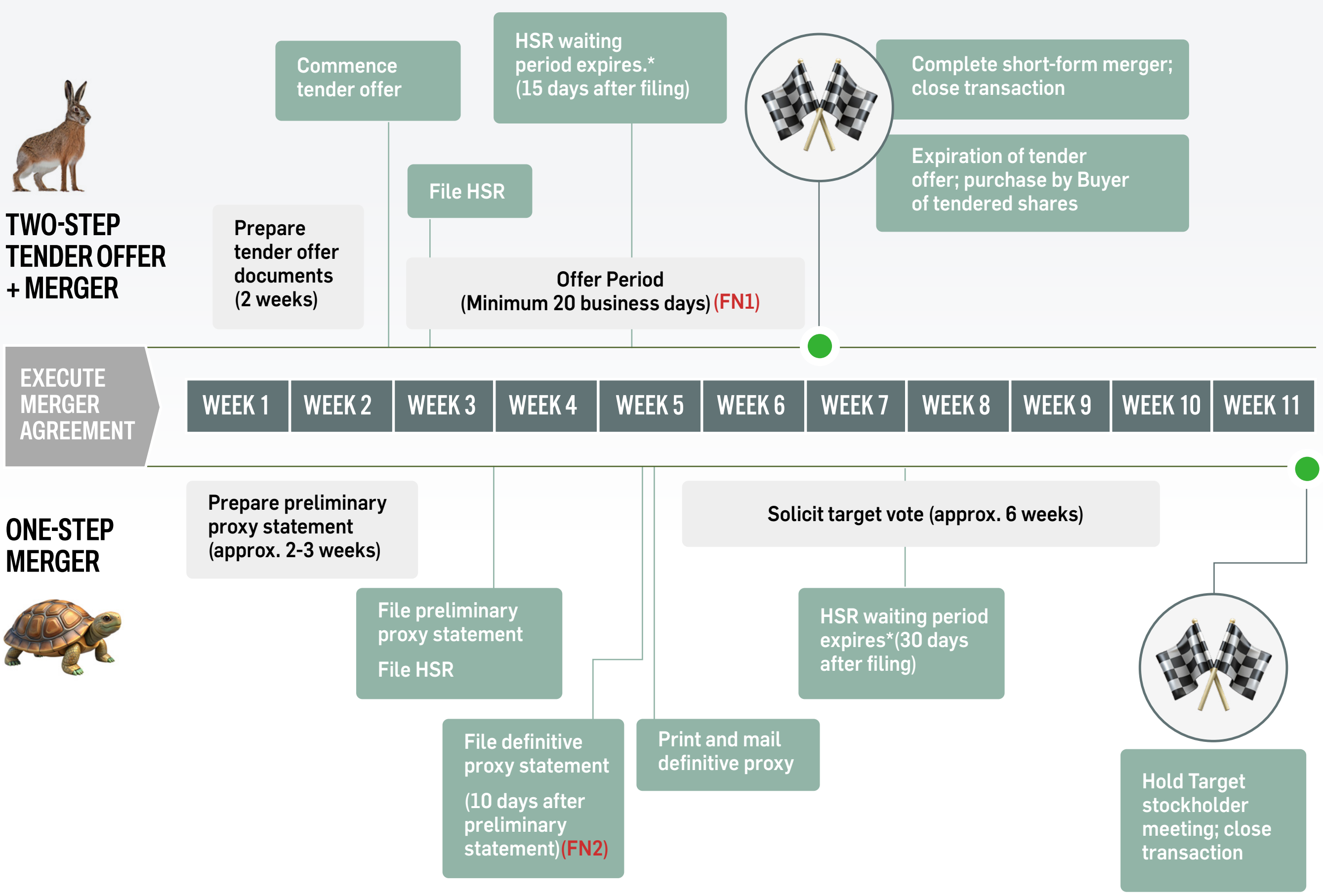
Winning the Race to Take Private Between Signing and Closing


James R. Griffin
Partner
Mergers & Acquisitions


Claudia Lai
Partner
Mergers & Acquisitions

A two-step structure can be faster, but does slow and steady win the race?

- A take-private is typically structured as (1) a one-step merger involving the target and typically, a newly-formed merger subsidiary of the buyer or (2) a two-step merger, consisting of a tender offer by the buyer for all outstanding shares of the target, followed by a short-form merger that does not require stockholder approval.
- Under a two-step structure, lenders may not be comfortable financing at the consummation of the tender offer for shares of a target that is not a Delaware corporation, if less than 100% of the shares are tendered. A one-step structure ensures 100% ownership at the time of financing.
- A two-step structure should be avoided if a lengthy regulatory process is anticipated, as the tender offer cannot be consummated until required regulatory approvals have been obtained.
- As a result, a one-step structure may be preferred in the event of a lengthy regulatory process.



*Assumes HSR filing is made 3 weeks after signing and clearance is obtained after minimum waiting period
1: Assumes no SEC comments. If the SEC reviews, the timeline could be extended by 1-2 weeks, depending on the nature of SEC review
2: Assumes no SEC comments. If the SEC reviews, the timeline could be extended by 6-7 weeks, depending on the nature of SEC review

U.S. Sponsor-Backed Take Private Deals: Year-to-Date Comparison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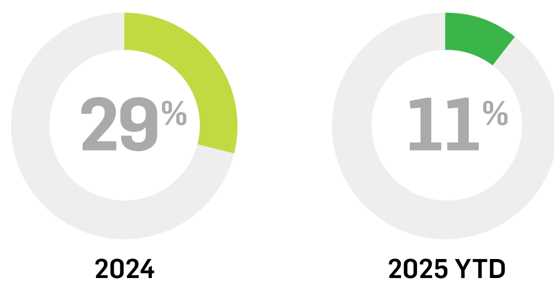
Brittany Butwin
Counsel
Private Equity

WEIL DealVision 360

As take privates continue to play a meaningful role in sponsor-backed transaction activity, below we compare key deal terms from sponsor-backed take private transactions announced in 2024 to those announced in 2025 (through May 2025). While the pace of sponsor-backed take-private deals has somewhat slowed, the below analysis reveals that many of the differences in deal terms across the two periods are modest. However, in some cases, we observed meaningful differences in deal terms across the two time periods which may suggest evolving market dynamics worth monitoring.

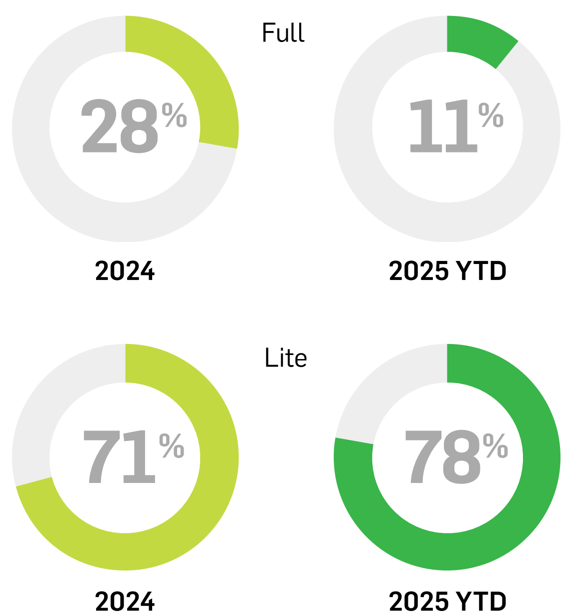
CLUB DEALS

Club deals are complex, as they involve multiple transactions within a transaction, both to execute the take private and to organize the business effective as of closing. Club deals accounted for 29% of sponsor-backed take privates in 2024, reflecting a willingness among sponsors to partner on large transactions and driven in part by the resurgence of the so-called “mega deals” (deals of at least $1 billion). By contrast, we have only observed one club deal so far in 2025, suggesting a possible shift toward single-sponsor funded transactions (and perhaps smaller transactions), though the trend may normalize as the year progresses.



SPECIFIC PERFORMANCE

In 2024, the “specific performance lite” construct (allowing the target to compel sponsor’s equity financing only if buyer’s debt financing is available) reemerged as the preferred market remedy to address an acquirer’s financing failure and a target’s closing risk in sponsor-backed going private transactions, due in part to the increase in debt-financed transactions. Among 2024 deals, 28% provided for full specific performance (whereby the target can force a closing upon satisfaction or waiver of the applicable closing conditions, regardless of whether an acquirer’s debt financing is available) while 71% contemplated specific performance lite. As we predicted in Weil’s 2024 Going Private Study, the prevalence of specific performance lite over full specific performance has continued in 2025 - with 11% of deals contemplating full specific performance and 78% using specific performance lite. This seems to indicate a continued, and perhaps growing, ability of sponsors to limit financing risk.



The data depicted above relates to sponsor-backed take transactions of U.S. targets with an equity value of at least $100 million and that signed in 2024 through May 2025.

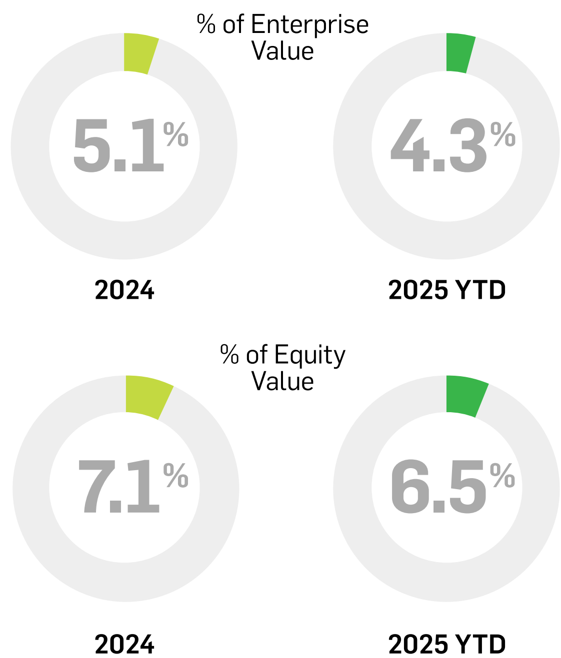
U.S. Sponsor-Backed Take Private Deals: Year-to-Date Comparison

Weil DealVision 360

REVERSE TERMINATION FEES

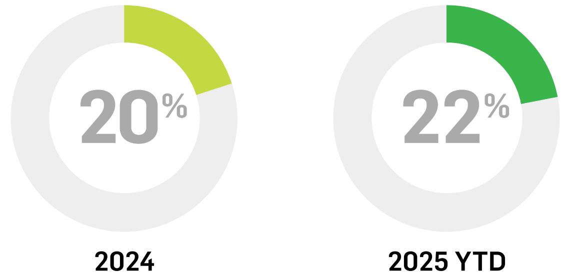
The average reverse termination fee (“RTF”) as a percentage of enterprise value and equity value in 2024 was 5.1% and 7.1%, respectively. For 2025 deals, those averages significantly declined to 4.3% and 6.5%, respectively. The mean RTF of 4.3% of target enterprise value is much lower than expected, and moreover, much lower than the mean amounts observed over the past few years (since 2018, the mean RTF as a percentage of enterprise value has been between 5 and 6% except in 2021 where it exceeded 6%). While these changes may normalize as the year progresses, they may reflect slightly more sponsor-favorable risk allocations or changes in deal leverage.

MEAN REVERSE TERMINATION FEE



GO-SHOPS

Go-shop provisions appeared in 20% of 2024 deals and 22% of 2025 deals. The negligible increase suggests continued selectivity in their use, which is typically tied to the target’s process. As we’ve previously noted in our annual Weil Going Private Study, the use of go-shop provisions in take private transactions generally fluctuates over time due to the fact specific nature of whether a target company’s board feels compelled to include a go-shop provision, which is often driven by the extent to which the company has engaged in a pre-signing market check.



The data depicted above relates to sponsor-backed take transactions of U.S. targets with an equity value of at least $100 million and that signed in 2024 through May 2025.

Delaware Mitigates Litigation Risk in Going Private Transactions

Evert Christensen
Partner
Litigation

SMART SUMMARY

- Recent amendments to the Delaware General Corporation Law afford safe-harbor protections for sponsors taking part in going private transactions, welcome clarifications that should (in the long run) reduce litigation risks.
- The amendments demonstrate Delaware's commitment to remaining a top jurisdiction for blue-chip corporate law and M&A.

Recent Delaware law developments should reduce litigation risks for sponsors engaged in going private transactions. First, for controlling stockholder "going private" transactions where a private equity sponsor may seek to squeeze out minority stockholders, Section 144 of the Delaware General Corporation Law (the "DGCL") now provides a safe-harbor to potentially insulate such transactions from stockholder challenge and judicial review. Second, the Delaware Supreme Court recently reaffirmed the high bar for establishing "aiding and abetting" claims against a third-party acquiror. More detail can be found here.

The Going Private Safe Harbor

Controlling stockholder "going private" transactions are generally subject to the entire fairness standard of review under Delaware law. Entire fairness is Delaware's most onerous standard of judicial review and typically requires the defendants to prove that the transaction was entirely fair to the corporation and its minority stockholders both in terms of the price and the process that was followed. For the last decade, Delaware law provided a path for controlling stockholders to shift the standard of review in a going private transaction from entire fairness back to the deferential business judgment standard of review if, among other things, the controller conditioned the transaction from the very outset on approval by both a fully-empowered committee of disinterested and independent directors (including the power to reject the transaction) and a fully-informed, uncoerced minority stockholder vote. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). A shift in the standard of review from entire fairness to business judgment would mean that a post-closing litigation challenging such transactions could be dismissed at the pleading stage, without the burden and expense of discovery. But the path to shifting the standard of

"The new DGCL safe harbor still requires the "twin" protections of approvals by both disinterested directors and disinterested stockholders for going-private transactions, but the statute simplifies the process and provides greater clarity for parties seeking to avail themselves of the safe harbor protections, which should reduce litigation risks for sponsors who undertake going private transactions in their controlled portfolio companies."

review under *MFW* was fraught with risk for potential foot-faults, including around timing for when the *MFW* protections were invoked, and many motions to dismiss by defendants who sough to implement the *MFW* framework were denied. The new DGCL safe harbor still requires the "twin" protections of approvals by both disinterested directors and disinterested stockholders for going-private transactions, but the statute simplifies the process and provides greater clarity for parties seeking to avail themselves of the safe harbor protections, which should reduce litigation risks for sponsors who undertake going private transactions in their controlled portfolio companies.

Aiding and Abetting Liability Continues to be a High Bar

Aiding and abetting claims against third-party buyers have always been difficult in Delaware. In *In re Mindbody, Inc. Stockholder Litigation*, 332 A.3d 349 (Del. 2024), the Delaware Supreme Court reaffirmed that principle, reversing the Court of Chancery's judgment that a private equity sponsor aided and abetted a breach of fiduciary duty by the target's CEO in a going private transaction because the sponsor had a contractual right to review the target's proxy filings and was aware of actions by the CEO that rendered statements in the proxy misleading. The Court affirmed that the "knowing participation" element of an aiding and abetting claim requires "substantial assistance" in the form of "active participation." Thus, the mere awareness of a fiduciary's breach of his disclosure duty upon review of the draft proxy, without more (e.g., actively participating in the drafting), did not rise to the level of active participation necessary to trigger aiding and abetting liability. The *Mindbody* decision is a welcome reassurance for buyers that customary contract rights under a merger agreement, such as the right to review a draft proxy statement, standing alone, are not a sufficient basis for aiding and abetting liability under Delaware law.

Bottom Line

The bottom line is that Delaware's corporate law continues to evolve and develop to strike an optimal balance between managerial freedom and stockholder rights, demonstrating its commitment to maintaining its status as the premier jurisdiction for corporate transactions.

REIT Privatizations in 2025: A Ripe Opportunity

Thomas Henry
Co-Head
Real Estate

Jules Bienenfeld
Associate
Real Estate

SMART SUMMARY

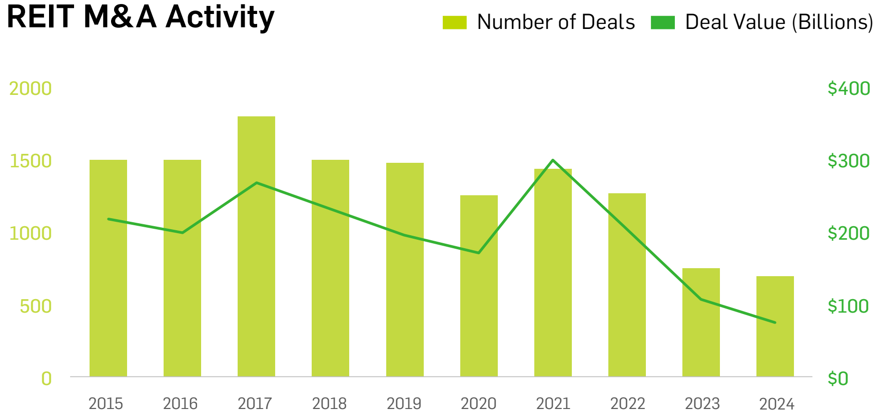
- In 2024, companies were reluctant to commit themselves to funding additional investments, including real estate investments. As a result, in 2025, there is increased liquidity in the market on the buy side and the debt side, with private equity firms eager to find opportunities.
- Many publicly traded REITs continue to experience a disconnect between their net asset value and their share price, leading to pressure from shareholders to explore strategic alternatives.
- Momentum is growing in the REIT privatization space. Notably, Blackstone acquired AIR Communities, purchasing the shares of the public REIT at a 25% premium. Public REITs, such as Elme Communities and Paramount Group, have recently announced that they would be exploring "strategic alternatives" to their current business model.

The real estate investor trust ("REIT") sector in 2025 presents a dynamic landscape, characterized by evolving market conditions and strategic opportunities. Notably, the trend of taking REITs private has gained momentum, offering potential advantages for investors.

Towards the end of 2024, there was a significant level of uncertainty in the market stemming from geopolitics, the election, and interest rates. Cost of capital matters to every business in the world, but it is particularly important to the real estate sector, where the product is an inherently steady performer, but a capital-intensive business.

REIT M&A activity was at its lowest point in ten years in 2024, as many companies have been taking "the wait and see" approach due to the volatility in the market. This trend has led to company's having excessive liquidity on both the cash and the debt side, making REIT privatizations a ripe opportunity to play a significant role in the private equity and M&A landscape in the near to mid-term.

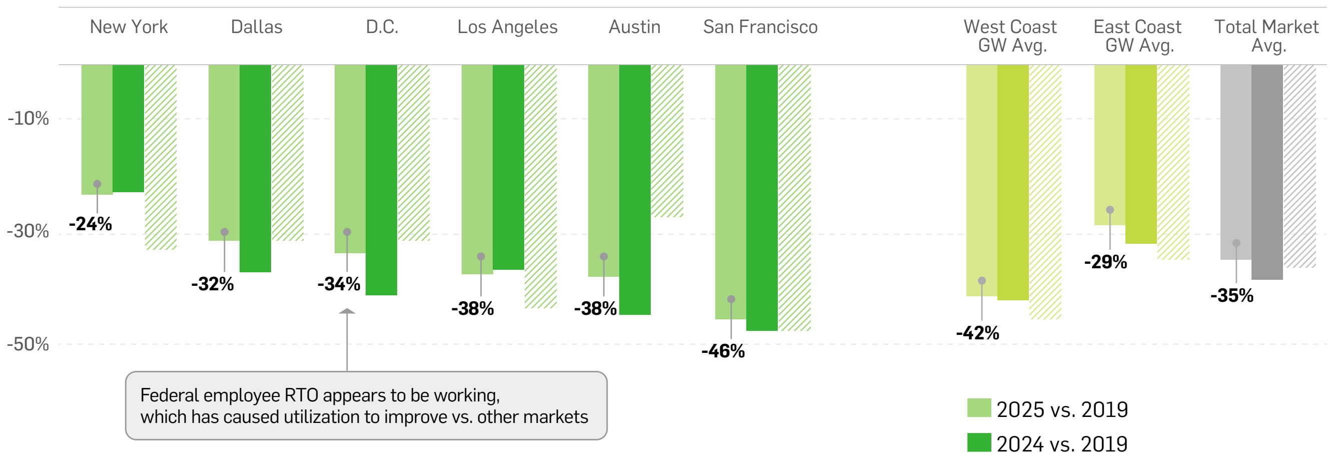
REIT M&A Activity



Sources: LSEG data as of January 9, 2025.

There are several key factors contributing to the current environment favoring REIT take-private transactions. Most notably, many publicly traded REITs are experiencing a disconnect between their market prices and their net asset value ("NAV"), and their shares often being traded well below NAV. For public REIT shareholders, persistent underperformance relative to NAV can be frustrating, however, where there is disconnect between share price and NAV, there is opportunity

Office Utilization Weekly average in April and Highest Occupied Day



Sources: : Kastle, Placer, Green Street

for both a purchaser and seller. The undervaluation presents acquisition opportunities for private investors who have liquidity and are seeking assets at discounted prices while providing the shareholders of public REITs the opportunity to sell their shares at a premium.

As with all REITs, private REITs do not pay federal income tax at the corporate level and instead let income and deductions pass through to the individual investors, leading to a decreased tax liability. Taking a REIT private has the additional benefit of increased operational flexibility while eliminating public market compliance costs, saving millions in internal compliance department costs, audit fees and more. There is also the added benefit to management and ownership not to have to address the scrutiny and time-consuming process of quarterly public market analyst reviews.

In the middle of 2024, Blackstone called the bottom of certain sectors of the real estate market and placed a sizeable bet on Apartment Income REIT, known as AIR Communities. Blackstone purchased all of the outstanding shares from AIR Communities for a total of $10 billion and has stated that it plans to invest another $400 million to maintain and improve the portfolio, fueling future growth. Moreover, the shareholders of AIR Communities were able to sell their shares at a 25% premium compared to its closing price on the NYSE on April 5, 2024.

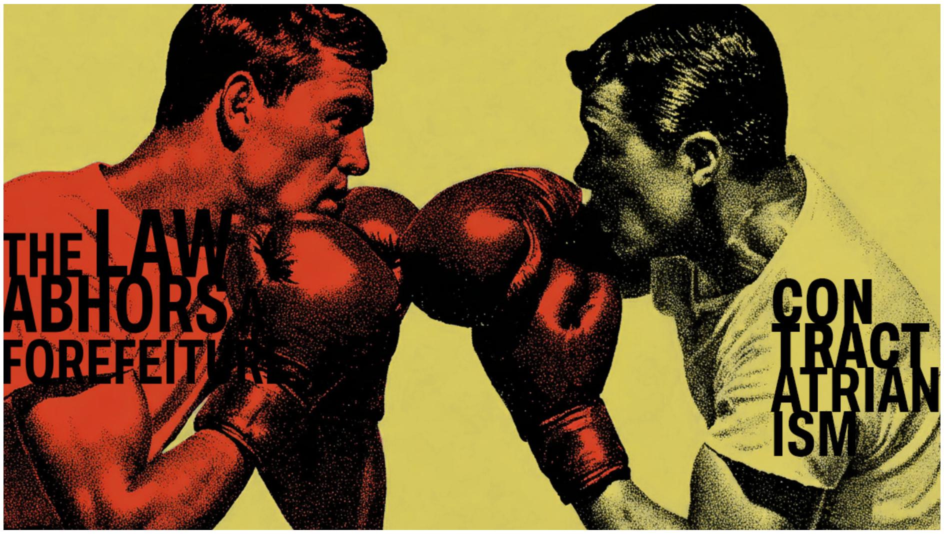
According to Blackstone president Jon Gray, "[the] [o]ffice [sector] has bottomed, particularly in stronger markets and better-quality buildings." This sentiment appears to be holding true, as utilization rates continue to improve, particularly in the east coast gateway cities and the Sun Belt as businesses continue its push for return to office. Blackstone has continued to bet on NYC Class A office as it recently purchased a 49% interest in 1345 Avenue of Americas.

Adding to the potential REIT take private momentum, in February 2025, Dream Residential Real Estate and Elme Communities announced that they too would be seeking strategic alternatives. More recently, in May 2025, Paramount Group ("PGRE"), a multi-billion-dollar office REIT, announced that it is considering strategic alternatives to maximize shareholder value. Following its announcement that it was evaluating a change to its current business model, shares of PGRE jumped over 13%, outperforming its peers by 1,280 bps. This trend indicates that there will be an uptick in the REIT private equity and M&A sector, as other REITs will likely face pressure to evaluate maximizing shareholder value by considering "going private."

Glenn's Corner

THE SURVIVAL CLAUSE, CLAIMS NOTICES, AND THE LAW'S ABHORRENCE OF FORFEITURES

Glenn D. West
Retired Partner
Private Equity



On April 28, 2025, the Delaware Supreme Court decided *Thompson Street Capital Partners IV, L.P. v. Sonova U.S. Hearing Instruments LLC*.[1] Thompson Street Capital involved a run-of-the-mill dispute over the sufficiency of a claims notice that was sent before the end of the survival period, but which was alleged to have failed to include the "specificity" regarding the claim as required by the merger agreement and which was sent more than 30 days after the Purchaser Indemnified Party became aware of the claim. While the nature of the dispute was pedestrian, the court's holding was anything but. Indeed, *Thompson Street Capital* may have exposed a potentially worrisome crack in Delaware's otherwise solid and reliable contractarianism.

The Dispute and the Court of Chancery Decision

The Plaintiff, a sell-side private equity firm acting as the "Members Representative," filed a declaratory judgment action in the Delaware Court of Chancery seeking "an order declaring that the Purported Claim Notice did not meet the contractual requirements with which [the buyer] had to comply and, as such, could not serve as a basis to withhold the escrow funds." Additionally, the Plaintiff's complaint "sought a mandatory injunction requiring [the buyer] to execute a Joint Instruction letter directing the Escrow Agent to release the contents of the Indemnity Escrow Fund to the Plaintiff." Anyone involved in private company M&A is well familiar with this scenario—i.e., a limited survival period coupled with an escrow fund that serves as the sole recourse for any rights to indemnification that may arise during that survival period, followed by a dispute over the timeliness or sufficiency of the notice of claim.

In response to the Plaintiff's complaint, the buyer made a motion to dismiss, which the Delaware Court of Chancery granted "after concluding that '[t]he notice provisions at issue here are unambiguous and [Plaintiff's] prayers for relief are fatally lacking.'" However, in reaching that holding, the Delaware Court of Chancery focused almost exclusively on the notice provisions of the Escrow Agreement and failed to recognize that compliance with the notice provisions of the Merger Agreement was a condition precedent to the buyer's rights to obtain indemnification.

Because there was both a merger agreement and a separate escrow agreement, which do not always mesh, it was understandable that some confusion might arise over which notice requirements were applicable. The Delaware Court of Chancery focused on the Escrow Agreement rather than the Merger Agreement, concluding that the notice was valid under the Escrow Agreement.

The Delaware Supreme Court's Decision

On appeal, the Delaware Supreme Court determined that the requirements of the Merger Agreement were unequivocal and should have been the focus of the Court of Chancery's decision. Section 9.3.2 of the Merger Agreement provided:

*"Any claim by a Purchaser Indemnified Party on account of Damages under this Article IX (a "**Claim**"), including those resulting from the assertion of a claim by any Person who is not a Party to this Agreement (a "**Third-Party Claim**"), will be asserted by giving the Members' Representative reasonably prompt written notice thereof, but in any event not later than 30 days after the Purchaser Indemnified Party becomes actually aware of such Claim, provided that no delay on the part of the Purchaser Indemnified Party in notifying the Members Representative will relieve the Merger Parties from any obligation under this Article IX, except to the extent such delay actually and materially prejudices the Merger Party. Such notice by the Purchaser Indemnified Party will describe the Claim* in reasonable detail, *will include the justification for the demand under this Agreement* with reasonable specificity, *will* include copies of all available material written evidence thereof, *and will* indicate the estimated amount, *if reasonably practicable, of Damages that has been or may be sustained by the Purchaser Indemnified Party.* ***The Purchaser Indemnified Parties shall have no right to recover any amounts pursuant to Section 9.2 unless the Purchaser notifies the Members' Representative in writing of such Claim pursuant to Section 9.3 on or before the Survival Date.***"

provision.[2] Moreover, the court held that "it was reasonably conceivable that [the buyer] failed to comply with the Specificity Requirement that [the buyer] 'include copies of all available material evidence' of its claim." Indeed, [the buyer] had apparently admitted that "it did not provide any written evidence with the Claim Notice beyond its own assertions in the Claim Notice itself." Finally, the court held that the Plaintiff had also sufficiently "alleged that [the buyer] did not comply with the Timing Requirement of Section 9.3.2." As a result, the Court of Chancery should not have granted the buyer's motion to dismiss.

"Indeed, *Thompson Street Capital* may have exposed a potentially worrisome crack in Delaware's otherwise solid and reliable contractarianism."

The court focused almost exclusively on the last sentence of Section 9.3.2 (defined in the case as the "Final Sentence"). Importantly, the Delaware Supreme Court held unequivocally that "the Final Sentence clearly embodies a condition precedent and *potential* for forfeiture because it states plainly that there is no right to indemnification unless the claim notice is provided." The court further held that the Final Sentence contained specific language creating the condition precedent of timely and compliant notice, which specific language controlled over the more general language contained in a boilerplate "no waiver"

So far, so good. But then comes the bombshell. According to the Delaware Supreme Court, the Final Sentence provides only the "potential" for forfeiture, not a definitive forfeiture of the indemnification right, because, notwithstanding the clear language of the contract, "our law abhors a forfeiture." As a result of that abhorrence, the Indemnified Party's "noncompliance may be excused if the timing and specificity requirements were not material to the agreement and noncompliance would result in a disproportionate forfeiture."

What? Have I entered another dimension? Did I misread the case? Is this case from California, not Delaware? Isn't Delaware the state whose courts pride themselves on saying:

Delaware courts enforce bad deals the same as good deals. The Court cannot rewrite the contracts, and it cannot ignore the plain terms of the contracts.[3]

But this is all too real, and it is Delaware. As a result of the Delaware Supreme Court's decision, the private equity seller will now have its day in the Delaware Court of Chancery to actually (a) prove (or fail to prove) that the notice was deficient under the Merger Agreement, and (b) if successful, thereby establish that the condition precedent to the indemnification obligation had not occurred, entitling the seller to the release of the escrowed funds as a matter of the bargained-for terms of the Merger Agreement. **However, the private-equity-seller plaintiff, even if successful in proving the noncompliant notice, must now also provide evidence in the Delaware Court of Chancery that the timing and specificity requirements it proved were not met were in fact "material to the agreement," and, if not material to the agreement, that the Purchaser Indemnified Party's noncompliance would not result in a disproportionate forfeiture of the indemnity rights that were legally conditioned upon that compliance**.

The Materiality of Survival and Notice of Claims Provisions

I am officially gobsmacked. It is truly hard to fathom how any private equity seller could not have considered the bargained-for length of the survival period and the bargained-for requirements for a notice of claim as material in any negotiation of a private company acquisition agreement. Limiting recourse and establishing a limited time to pursue remedies, based on real, not presumed or anticipated claims, is private equity deal-making 101.

Indeed, I was disappointed that the Delaware Supreme Court could not reach a materiality conclusion as a matter of law. The court cites cases that do so, including a non-Delaware decision that held that the notice requirements of a claims-made insurance policy were material as a matter of law, and a Delaware Court of Chancery decision involving a claim of forfeiture arising from an earnout provision.[4] While the insurance policy example is very similar to a survival clause that conditions any indemnification rights on a compliant notice having been given before the end of the survival period, the Delaware Supreme Court noted the claims-made insurance policy example without comment. But the court did discuss the earnout example, *Obsidian Fin. Grp., LLC v. Identity Theft Guard Sols., Inc.*[5]

In *Obsidian*, the Delaware Court of Chancery considered an argument by a disappointed seller who failed to meet the exact requirements for an earnout. Instead of the company obtaining an extension of a government contract for 6 years as required by the earnout terms, it only obtained an extension for 5 years and six months. Certainly close, but no cigar, said the Delaware Court of Chancery:

Obsidian's argument that the Court may declare immaterial the six-month difference between the 5.5-year contract and the six-year earnout condition is misplaced. Obsidian cites no authority that would support a holding that a party to a merger agreement may be excused from satisfying a condition to an earnout on grounds of forfeiture. This comes as no surprise, as an earnout provision contemplates the payout of additional, often substantial, consideration when the entity sold achieves specific, bargained-for milestones. The value of the contingent consideration is inextricably linked to the estimated probability of the contingent event's occurrence. To change the benchmark of the earnout would be to change its risk profile and, by

"The limited additional record the Delaware Supreme Court is requiring should be straightforward, therefore, but the fact that it's necessary, in addition to the proof that the notice was in fact noncompliant, is troubling."

extension, the amount that should be paid in the event of its achievement. Under Delaware law, however, "a party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table." ***Unlike horseshoes or hand grenades, there is no "close enough" when it comes to earnouts negotiated by sophisticated parties based on the estimated probability that the precise measure would be hit. Any adjustment to the earnout condition, then, would be "material" as a matter of law***.[6]

The rationale for why this example from the realm of earnouts is not applicable in the context of bargained-for time periods for submitting compliant claims notices as a condition to a buyer's entitlement to indemnification is not explained. The Delaware Supreme Court simply notes:

We are unable on this record to resolve the materiality and disproportionate forfeiture questions. We address materiality first because excusal of the condition, according to Section 229 of the Restatement, "applies only where occurrence of the condition was not a material part of the agreed exchange." Although, [the Plaintiff] alleges that the timing and particularity requirements were material, the record has not been developed on these points, including whether the parties, in negotiating these agreements, considered these requirements to be material.

Even if we were to determine that the Notice Requirements are not material, we are still unable to determine the disproportionate forfeiture issue on this record. Accordingly, we remand to the Court of Chancery for further consideration on these points.[7]

The court then provides guidance to the Court of Chancery from Section 229 of the Restatement (Second) of Contracts. However, the Restatement's guidance is a list of factors to consider that are rather squishy. But the court then quotes from a Pennsylvania Supreme Court case to summarize what is essentially required for the materiality analysis under Section 229 of the Restatement: "materiality in the context of Section 229 'rests to a large extent on the analysis of the requirement's purpose, [but] it also involves consideration of the negotiations of the parties along with all other circumstances relevant to the formation of the contract or the requirement itself.[].'"[8]

In private equity, sellers desire certainty over the limits of recourse for, and the timing of, indemnification claims. Limiting recourse to the escrowed funds, and returning the remaining sales proceeds held in escrow to the private equity fund's limited partners after the end of the survival period, is a material part of any private company acquisition agreement. The limited additional record the Delaware Supreme Court is requiring should be straightforward, therefore, but the fact that it's necessary, in addition to the proof that the notice was in fact noncompliant, is troubling.

Contractarianism versus Equitable Principles From the Middle-Ages

Professors Jody S. Kraus and Robert E. Scott are among the leading theorists in contract law.[9] They have expressed their dismay over the importation into contract law of equitable principles developed by the English Chancery Courts in the middle-ages, and which were intended to mitigate some of the harshness of the common law courts, where no means were available for enforcing executory contracts other than penal bonds.[10] But we no longer live in that world. The common law now provides remedies for breach of executory contracts, and penal bonds have been assigned to the history books.

In addressing the interplay between the law of conditions and the equitable concepts related to forfeitures, Professors Kraus and Scott noted the following:

"The law of conditions explicitly endorses the principle of freedom of contract by committing to the strict enforcement of all express conditions. Yet, it is also home to the hoary equitable maxim that "the law abhors forfeitures." The antiforfeiture norm suffuses the law of conditions, which therefore reads like a schizophrenic text, in one sentence insisting on the sanctity of strict construction and enforcement of conditions in spite of forfeiture, while in the next admonishing courts, whenever interpretation allows, to avoid the conclusion that the promisor's obligation is subject to an enforceable condition if enforcement of the condition would raise the specter of forfeiture."[11]

The Professors further opine that:

"Even if the parties succeed in writing an express term that unequivocally creates a condition, the ex post form of the antiforfeiture norm strongly encourages courts to exercise their discretion to excuse the condition whenever its enforcement would create a forfeiture and the court deems the condition not to have been a material part of the agreement at the time of formation. In addition, even if a court agrees that a contract contains a material, express condition, the ex post norm encourages the court to find that the promisor has implicitly waived the condition, either retrospectively or prospectively, whenever enforcement of the condition would create a forfeiture."[12]

Accordingly, they encourage a contractarian approach that Delaware is known for generally. Specifically, in their view:

"[C]onditions are always material from the ex ante perspective because they allocate risks between the parties, the contract compensates each party for bearing those risks, and the parties inevitably rely on that allocation of risks. Since materiality is determined by the parties' intent at the time of formation, conditions will always be material."[13]

And I would add to that the following question: How can it be that a buyer, whose right to indemnification is expressly conditioned upon a compliant notice having been timely given, actually be deemed to have forfeited anything if the buyer, in fact, failed to comply with the express condition giving rise to that right? But alas, the Professors theories and my question are just that. *Thompson Street Capital* is the law in Delaware.

Where Do We Go From Here?

So, what should we do in representing sellers?

My current view is that there should be a statement in the survival clause reflecting the parties' agreement that compliance with the terms of the notice provisions is not only a condition precedent to the Indemnifying Party's obligation to indemnify, but also that it was a material part of the parties' bargained-for exchange. Would that bind the court? Perhaps not, but it may be persuasive. After all, Delaware courts have ordered specific performance based on similar agreements between the parties, even though the award of specific performance is an equitable remedy.[14] I also believe it might be helpful to add "time is of the essence" language to the survival clause, as those words seem have an almost talismanic effect in other contexts.[15]

How might these additions to a survival clause look? Well, I am still musing, but here is a quick effort at such additions (and I was up into the early am working on this, so excuse any sloppy thinking):

Notwithstanding anything herein to the contrary, the obligations to indemnify, pay, reimburse, compensate, and hold harmless a Person pursuant to this ARTICLE IX in respect of a breach of representation or warranty, covenant or agreement shall terminate on the applicable survival termination date (as set forth in Section 9.1(a)), unless an Indemnified Party shall have made a claim for indemnification pursuant to Section 9.2 or Section 9.3, prior to such survival termination date, as applicable, including by delivering an Indemnification Claim Notice or Third Party Indemnification Claim, as applicable, to the Indemnifying Party. The Parties specifically and unambiguously intend and agree that (a) the survival periods that are set forth in this Section 9.1(a) shall replace any statute of limitations that would otherwise be applicable, (b) the timely delivery of an Indemnification Claim Notice or Third Party Indemnification Claim, as applicable, to the Indemnifying Party pursuant to Section 9.2 or Section 9.3 shall be an express condition precedent to the obligations to indemnify, pay, reimburse, compensate, and hold harmless a Person pursuant to the ARTICLE IX, (c) time shall be of the essence in the delivery of an Indemnification Claim Notice or Third Party Indemnification Claim, as applicable, to the Indemnifying Party pursuant to Section 9.2 or Section 9.3, and (d) the survival periods, and the timing and content of an Indemnification Claim Notice or Third Party Indemnification Claim, as required by this ARTICLE IX, were a material part of the agreed exchange made by the Parties in entering into this Agreement.

I am not used to seeing time of the essence language as part of the boilerplate of typical private company acquisition agreements. However, I came across the following in the recently filed Membership Interest Purchase Agreement, dated April 28, 2025, regarding Astec Industries, Inc.'s acquisition of equity interests of TerraSource Holdings, LLC (please note the bolded clause):

> Section 1.03. Construction and Interpretation. 16
>
> (b) Headings. The headings of articles, sections and subsections to this Agreement are provided for convenience only and will not affect the construction or interpretation hereof.
>
> **(f) *Time of the Essence. Time shall be of the essence hereof*.**
>
> (h) Payment Dates. If any payment is required to be made, *or other action (including the giving of notice) is required to be taken*, pursuant to this Agreement on a day which is not a Business Day, then such payment or action shall be considered to have been made or taken in compliance with this Agreement if made or taken on the next succeeding Business Day.
>
> (i) Time Periods. In this Agreement, a period of days shall be deemed to begin on the first day after the event which began the period and to end at 5:00 p.m. Eastern Time on the last day of the period. If any period of time is to expire hereunder on any day that is not a Business Day, the period shall be deemed to expire at 5:00 p.m. Eastern Time on the next succeeding Business Day.

I prefer my approach of placing the time of the essence language directly in the Survival provision rather than relying on generalized boilerplate. But if I was going to use this approach I might add something specific like "Time shall be of the essence of any notices or payments required pursuant to the terms of this Agreement." And then I would make sure I meant it by reviewing all of the places where specific time limits were mentioned.

Please note clauses (h) and (i) however. As a seller, you may not want (h) to apply to notices required by a specific date, which (h) clearly does even though it is labeled as only applying to Payment Dates (see clause (b) that makes that heading irrelevant and the italicized language in clause (h)). Clause (h) provides an additional Business Day if the date falls on a date which is not a Business Day (as a seller, when notices can be given by email do you really want to provide that extra time to the buyer –as a buyer you of course want it). And you also should note that clause (i) makes 5pm the end of a day. So any notice after that time is the next day; you may not like that as a buyer. All the more reason to make sure you are reading this stuff whichever side of the table you are on.[17] W

ENDNOTES

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27 'Reverse Yankee' deals hit record as US companies flock to euro debt market (FINANCIAL TIMES, May 15, 2025).

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31 US Corporate Bond Sales Expected to Drop After Banks Slow Issuance (BLOOMBERG, July 3, 2025); Junk bond sales surge as companies try to beat fresh tariff uncertainty (FINANCIAL TIMES, June 8, 2025).

32 US Corporate Bond Sales Expected to Drop After Banks Slow Issuance (BLOOMBERG, July 3, 2025).

SHIFTING TIDES: A REALLOCATION OF LP CAPITAL FROM US TO EUROPE

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4 Source: https://www.ft.com/content/1391b1ff-2ce8-4f9e-b63f-7cf5c918047b

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THE SEC & AI: EVOLVING OVERSIGHT OF PRIVATE EQUITY SPONSORS

1 See Gary Gensler, "Isaac Newton to AI": Remarks before the National Press Club (July 17, 2023), available here. See also Gary Gensler, Remarks before the

ENDNOTES

Financial Stability Oversight Council: 2023 Annual Report (December 14, 2023), available here.

2 SEC, SEC Division of Examinations, 2024 Examination Priorities (October 16, 2023), available here; SEC, SEC Division of Examinations, 2025 Examination Priorities (October 21, 2024), available here.

3 Financial Times, Gary Gensler urges regulators to tame AI risks to financial stability (October 15, 2023), available here.

4 Mark Uyeda, Remarks at the SEC Roundtable on Artificial Intelligence in the Financial Industry (March 27, 2025), available here.

5 SEC, Rulemaking Activity (reflecting the withdrawal of the proposed "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers" rule on June 12, 2025), available here.

6 SEC, SEC Announces Cyber and Emerging Technologies Unit to Protect Retail Investors (February 20, 2025), available here.

7 In the Matter of Presto Automation Inc., Securities Act Release No. 11352; Exchange Act Release No. 102177 (SEC Jan. 14 2025), full order available here; Securities and Exchange Commission v. Albert Saniger, No. 1:25-cv-02937 (S.D.N.Y. filed Apr. 9, 2025), full complaint available here.

AI IN PRACTICE: PROMISE, PITFALLS, AND WHAT COMES NEXT

1 https://www.forbes.com/sites/sap/2025/04/24/productivity-savings-from-gen-ai-dont-always-add-up/

THE SURVIVAL CLAUSE CLAIMS NOTICES AND THE LAWS ABHORRENCE OF FORFEITURES

1 2025 WL 1213667 (Del. April 28, 2025).

2 The "no waiver" provision stated that: "No failure or delay by any Party in exercising any right, power, or privilege under this Agreement will operate as a waiver thereof nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power, or privilege."

3 HC Companies, Inc. v. Meyers Industries, Inc., 2017 WL 6016573, at *9 (Del. Ch. Dec. 5, 2017); see also, Nemac v. Schrader, 991 A.2d 1120, 1125 (Del. 2010) ("[W]e must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts, the law enforces both."). It may also be worth mentioning that, in 2023, the Delaware Supreme Court rejected Vice Chancellor Laster's invitation to apply equitable principles of "acquiescence" to override a provision in an LLC membership agreement that declared "void" any assignment made of the anti-assignment clause. See Holified v. XRI Investments Holdings LLC, 304 A.2d 896 (Del. 2023).

4 See Thompson Street Capital, 2025 WL 1213667, at *20.

5 2021 WL 1578201 (Del. Ch. Apr. 22, 2021).

6 Id. at *8.

7 Thompson Street Capital, 2025 WL 1213667, at *20. The non-Delaware case cited with respect to a claims-made insurance policy's notice requirements was Citizen Ins. Co. of Amer. V. Assessment Sys. Corp., 2019 WL 4014955, at *5-7 (D. Minn. Aug. 26, 2019). See Thompson Street Capital, 2025 WL 1213667, at *20, n. 148.

8 Thompson Street Capital, 2025 WL 1213667, at *21, citing Acme Mkts., Inc. v. Fed. Armored Express, Inc., 648 A.2d 1218, 1222 (Pa. 1994).

9 See Robert E. Scott & Jody S. Kraus, Contract Law and Theory (Carolina Academic Press, 6th Ed. 2023).

10 See Jody S. Kraus & Robert E. Scott, The Case Against Equity in American Contract Law, 93 Cal. L. Rev. 1323 (2020); Jody S. Kraus & Robert E. Scott, Contract Design and the Structure of Contractual Intent, 84 N.Y.U. L. Rev. 1023 (2009).

11 Kraus & Scott, Contract Design and the Structure of Contractual Intent, supra note 10, at 1081-82.

12 Id. at 1084.

13 Id.

14 See e.g., Snow Phipps Gp., LLC v. KCAKE Acq., Inc., 2021 WL 1714202, at *51 (Del. Ch. Apr. 30, 2021) ("This court has not hesitated to order specific performance in cases of this nature, particularly where sophisticated parties represented by sophisticated counsel stipulate that specific performance would be an appropriate remedy in the event of breach.").

15 See HIFN, Inc. v. Intel Corp., 2007 WL 1309376, at *9 (Del Ch. May 7, 2007) ("When time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain. Whether time is of the essence in a contract turns in the first instance on whether the contract explicitly states so. When the contract fails to contain a time of the essence clause, time will only be of the essence if the circumstances surrounding the contract or the parties' course of dealing clearly indicate that strict compliance with a specified timeframe was intended.").

16 See Membership Interest Purchase Agreement, dated April 28, 2025, by and among, TerraSource Holdings, Inc., as Sellers, Sellers' Representative, Astec Industries, Inc., and for limited purposes set forth therein, RLIH, LLC, https://www.sec.gov/Archives/edgar/data/792987/000110465925044104/tm2513690d1_ex2-1.htm

17 See Glenn D. West, The Perils and Delights of Contractual Boilerplate, Bus. Law Today, April 15, 2025, https://businesslawtoday.org/2025/04/perils-and-delights-of-contractual-boilerplate/

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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:

- Advent International in its acquisition of LayerZero Power Systems
- Apollo S3 Investment Management, L.P., as lead investor, in its investment in a newly formed Crestview Partners continuation fund that includes two Crestview Partners III, L.P. investments, Venerable and ATC
- Blackstone in its $200 million investment in Entrata
- Blue Star Innovation Partners and PSG Equity in the sale of their portfolio company PlayMetrics to Genstar Capital
- Cove Hill Partners in its strategic investment in Swiftly
- EQT and its portfolio company WASH Multifamily Laundry Systems in the sale of WASH to Northleaf Capital Partners and AVALT
- Mudrick Capital and its portfolio company Catalina Marketing Corporation Inc. in its sale of NCSolutions to Circana
- OMERS Private Equity and its portfolio company Paradigm in a strategic investment by Neuberger Berman Capital Solutions
- Permira and its portfolio company Octus, formerly Reorg, in the acquisition of Sky Road
- Providence Equity Partners and its portfolio company 365 Retail Markets in the $848 million acquisition of Cantaloupe, Inc.
- PSG in numerous transactions, including its strategic growth investment in Uptick
- PX3 Partners and its portfolio company Cleanova in its $1.3 billion acquisition of Micronics Engineered Filtration Group Inc.
- Stone Ridge Holdings Group in its acquisition of Wincoram Asset Management
- TPG Inc. in its acquisition of Peppertree Capital Management, Inc.
- The Visualize Group in its acquisition of BMM Testlabs

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