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FROM THE EDITORS

We are excited to present our latest issue of Sponsor Sync, Our editorial team and contributors have been hard at work, delving into the topics that matter most to you, today. As you peruse our pages, we trust you'll find the knowledge and strategies necessary to thrive amid today's challenges, in a user-friendly and digestible format. We pride ourselves on cutting through legal jargon and presenting *Sponsor Sync* specifically for business leaders and deal professionals.

In this issue, we feature our second ever issue-within-an issue, tackling the complexities of liability management exercises (LMEs), sharing our unique vantage point and actionable insights. Our special issue includes an interview with Justin Lee, Weil's Global Head of Liability Management, who shares his expert views on the future of LME, and runs through the nuts and bolts of a modern LME transaction. We also feature our quarterly leveraged finance update (new this quarter, with trans-Atlantic perspective) and delve into the new terrain of NYSE Texas. Also of interest, our latest issue touches on strategic aspects of franchised businesses, highlighting hidden risks and providing guidance on navigating these potential pitfalls. Our renowned antitrust group also dissects the implications and opportunities from recent regulatory changes in UK merger control, ensuring our readers are well-equipped to transact in the new, more business-friendly, UK regulatory climate.

We can't wait for you to explore all that we have in store for you this issue. Whether you're a seasoned private equity deal professional or newer to the realm of private capital, there's something in this issue for everyone. Let this edition be your compass in navigating the complex world of private equity with resilience and foresight.

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LETTER FROM THE SPECIAL EDITOR

In this issue-within-an-issue, we explore the evolving landscape of liability management exercises and strategic capital solutions, offering insights into how companies can proactively navigate financial challenges and capture opportunities (for liquidity, discount, and runway). Whether you're a corporate leader, investor, or advisor, this issue delivers valuable guidance on managing financial risk and staying ahead of the curve when it comes to leveraging documentation flexibility and negotiating power in a world where liability management is in the everyday lexicon for debt professionals.

WEIL U.S. LOAN TRACKER

Q1'25

Average First-Lien Broadly Syndicated Spread for Single B Rated Borrowers: S + 333.7 (down 19.8 bps from Q4'24)

Average First-Lien Broadly Syndicated Spread for B-Minus Rated Borrowers: S + 373.3 (down 23.9 bps from Q4'24)

YTD Volume of Refinancings of U.S. Private Credit Loans into Syndicated Loan Market: $8.82 billion

YTD Volume of Repricings of U.S. Leveraged Loans: $185.6 billion

GLOBAL LEVERAGED FINANCE MARKET UPDATE

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SMART SUMMARY

- 2024 witnessed a boom in leveraged loan activity, characterized primarily by repricings, refinancings and dividend recap transactions and an increase in M&A activity and LBOs, which has largely continued into the start of 2025.
- 2024 also witnessed a boom in high yield bond issuances. This increase continued in early 2025, but year to date, high-yield bond volumes in the U.S. are down compared to Q1'24, with expectations that recent volatility in the market will persist.
- Concerns over the new administration's economic policies have recently reduced companies' appetite for new debt, but dividend recapitalizations and refinancings remain prevalent.

2024 Recap

FY 2024 was characterized by a wave of momentum in the U.S. leveraged loan market, propelled by a surge in opportunistic repricings, refinancings and dividend recap transactions in a vibrant broadly syndicated loan market. As the shortage in new paper – against exceptionally elevated demand – persisted throughout 2024, lenders showed that they were prepared to revisit pricing on existing deals and to accept riskier borrower profiles, a marked shift from their increased focus on credit quality in 2023. The same appetite for risk existed in the U.S. high-yield bond market, which saw an issuance of $301.3 billion in high-yield bonds in 2024 (up 64.1% from 2023).[1] These market conditions enabled highly speculative borrowers to take advantage of highly accommodating credit conditions, resulting in a FY 2024-25 loan repricing volume of $757 billion, an amount that eclipsed the last record-high of $432 billion in 2017.

The second half of 2024 was also marked by an upward trajectory in M&A and acquisition financing. Although the resurgence of new money transactions was modest, it showed promising change as BSL volume to finance LBOs rose to its highest level in over two years. This milestone marked an encouraging start to what many market participants hoped would be a substantial rise in M&A in 2025.

Q1 2025 Recap

Following a banner year that peaked in December 2024, opportunistic deals continued to hold ground in the U.S. leveraged loan market into Q1'25. Similarly, the U.S. bond market held onto its record-breaking 2024 with a record breaking start to Q1'25, where $83 billion of bonds were issued in the first eight days of 2025 (the highest year to date figure since 1990).[2] However, U.S. high-yield bond issuances in Q1'25 were down year-over-year by 19.57% with sponsor backed high-yield bond issuances down year over-year by 46.26%.[3]

Activity in the U.S. high-yield bond market was strongest in January, but cooled in the subsequent months as a result of the turbulent conditions sparked by tariff and recessionary concerns, but picked back up during the last week of March 2025.[4] The expectation that high-yield bond issuances to finance LBOs and M&A would increase in Q1'25 never materialized as a result of the same concerns; rather, refinancings continued be the primary driver for high-yield bond issuances during Q1'25. Additionally, 61% of the high-yield bond issuances carried at least one BB rating (a high since the Global Financial Crisis and up from 50% last year) and only 2% carried CCC ratings. Finally, the markets saw a shift back to the historical trend of unsecured issuances (moving away from the recent uptick in secured bonds).[5] Recently, high-yield bonds have fared better than leveraged loans, where prices in the secondary market are hovering around the lowest levels since August.[6]

Repricing Frenzy Briefly Stalls

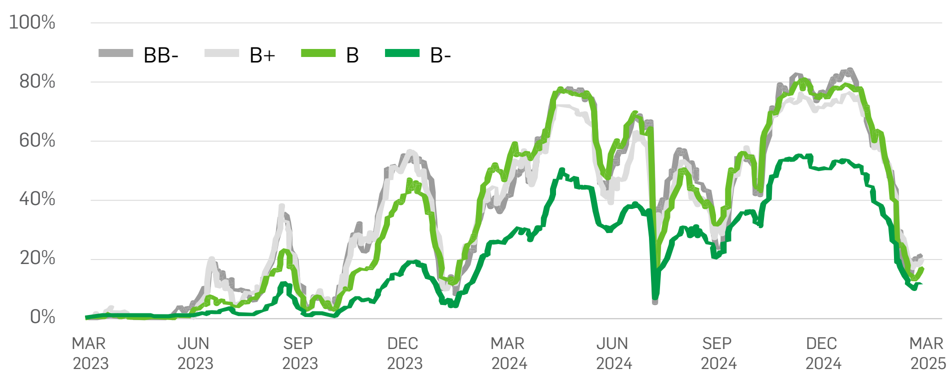
In January alone, borrowers launched $138 billion of repricing amendments on their term loans, the second highest monthly volume on record, trailing only a repricing volume of $153 billion in December 2024.[7]

In February, however, feelings of optimism surrounding growth in the U.S. leveraged loan market were tainted by "tariff concerns, volatility in the equity markets, and the potential effect of a less certain growth picture on borrower fundamentals."[8] Faced with these conditions, the share of index loans priced at par or higher decreased from 66% in January to 36%,[9] resulting in a slowdown of opportunistic activity, with repricing activity falling to $39 billion, the lowest reading in six months.[10] Further, multiple borrowers pulled their repricing requests.[11] Despite the February lull, however, this year's repricing activity is nonetheless thriving at $176 billion, a volume nearly double the amount of repricing activity at this point last year.[12]

After a 15 month record repricing wave that cut spreads on nearly $1 trillion in term loans, growing uncertainty and volatility pushed investors to reassess investment opportunities.[13] To put this into perspective, during the 15-month period from December 2023 to February 2025, $935 billion was repriced, with many borrowers returning for multiple rounds. In March, the repricing volume collapsed to just $8.9 billion – a fraction of last year's $138 billion.[14]

Despite the slowdown, a frenzied January helped push first quarter transactions to $351 billion, with repricing making up to 53% of year-to-date activity. In Q1 alone, companies refinanced $7.7 billion in direct lending deals with syndicated loans, hitting the second-highest quarterly volume in at least four years, just behind Q1'24's $11.7 billion.[15]

Loans Priced at Par and Above by Issuer Rating



Sources: : PitchBook | LCD; Morningstar LSTA US Leveraged Loan Index • Data through March 25, 2025

New Money Financings

The year 2025 started with excitement, with talk of how private equity firms would drive significant activity in the market by capitalizing on "narrowing valuation gaps, economic stability and favorable monetary policies".[16] With dry powder exceeding $2 trillion globally, it seemed that private equity firms had a clear incentive to increase activity following a three-year lull.[17]

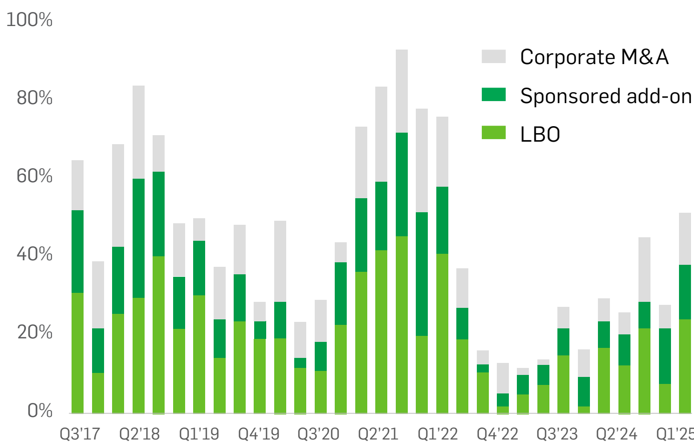
Though still a long way off from pre-pandemic levels, January proved to be a promising start to 2025 for new issuance of loans, which rose to $34.8 billion, the second highest volume in three years, driven primarily by deals that were underwritten at the end of 2024.[18] Despite early signs of growth in the first weeks of the year, regulatory uncertainty, unleashed by concerns over the new administration's economic and trade policies, caused market hesitation. Syndicated loan issuance to finance LBOs, sponsored add-ons and M&A plummeted to $7.1 billion in February, significantly below the $24.7 billion in January and even down from the $10.8 billion monthly average last year.[19] Similarly, high-yield bond issuances to finance LBOs and M&A dropped to $2.4 billion in Q1'25, below the $3.4 billion in the previous quarter and the $3.5 billion issued in Q1'24.[20]

While new issuance volume of loans has not reached the levels that many predicted, the strong credit market has allowed private equity firms to continue to provide liquidity to investors through dividend recapitalizations.[21] Loan dividend recap transactions got off to a booming start in January with a volume of $15.7 billion in January.[22] By mid-February, loan dividend recap volume had increased $22.4 billion, up 60% from the corresponding metric at this time last year.[23] Similarly, the dividend recap volume in the high-yield bond market in Q1'25 was up over 161% from 2024 at $3.3 billion.[24] In the face of fragile equity capital markets, there is a strong likelihood that the market will continue to see private equity firms look to dividend recaps in lieu of under-valued public offerings and sales.[25]

And despite the overall downward trend of the new-issue market in Q1'25, the frenzy of refinancings continued apace, with borrowers launching $27.5 billion of new loans to take out existing debt, the highest volume of issuance in nearly eight months, whereas only $6.7 billion of bonds were issued to take out existing loans.[26] In Q1'25, high-yield bond issuances for refinancings were 66.4% of total high-yield bond issuances at $45.5 billion. While high-yield bond issuances for refinancings constituted a significant portion of the issuances in Q1'25, the issuances are down from 2024 by 24.8%.[27]

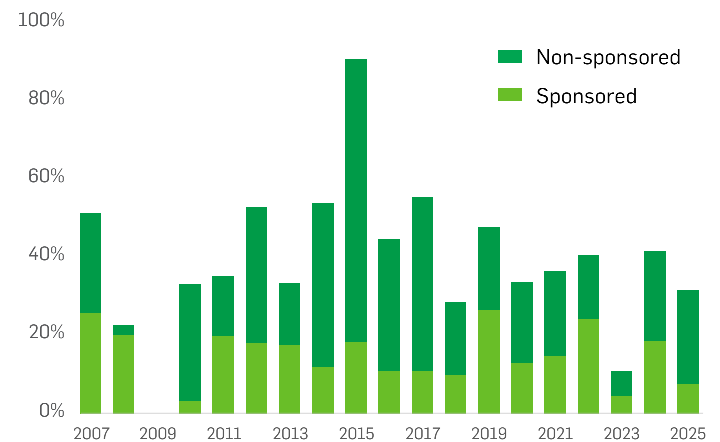
Market volatility drove debt costs higher, with average spreads widening to S+359 from S+324 for buyout and M&A deals.[28] Despite this, deals are

M&A-Related Loan Volume ($B)



Sources: : PitchBook | LCD + Data through March 31, 2025

M&A/LBO HY Bond Volume, YTD ($B)



Sources: : PitchBook | LCD + Data through March 31, 2025

"Although it has been several months since the shift to a new administration, the finance market continues to be plagued by high levels of economic and political uncertainty, which has prolonged dealmakers' reticence to transact. While strong M&A activity remains a possibility, the immediate outlook points to more refinancing transactions as the market adjusts to the evolving economic and policy landscape."

still getting done. Speculative-grade borrowers raised $49.5 billion in institutional term loans for buyouts, acquisitions, and M&A in Q1. January dominated, making up 50% of the quarter's volume, but March surged with $17.7 billion – well above the 2024 monthly average of $11 billion.[29]

Year-to-date issuance excluding refinancings has surged to $75.7 billion, up from $56.3 billion at this time in 2024. Loans backing dividend recapitalizations are on track for a record pace, hitting $24.1 billion so far this year.[30] This slightly outpaces the $22.6 billion recorded by this time in 2021, which was a record year for these deals.[31]

Accessing the Euro Bond Markets

In 2024, U.S. issuers were drawn to the euro-denominated bond market as a result of the European Central Bank's (ECB) low deposit rate and raised €108 billion in euro debt, which was the highest amount raised in five years.[32] This uptick has continued into 2025 with U.S. issuers (both investment grade and high-yield) raising approximately €37 billion by way of these reverse Yankee issuances as in Q1'25, up from the €29 billion in Q1'24.[33]

High-yield issuers in Q1'25 raised $6.6 billion in euro bonds, which is down 37.5% from the same period in 2024.[34] While historically, high-yield issuers have not participated heavily in reverse Yankee issuances, that trend may change as investors are demanding a bigger premium to hold junk-rated U.S. debt than the European equivalent for the first time in two years.[35] Reverse Yankee issuances may pick up if the European credit markets continue to perform more steadily than the U.S. markets; however, these issuances come with risks especially with the speculation that the ECB is drawing closer to pausing rate cuts.[36]

The European Leveraged Loan and Bond Market

Trends in the European leveraged finance landscape have been broadly consistent with those seen in the US market. In 2024, the European market provided a constructive environment for debt issuances, with strong investor demand and tightening spreads supporting growing deal activity (primarily driven by refinancings and repricings, rather than new money issuances). This constructive dynamic was particularly clear in the European leveraged loan market, where a technical imbalance between supply (i.e. a lack of new money financings, exacerbated by the low levels of M&A activity over the recent years) and demand (i.e. predominantly CLO formation) drove a wave of repricings. Early Q1'2025 represented a continuation of this momentum, with issuance volumes at very healthy levels, but continue to be dominated by refinancings and repricings, which in turn continued to compress margins to ever-tighter lows.

After a strong start to the year, the mood music shifted sharply in the second half of March 2025 / early April as a result of US tariff talk and the reverberations that this is anticipated to have on global trade. The impact of this has been seen across asset classes and has been felt keenly in the world of sub-investment grade corporate credit, with increased volatility, a significant increase in yields

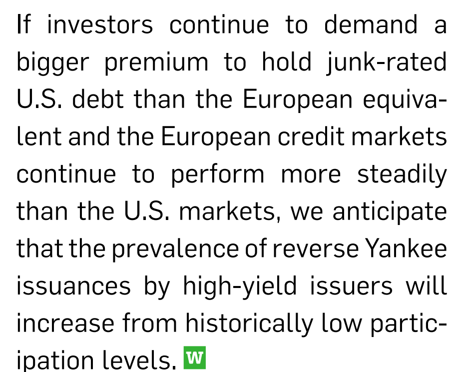
and a number of slated transactions put on pause as market participants react to wider macro events. As an indication of this, the ITRAXX European Crossover index (a proxy for spreads in sub-IG credits in Europe) has spiked from a low of 280 in mid-February to a high of 424 as of 9 April,[37] reaching levels last seen in the second half of 2023. It remains to be seen what impact the continued uncertainty will have over the coming weeks and months, but for now debt markets remain subdued and it is unlikely that we will see any meaningful new issuance in the European public sub-IG debt markets until after the Easter break. On the private credit side, deals continue to be signed, but with an increased focus on credit-selection (i.e. identifying businesses that are insulated from the tariff threat). Reduced competition from the public markets also gives private credit investors the opportunity to potentially increase margins (which had been compressing in response to pricing pressure from the formerly-buoyant syndicated loan market).

Q2 2025 Outlook

With recent shifts in U.S. trade policy – and a proliferation in news headlines surrounding the disruption such shifts would have to major economies, including the aftermath of President Trump's tariff announcements on "Liberation Day", – views of 2025 bringing significant upticks in the pace of deal activity have tempered.[38]

Although it has been several months since the shift to a new administration, the finance market continues to be plagued by high levels of economic and political uncertainty, which has prolonged dealmakers' reticence to transact.[39] While strong M&A activity remains a possibility, the immediate outlook points to more refinancing transactions as the market adjusts to the evolving economic and policy landscape.

If investors continue to demand a bigger premium to hold junk-rated U.S. debt than the European equivalent and the European credit markets continue to perform more steadily than the U.S. markets, we anticipate that the prevalence of reverse Yankee issuances by high-yield issuers will increase from historically low participation levels.



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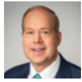
JUMPING ON THE TEXAS BANDWAGON: NEW YORK STOCK EXCHANGE ANNOUNCES LAUNCH OF NYSE TEXAS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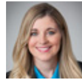
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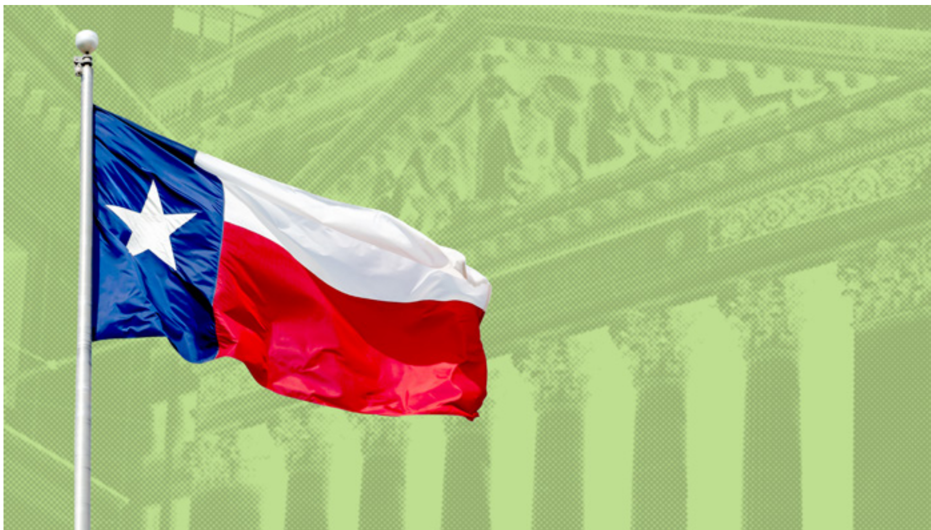

On February 13, 2025, the New York Stock Exchange (NYSE) announced plans to launch a new electronic exchange in Texas, highlighting the growing appeal of the state's business-friendly environment. Pending regulatory approvals, the NYSE plans to reincorporate NYSE Chicago in Texas and headquarter the rebranded exchange in Dallas, Texas. NYSE Texas will seek to provide Texas headquartered, national and international companies with a new venue to list their securities, and capitalize on the growing corporate presence in Texas. With this move, NYSE Texas is expected to compete in the state with the recently announced Texas Stock Exchange.

Texas has emerged in recent years as a burgeoning hub for major corporations and large institutional investors. In a statement announcing the launch of NYSE Texas, the NYSE emphasized the "pro-business atmosphere" in Texas as a motivation for launching the new exchange, while noting that Texas is currently home to the largest number of NYSE-listed companies with more than $3.7 trillion in market value.

The NYSE's announcement follows the announcement last month by the Texas Stock Exchange that it had raised $161 million in initial funding and proposes to operate as a national stock exchange, with trading slated to begin in 2026 pending approval from the U.S. Securities and Exchange Commission.

Nicknamed "Y'all Street," North Texas has rapidly emerged as the second largest financial hub in the United States, behind New York City. Beyond the influx of national exchanges and operations of major financial institutions, Texas has also enhanced its business-friendly environment through the establishment of the Texas Business Courts, specialized business courts designed to resemble the Delaware Court of Chancery that offer an alternative forum for parties to resolve complex commercial disputes, in September 2024.

These developments evidence the continuing growing momentum of Texas as a major financial hub and are expected to encourage further breadth and depth of opportunities for financial sponsors and their portfolio companies, strategics and financial institutions alike. The timing of a Texas-based national securities exchange is subject to regulatory approvals and therefore estimates as to when these exchanges may commence listings are preliminary. Similarly, it is too early to understand a number of other key considerations

that will be important in deciding whether to list on one of the Texas-based national securities exchanges, such as:

- market acceptance of the exchanges by investors,
- trading volumes and liquidity,
- the willingness of existing issuers to move a listing or IPO issuers to seek an initial listing, including any incentives offered by the exchanges to early participants,
- the introduction of any new trading technologies, and
- whether the new exchanges will create a brand identity that aligns with particular industries, issuer types or geographic focus.

Nevertheless, private equity portfolio companies and other companies contemplating a potential IPO in the next 12-18 months, particularly those who seek to identify themselves more strongly with Texas or the southern region of the United States, may benefit from closely monitoring developments to see if there are potential benefits to seeking a Texas-based listing.

WEIL IS PROUD TO BE RANKED

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GLOBAL: MULTI-JURISDICTIONAL
Chambers Global 2025

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"Weil's ability to handle complexities across very different issues and stakeholders was remarkable."

"We have consistently worked with Weil Gotshal on PE deals and found them outstanding in many respects. The lawyers are highly knowledgeable on market practices."

WEIL IS PROUD TO HAVE BEEN NAMED A 2024

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Law360

"We very much pride ourselves on the breadth of our practice. We've never aspired to be the biggest, but we certainly seek to be the best, and part of that offering is ensuring that we are able to service clients of various shapes and sizes across various strategies."

Jonathon Soler Weil's Co-Managing Partner

Weil's Private Funds Group Tops Global Infrastructure Investor's 2025 Fund Formation League Table

Weil's Private Funds Group has been ranked as the #1 global legal advisor for 2025 by Infrastructure Investor, based on the total value of infrastructure funds formed worldwide.

Weil advised on funds totaling nearly $35 billion in commitments during the 12 months in consideration, a full $12 billion more than the next closest firm. *Infrastructure Investor* also highlighted Weil's involvement guiding several of the industry's largest fundraises, including, among others, Brookfield's flagship infrastructure fund, Brookfield Infrastructure Fund V, and its global debt infrastructure program, Brookfield Infrastructure Debt Fund III, each representing the largest fund of its kind in the market to date.

THE CONTINUED RISE OF THE CONTINUATION FUND

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Partner
Private Equity

Trey Muldrow
Partner
Private Equity

SMART SUMMARY

- With traditional PE exit activity having moved at a below optimal pace in 2024, GP-led continuation funds continued gaining traction as a key liquidity tool, driving secondary market transaction volume to a record $152 billion – a 21% increase over the previous high in 2021.
- GP-led continuation funds accounted for $72 billion of 2024 transaction volume (48% of all secondary transactions), up from $48 billion in 2023. The market saw a notable shift toward single-asset continuation funds, which comprised 48% of GP-led transactions, as sponsors sought to retain trophy assets.
- Attractive pricing and predictable deal consummation made continuation funds an appealing alternative to traditional exit routes, facilitating liquidity for LPs while enabling sponsors to potentially negotiate new carry waterfalls, despite broader macroeconomic uncertainty.

Introduction

In 2024, despite gradually improving macro-economic conditions, private M&A activity remained muted relative to expectations and the secondary transaction market continued its ascent against persistent challenges for private equity sponsors seeking liquidity for their limited partners. Although sponsor-backed M&A rebounded from two straight years of declines, increasing by 37% in value and 10% in deal count as compared to 2023,[1] the pace of distributions from sponsors to LPs as a percentage of NAV dropped from an average of 29% over the period 2014-2017 to only 11% in 2024. It is estimated that PE sponsors now sit on 30,000 unsold investments representing $3.6 trillion of value.[2] Furthermore, IPO activity remained sluggish in 2024, representing only an estimated 6% of the total PE sponsor exit volume.[3] Opportunities for traditional paths to exits are expected to improve, but the current pace will not be fast enough to dramatically reduce the existing backlog.

As M&A, IPO and recapitalization transactions have returned at a more tepid pace than hoped for, sponsors and limited partners have increasingly turned to secondary transactions, including GP-led and LP-led transactions,[4] as an alternative method to generate liquidity for limited partners, with 2024 setting a new annual record of an estimated $152 billion in transaction volume, a 21% increase over the prior record set in 2021.[5]

The GP-led Transaction Market in 2024

Over the past several years, GP-led continuation fund transactions, in which a sponsor will initiate a sale of one or more of its portfolio companies

“There is strong sentiment among industry insiders that continuation funds will continue to flourish.”

to a new investment vehicle (a continuation fund) formed and managed by the sponsor, have gained market share as a percentage of the overall number of secondaries transactions consummated. In 2024, GP-led transaction volume amounted to $72 billion and constituted approximately 48% of all secondaries transaction volume, up from $48 billion and 44% in 2023, and exceeding the previous record high of $63 billion set in 2021.[6] This demand trend is currently expected to continue, driven by increased acceptance and participation in continuation funds by traditional fund LPs, the rise of ’40 Act funds and influx of retail investor capital, the growth in size of dedicated GP-led funds that can write bigger check sizes and new market entrants, with several multi-strategy managers having now launched (or acquired) dedicated secondaries platforms.[7]

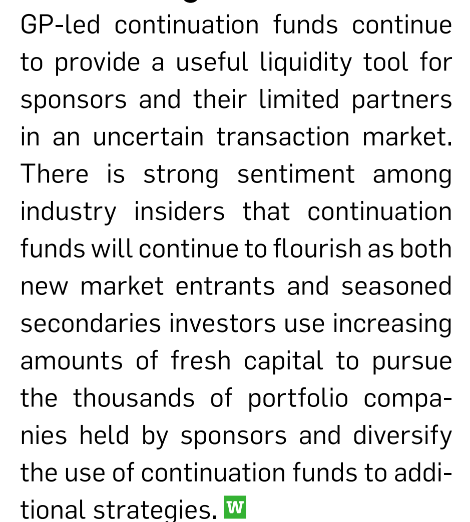
Within GP-led transactions, 2024 also witnessed an increase in the number of single-asset GP-led transactions (48% in 2024; 39% in 2023) versus the number of multi-asset GP-led transactions (31% in 2024; 38% in 2023).[8] This shift was driven by an increase in GPs bringing to market increasingly larger “trophy” assets through single-asset continuation funds, although multi-asset funds remain a significant driver of transaction volume.

Buyout funds remain the favored target for continuation funds in 2024, representing over 70% of transaction volume, with Growth and Venture representing 10%, Infrastructure and Energy representing 10% and Credit representing 5%.[9] Some analysts expect appetite for Buyout, Growth and Venture to decrease and appetite for Infrastructure and Credit to increase in 2025.[10] In 2024, the top 3 industries that saw continuation fund activity included (in order of magnitude) Business Services, Healthcare and Technology.[11] Investments in North American-based companies continue to dominate the continuation fund landscape with 66% of all GP-led secondary transaction volume, followed by Europe at 30%.[12]

Value of Continuation Funds in the Current Market

In offering a secondary market solution to its limited partners with respect to a single portfolio company or several portfolio companies, the sponsor is often able to offer its limited partners liquidity at or close to the sponsor’s mark for the assets. In 2024, 87% of single-asset continuation funds priced at or above 90% of NAV and 56% priced at or above par.[13] Having price discovery at this level offers an attractive alternative to the pricing pressures arising from current auction processes involving other sponsors and strategic acquirers. In addition, continuation funds often permit (a) existing portfolio company management teams to remain in place, (b) the retention of existing credit agreements, (c) a reduction in regulatory uncertainty associated with a typical change of control transaction and (d) the sponsor to retain its existing corporate governance framework, subject to certain minority protections offered to the new investors.

Final Thoughts



GP-led continuation funds continue to provide a useful liquidity tool for sponsors and their limited partners in an uncertain transaction market. There is strong sentiment among industry insiders that continuation funds will continue to flourish as both new market entrants and seasoned secondaries investors use increasing amounts of fresh capital to pursue the thousands of portfolio companies held by sponsors and diversify the use of continuation funds to additional strategies.

A NEW DAWN FOR UK MERGER CONTROL

Jenine Hulsmann
Partner
Antitrust

Chris Chapman
Counsel
Antitrust

SMART SUMMARY

- The UK CMA is implementing significant reforms to support economic growth and attract international investment, focusing on faster merger reviews, clearer guidelines, and better engagement with businesses.
- The CMA's new approach, centered on pace, predictability, proportionality, and process, aims to enhance business certainty and streamline the merger review process.

In what is shaping up to be the most consequential reform of UK merger control in over a decade, the government and the Competition and Markets Authority (CMA) each published on 13 February the equivalent of Jeff Bezos' "Day 1" letter to Amazon shareholders, setting out a new culture and operating model for the CMA.

A strategic steer focused on delivering investment and economic growth

The UK government has been clear that it expects the CMA to do more to support the government's pro-growth agenda, having replaced the CMA's Chair Marcus Bokkerink with former Amazon executive Doug Gurr in January. It is therefore no surprise that this forms the central focus of a new proposed strategic steer to the CMA, which makes clear that the government expects the CMA's work to unambiguously reflect the need to enhance the attractiveness of the UK as a destination for international investment.

The CMA's CEO, Sarah Cardell, has responded to the strategic steer by announcing a "step change" in the operation of the UK merger regime, with a **focus on pace, predictability, proportionality, and process**. Cardell previously outlined these '4Ps' in a Chatham House speech in November, but has now announced a number of concrete changes. In particular:

- **PACE - Faster merger reviews**. By June 2025, the CMA will establish a new KPI to complete the pre-notification phase within 40 working days, compared to a current average of 65, which can be significantly exceeded in some cases. The CMA will also aim to approve 'straightforward' Phase 1 cases within 25 working days, down from its current target of 35.
- **PREDICTABILITY - Clarification on 'material influence' and 'share of supply' tests**. UK law gives the CMA "an unusually broad jurisdiction by international standards", which it has applied expansively. The CMA therefore intends to clarify and delineate

its remit, as far as legally possible, to "strengthen business certainty about which deals might attract the CMA's attention".

- PROPORTIONALITY - **Revised approach to remedies and global mergers**. The CMA will launch a consultation on remedies in March, which will assess not only process but also how the CMA assesses behavioural remedies (which it has historically been skeptical of), including remedies which can secure increased investment, as seen in the recent Vodafone/Three case. The CMA is also reviewing how it assesses global deals, with indications it may take a more restrained approach where action taken by regulators in other jurisdictions could resolve UK concerns.
- PROCESS - **Greater engagement with business**. The CMA has committed to deliver a "step change" in direct, open and constructive engagement with merging parties, including through including more senior meetings earlier in the merger review process. The CMA will publish a 'Mergers Charter' in March containing a public commitment to deliver on the '4Ps' and initiate a targeted outreach program for businesses and investors.

First mergers, what next?

Cardell has made clear the CMA does not intend to stop there, but will apply its '4Ps' framework across all areas of its work. In our previous post, we outlined several areas where the CMA could have an outsized impact on the government's growth agenda. With the first cases currently going through the new regime – each focusing on US tech companies operating in global markets – this is another area where the CMA can expect to face intense scrutiny and debate on how its work supports growth and investment in the UK.

GOLDILOCKS AND THE DEAL MARKET OF 2025

In 2023 and 2024, inflation was too hot and high interest rates chilled the LBO market. Leading into 2025, both issues seemed to be mellowing into a just-right rate environment. The table was set and the timing could not have been better: PE firms were hungry for liquidity after two years of delayed exits. Hopes were high that the Goldilocks deal market was near. The result? So far, public markets have found more bear than porridge, and the private markets continue to take the temperature. Existing worries of inflation and interest rates are now mixed with new questions of government spending and tariffs. What's one to do? At Weil, we have seen the last few years of imperfect deal markets drive innovation in business and legal strategies – from secondaries to LME to new rollover approaches. We are excited to continue to partner with you, our clients, to capture the opportunities in the midst of the challenge, and as we do, we will keep telling the stories in Sponsor Sync.

IDENTIFYING THE LANDMINES OF FRANCHISED BUSINESSES

Dave Koch
Partner
Plave Koch PLC

David Gail
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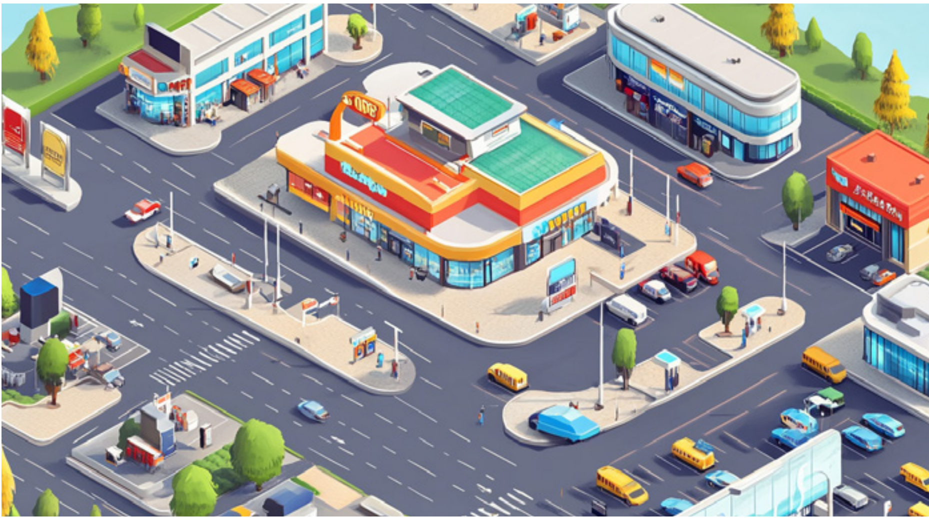
Private Equity

Luke Laumann
Partner
Private Equity



SMART SUMMARY

- Private equity investments in franchises continue to increase. Private equity sponsors should be aware that the biggest risk of investing in a franchise is not regulatory non-compliance. Hidden risks of franchised businesses include the initial investment estimate, marketing of financial performance, sold-but-not-open franchises and development rights of franchisees.

Private equity transactions in the franchise space are popular these days. For a franchise law boutique like Plave Koch PLC, private equity transactions are now a regular part of the work, and at Weil we have led an increasing number of franchise transactions for household names and in all contexts – from take-private transactions to carveouts. The value of franchise related deals by PE sponsors soared in 2024, and we expect elevated deal activity in 2025.[1]

The biggest risks may not be what buyers expect. Franchising is a heavily regulated activity, so it's natural to think that regulatory non-compliance is the biggest risk. It's not. Glitches with pre-sale disclosure and registration of franchise offerings are not uncommon, but it's rare to find them on a scale that truly affects deal value. This article describes a few of the landmines that may be lurking for dealmakers in any industry where franchising is common.

- ***The initial investment estimate.*** As part of the information disclosure to prospective franchisees, franchisors are required to include an estimated range of the start-up costs of a franchise. Increasingly, if a franchisee's business struggles, franchisors face claims that they have understated the required investment and thereby doomed the franchise from the start. In due diligence, corporate counsel and franchise counsel will review the target's initial investment estimate, but the deal team is in the best position to know whether the estimate is understated.

WEIL INSIGHTS

Many large franchisors have shifted into whole business securitization (WBS) structures allowing for not only cheaper debt than many alternatives but also debt that is portable. A seller's ability to deliver cheap debt to a buyer allows a buyer to pay a larger multiple and the seller to capture the value of that spread. This dynamic mitigates one of the primary challenges in the M&A market right now – the differing rate environments in which buyers and sellers are valuing assets.

- ***Marketing of financial performance.*** A franchisor who wishes to provide information to prospective franchisees about the financial performance of its franchises must do so in its Franchise Disclosure Document. About two-thirds of franchisors now include financial performance representations (FPRs) in their FDDs, but franchisors may not know that they can use excerpts of the FDD only if there are clear directional signals back to the FDD for the full set of assumptions and limitations. Corporate counsel and franchise counsel need to evaluate whether the target's marketing has armed its franchisees with potential future claims.
- ***The Sold-But-Not-Open (SBNO) list.*** A target franchisor may proudly display its development pipeline of 70 units open and commitments signed for 260 more. A full pipeline is obviously a major opportunity for the buyer, but there could be a dark side. It might mean something is blocking the transition from "sold" to "open"– maybe the open franchises aren't performing well, maybe market conditions for the brand have changed, maybe the target company lacks the capacity to keep up with the growth curve. The franchisor could find itself in a mess if sold-but-not-open franchisees run out of patience and begin to ask for their money back. It's a slow fuse, which could further disguise the danger.
- ***Development "rights."*** When the target is not the franchisor, PE sponsors should pay close attention to the franchisee's representations about its development rights with the brand. We have seen cases where the represented "development rights" were more like expectations – the franchisee did not actually have contractual rights to all of the anticipated development territory or number of outlets.

"The biggest risks may not be what buyers expect. Franchising is a heavily regulated activity, so it's natural to think that regulatory non-compliance is the biggest risk. It's not."

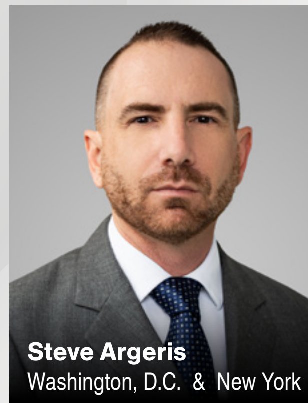
Other landmines in a franchise acquisition include undisclosed vendor payments to the franchisor or misuse of marketing monies contributed by franchisees. These are in addition to well-known risks like a flawed unit-level business model. Top-notch counsel with deep transactional and franchise law expertise can help navigate the issues unique to franchising.

Weil PE WELCOMES STEVE ARGERIS AND FRANCES DALES

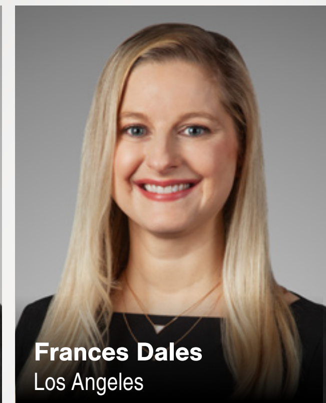
Weil is thrilled to announce the Q1 arrivals of partners Steve Argeris and Frances Dales as part of an ongoing expansion of Weil's Private Equity practice.

Steve joins Weil in the Firm's Washington, D.C. and New York offices. His practice includes advising leagues, teams, universities, brands and investors across the sports, media and entertainment sectors and has represented multiple high-profile sports teams and owners in bet-the-company matters.

Frances joins the Firm in Weil's Los Angeles office. Frances represents private equity funds, private companies and public companies in a variety of complex business transactions, including leveraged buyouts, mergers and acquisitions, minority and joint venture investments, growth equity investments, carve-outs and divestitures.



Steve Argeris
Washington, D.C. & New York



Frances Dales
Los Angeles

PARTNER PERSPECTIVES

Weil/Carta Insights: Employee Equity Incentive Plans

Jackie Ammon
Senior Business Development Manager
Carta

Hamza Shad
Insights Manager
Carta

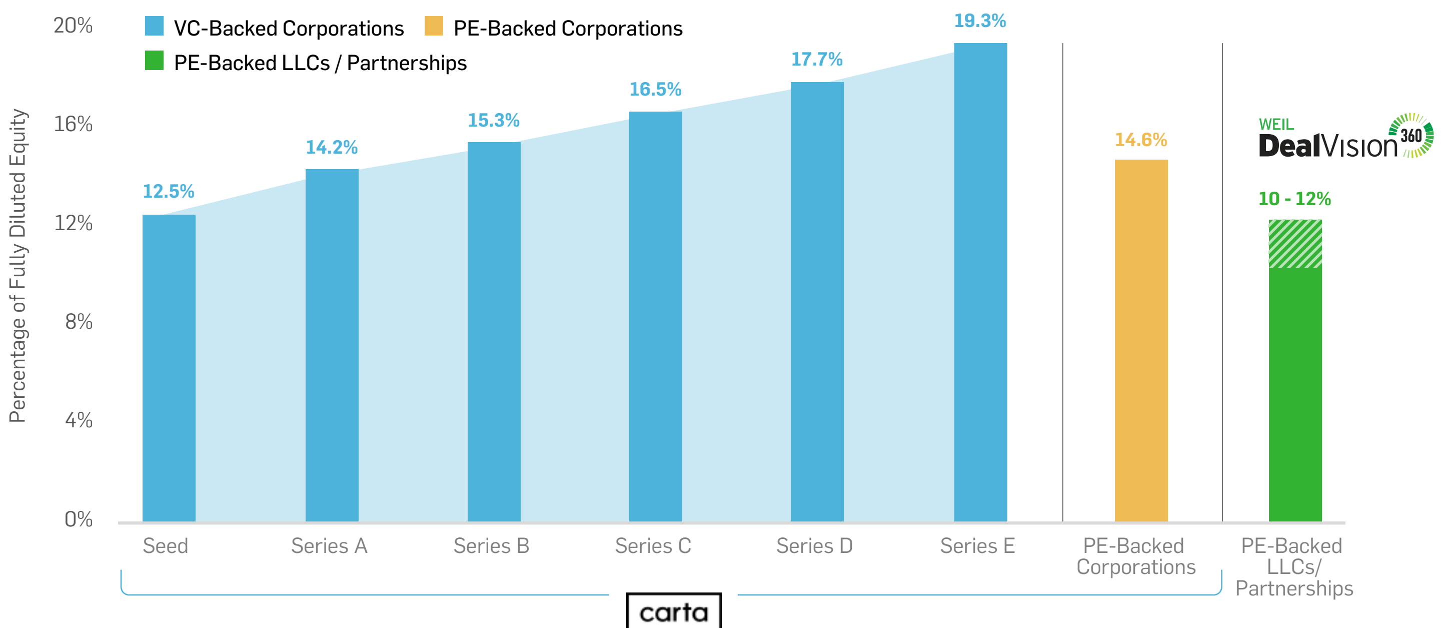
Amanda Rotkel
Partner
Executive Compensation & Benefits

Brittany Butwin
Counsel
Private Equity

Together with Carta, our data shows the considerable variation in plan size across ***corporations*** (ranging from VC-backed startups to PE-backed growth equity and crossover strategies) as compared to larger Tier 1 ***PE-backed flow-through entities*** (i.e., limited liability companies and limited partnerships, which are common structures for Weil clients). Private equity sponsors generally hold investments with a flow-through structure – that is, the equity incentive plan sits at a limited liability company (or partnership) and involves the issuance of profits interests. In that regard, using Weil's proprietary ***DealVision 360*** to gain a unique view on how Tier 1 PE sponsors structure MIP plans, we typically see our clients establish incentive equity programs ranging from **10-12%** of the fully diluted equity. In comparison, as the ***Carta*** data below depicts, plan sizes in corporations look a bit different and are more varied (and generally, equity incentive plans are larger in corporations than in PE-backed LLCs/Partnerships). For corporate startups, plan sizes vary (and are positively correlated) as the company grows and raises money – with the median employee equity pool ranging from **12.5%** (fully diluted equity) after raising a priced seed round to **19.3%** (fully diluted equity) by Series E. For PE-backed corporations, the median employee equity incentive plan is **14.6%** (fully diluted equity).

Stay tuned for a more detailed Weil-Carta report of equity incentive plans, forthcoming in our next (Summer) edition of *Sponsor Sync*.

Employee Equity Incentive Plans in PE-Backed Companies: Corporations vs. LLCs/Partnerships



Source: 2025 eShares Inc. dba Carta Inc. ("Carta")

SECTOR-BY-SECTOR BREAKDOWN: KEY DEAL TERMS IN SPONSOR-BACKED TRANSACTIONS

Arnie Fridhandler
Partner
Private Equity

Brittany Butwin
Counsel
Private Equity

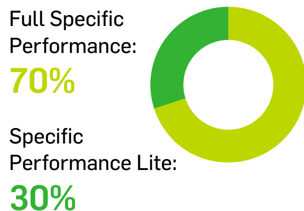
Using DealVision360 (Weil's unique proprietary deals database), below we compare key deal terms in sponsor-backed transactions across different industry sectors. Our findings highlight how sector-specific dynamics can influence risk allocation – specifically, with respect to closing risk (specific performance and RTFs) and post-closing recourse (seller indemnification and RWI) – and how sponsors accordingly tailor deal terms.

SPECIFIC PERFORMANCE

How often are Tier 1 PE firms in the U.S. investing on a full equity backstop basis? Depending on the sector and market dynamics, the answer may surprise you. Where sponsors arrange full equity backstopped investments, purchase agreements will include full specific performance for the seller's benefit (more deal certainty for sellers). On the other hand, typical debt and equity funded investments require a specific performance lite mechanic, supported by a reverse termination fee if committed debt is not available at closing.

All Sectors

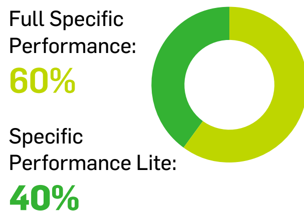
Full Specific Performance: **70%**



Specific Performance Lite: **30%**

Consumer Goods/ Consumer Services

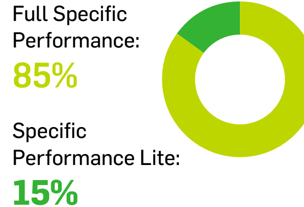
Full Specific Performance: **60%**



Specific Performance Lite: **40%**

Technology

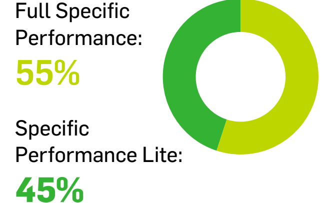
Full Specific Performance: **85%**



Specific Performance Lite: **15%**

Industrials

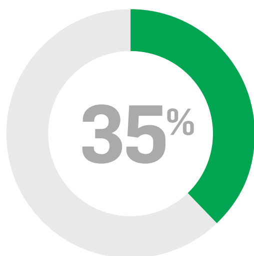
Full Specific Performance: **55%**



Specific Performance Lite: **45%**

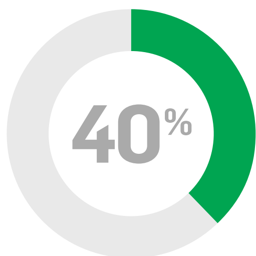
REVERSE TERMINATION FEES

Depending on the sector, the relative size of reverse termination fees are a proxy of perceived risk of arranging debt financing.



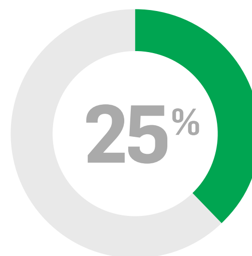
All Sectors

RTF Mean = **5.74%**



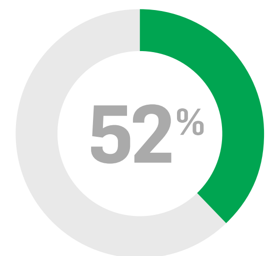
Consumer Goods/ Consumer Services

RTF Mean = **5.76%**



Technology

RTF Mean = **5.08%**

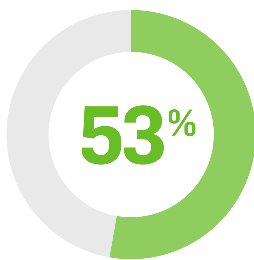


Industrials

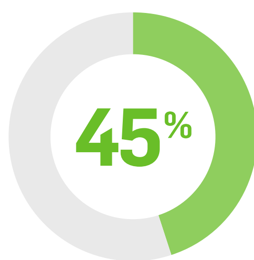
RTF Mean = **6.10%**

POST-CLOSING RECOURSE: SELLER INDEMNIFICATION

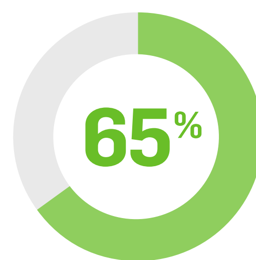
In a market where sponsors are completing relatively more add-ons, acquiring from founders or where market dynamics have shifted away from sellers, PE sponsors have found opportunities to bring back seller indemnifications and no longer need to entirely rely on RWI (as the seller functionally provides post-closing recourse instead of an insurance company). PE sponsors have been most successful in technology transactions at extracting that concession.



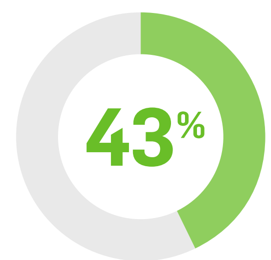
All Sectors



Consumer Goods/ Consumer Services



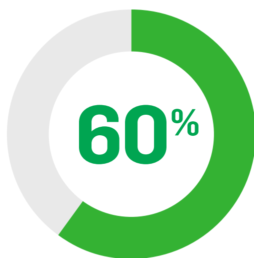
Technology



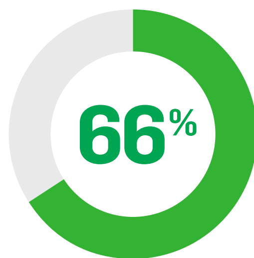
Industrials

USE OF RWI BY BUYERS

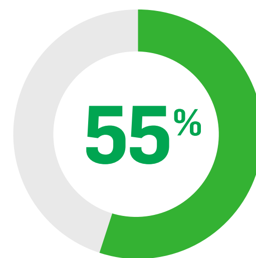
RWI is still prevalent, with a vast majority of transactions by Tier 1 PE sponsors relying on the product, in some form or another. RWI products have permeated much deeper than LBOs; we now assist clients in binding these policies in all types of transactions, including secondaries and minority investments.



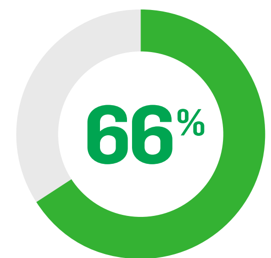
All Sectors



Consumer Goods/ Consumer Services



Technology



Industrials

PARTNER PERSPECTIVES

Thinking Outside the Box: NAV Finance for Management Companies

Dane Graham
Partner
17Capital

George Lee
Director
17Capital

Cassie Kimmelman
Partner
Private Funds

Private equity buyout funds now manage over $4 trillion in assets, having grown at a CAGR of approximately 11% since 2000.[1] As the industry scales, private equity management companies increasingly seek financing to fuel their continued expansion.

One prominent solution has been selling GP minority stakes. Since 2000, more than $60 billion has been deployed across 380+ investments in this space, with over 50% of the total volume occurring since 2018[2]. While this approach provides liquidity for strategic initiatives, it comes at a cost: permanent equity dilution.

NAV finance offers an alternative – without sacrificing ownership.

Many associate NAV finance solely with NAV loans to buyout funds. While that segment has gained attention in recent years, a less visible but equally impactful application is management company financing.

WEIL INSIGHTS

"Management company and GP financings allow sponsors to utilize their expected management fee income streams, fund interests and carried interest entitlements to combat the slow-down in distributions and to fuel expansion of new product lines, fund the sponsor commitments and assist with succession planning."

Over the past five years, 17Capital has deployed nearly $6 billion across 28 NAV finance transactions with management companies. Unlike traditional NAV loans, which primarily fund additional investments, management company financing addresses a broader range of strategic objectives. It has been used by a diverse range of GPs – from fast-growing firms where equity dilution would be costly in the long run to established ones with multi-billion-dollar (and sometimes publicly listed) balance sheets seeking flexible capital solutions.

WEIL INSIGHTS

"Management Company and GP financings may be structured in the form of a NAV-based loan, preferred equity or other bespoke financing structures, each of which differ in their payment terms, security features and cost of capital."

In fact, we've identified at least 6 distinct use cases for NAV finance, underscoring its versatility. These include:

- Making outsized GP commitments (the most common use case)
- Repurchasing minority stakes
- Acquiring other managers

- Purchasing LP stakes
- Seeding new strategies
- Succession planning and facilitating generational transfers

WEIL INSIGHTS

"As the fund industry continues to expand the use of leverage, the LP community and regulators have become more focused on the topic, including the use of leverage at the management company and GP levels. While explicit contractual limitations in fund documents may be modest with respect to these types of financings, it is important for sponsors to consider any restrictions on leverage, particularly with respect to pledges and transfers by a management company, GP and their owners, to ensure that they are not running afoul of obligations to investors."

Essentially, NAV finance enables the same objectives as selling a minority stake, while maintaining all of the upside.

A key theme across these transactions is the confidence managers have in their firms and fund performance. Rather than selling equity and ceding control, they leverage their management company assets to drive growth and expansion.

NAV financing is available across a broad range of LTVs and features flexible repayment terms. It is often naturally repaid through liquidity from GP commitments or balance sheet allocations to prior funds. Unlike traditional financing, the

collateral pool for NAV finance can be isolated, freeing up the remaining value for other solutions or repeat NAV transactions for further growth.

WEIL INSIGHTS

"Depending upon structure (i.e. at what level the leverage is utilized), there could be restrictions in existing fund-level credit documents, additional regulatory considerations under the Advisers Act, disclosure and transparency considerations or change of control concerns at portfolio company levels. Careful diligence upfront will help sponsors determine the best approach."

In the most common scenario – financing GP commitments – the capital isn't used for the standard 2% LPA-mandated commitment. Instead, it allows managers to make outsized commitments, often making them the largest investor in their own fund. This "skin in the game" strengthens alignment with LPs, reinforcing confidence in the fund's success.

WEIL INSIGHTS

"LPs expectation with respect to "skin in the game" has only increased in recent years, making management company and GP financing even more relevant."

As the private equity industry matures and GP balance sheets expand, creative financing solutions become more relevant. Our message to managers is simple: think outside the box – permanent equity dilution isn't the only path to financing growth.

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On Weil's Global Liability Management Initiative with Global Head Justin Lee

Sponsor Sync editor and Weil Private Equity counsel Brittany Butwin sat down with Justin Lee, Global Head of Liability Management on a wide-ranging conversation, from the basics of liability management exercises (LMEs) to Weil's LME group and its strengths. Weil's many decades of industry leadership and innovation in business finance and restructuring have crystallized in 2025 under the Global Liability Management Group.

Brittany Butwin, Editor (left) and Justin Lee, Global Head of Liability Management (right)

Q: What is LME?

A: In a nutshell, liability management exercises (or LME for short) and strategic capital solutions center around a company's ability to address debt maturities, liquidity challenges and other pressing financial needs. In a world where debt documentation, for the most part, is borrower-friendly, we look to unlock value by analyzing existing documentation to implement innovative, tailored solutions that provide cost-efficient alternatives to traditional restructuring. Such solutions can take a variety of forms – whether by way of "drop down", "up-tier", "double dip", "pari plus", some combination thereof, or an entirely new strategy. If you are more familiar with front end transactions like LBOs and new underwritings, you may be more accustomed to hearing about LME in the form of "blockers", but the practice of LME is primarily about exploring the art of the possible and crafting company / document-specific guidance and possibilities to enhance leverage and recovery in the most challenging circumstances.

Q: Why is LME important for sponsors?

A: While liability management exercises were traditionally viewed as as tools used only by the most aggressive sponsors, it has become commonplace for sponsors and companies to evaluate these tools in light of flexible documentation terms and willing counterparties (including both third party debt providers for a "deal away" and existing credit groups for a "consensual" LME). Indeed, it seems within the scope of fiduciary duty to at least consider these options given many other sponsors and companies are doing so. LME can help sponsors to avoid a costly in court restructuring process while addressing issues at the company, providing more runway for a turnaround, and preserving value, which will accrue to the equity.

Q: What distinguishes Weil's Global Liability Management and Strategic Capital Solutions practice?

A: Weil has been at the forefront of many marquee transactions in the LME and SCS space since these transactions were first implemented,

"LME can help sponsors to avoid a costly in court restructuring process while addressing issues at the company, providing more runway for a turnaround, and preserving value, which will accrue to the equity."

our Global Liability Management and Strategic Capital Solutions initiative builds off of those successes and strengthens our multilateral approach to deal making with expert coordination between different practice groups and an emphasis on delivering cutting edge, streamlined advice. LME is not one size fits all so we bring a constructive, tailored approach, which helps companies to consider their options in a thoughtful manner with a team of skilled professionals. One thing that I have always found unique about Weil is the team atmosphere – we all really enjoy working together and it shows through to clients in our collaborative and unified approach to complicated challenges.

Q: How do you collaborate with other practice groups within Weil, such as restructuring, capital markets, private equity and/or M&A, to deliver a comprehensive liability management strategy?

A: We approach everything with a "one firm" mentality so that we always know who is doing what, nothing is being overlooked and we are not duplicating efforts. Our approach is to leverage off our vast experience in representing stakeholders from across the capital stack in these types of transactions to quickly identify relevant teams and develop a coordinated approach to bespoke solutions. In doing so, we are able to benefit from the vast Weil network of professionals, including pressure testing with our litigation colleagues and being thoughtful as to structuring, governance and negotiating strategy. Weil is the kind of place where we do not have origination credit so we are incentivized to work very closely together without attribution or egos. Collaborating across groups is one of my favorite parts of the job – Weil is truly a one-stop shop for these types of transactions with devoted teams of collaborative professionals.

Q: What trends are you seeing in liability management?

A: The field of liability management is constantly evolving. The majority of transactions that we have seen recently involve both an approach to existing creditors (likely a subset thereof) and third party debt financing sources (sometimes called a "deal away"). The competitive dynamic plays out with companies trying to source a solution that delivers the most efficient outcome and fits within the parameters of their capital structure / documentation (as amended). In terms of trends, we have seen an increasingly high level of participation in existing lender structures potentially as a reaction towards more cooperative (no pun intended) outcomes and less drawn out litigation. This trend has sometimes been coined "LME 2.0", but it will be telling to see if these friendly transactions continue or if there is continued bifurcation between the consensual deals and ones that push the envelope a little further. We have been closely following the market reaction and new technologies to address the Fifth Circuit's recent ruling that the Serta up-tier transaction was not a permissible "open market purchase", but have already seen ourselves and other advisors quickly tailor creative solutions to effectuate similar transactions.

> **“Our goal is always to demystify LME and design options that resonate with the company and its stakeholders rather than an ‘off the shelf’ approach.”**

Q: How should sponsors prepare for future developments in this space?

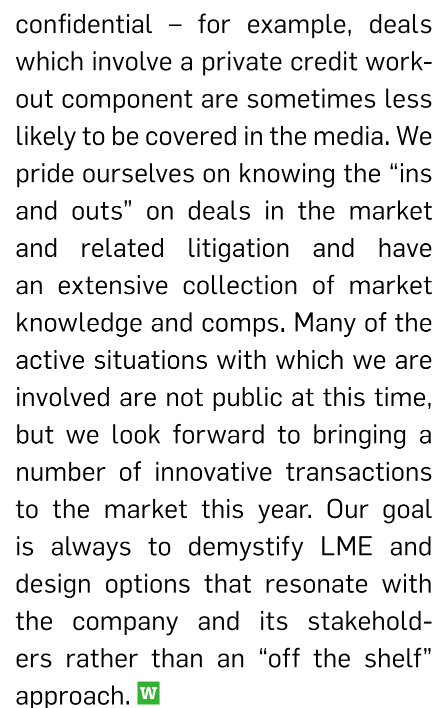
A: Having a trusted team of dedicated advisors is essential. While many firms have developed similar practices, Weil has always been at the cutting edge of market developments in this space and has assembled a team of outstanding and synergistic professionals from across the firm to expertly evaluate and capitalize on opportunities for our clients. The sponsors with whom we work are adept at finding strong investments and negotiating for top tier terms along the way – the team here is available and ready to offer unique perspectives when something is not going according to plan (i.e. there's a maturity wall coming up, there are unanticipated liquidity needs) or just to simply capitalize on discount. We are always happy to talk about the market, technologies and trends more generally or to do a deep dive diagnostic on optionality for a particular portfolio company.

Q: What are the key risks, challenges and/or considerations sponsors should be aware liability management transactions?

A: Establishing a proper process and governance in connection with liability management opportunities while understanding the risks is essential to a successful LME. These types of transactions are far from cookie cutter so we endeavor to break down the various work streams and make sure that we are thinking three to four moves ahead as opposed to being reactive. This involves heavy coordination internally, including with our excellent litigation team as well as with other advisors in the space with whom we have longstanding relationships. When sponsors bring in Weil, we take a global view of the transaction to come up with a strategic plan and timeline for execution – highlighting key risks and challenges (i.e. governance, conflicts of interest, third party claims) along the way while crafting an approach which addresses and minimizes those risks.

Q: Can you share any recent case studies or examples of LME transactions that you worked on?

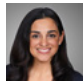
A: The LME Team at Weil has been involved in some of the biggest names in the space (i.e. J. Crew, Serta, Envision, DISH and AMC) as well as many other matters which are less widely publicized and/or



confidential – for example, deals which involve a private credit workout component are sometimes less likely to be covered in the media. We pride ourselves on knowing the “ins and outs” on deals in the market and related litigation and have an extensive collection of market knowledge and comps. Many of the active situations with which we are involved are not public at this time, but we look forward to bringing a number of innovative transactions to the market this year. Our goal is always to demystify LME and design options that resonate with the company and its stakeholders rather than an “off the shelf” approach. W

History of LME and Current State of Play

Frank Adams
Partner
Capital Markets


Vynessa Nemunaitis
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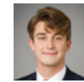
Ari Anderson
Associate
Capital Markets

In this article, we take a historical deep dive into LMEs – tracing their evolution, key transactions, emerging trends, and future outlook.

Much has been said about the current state of LME, which is best described as a complex, highly-negotiated transaction that allow a borrower to restructure or refinance its outstanding debt obligations where a conventional refinancing is not feasible. In recent years, LMEs have become increasingly sophisticated and often controversial, as borrowers seek creative ways to avoid an in-court restructuring within the confines of their existing debt documents and legal precedent. Yet despite the recent proliferation of these complex transactions, LMEs are nothing new, having been around for decades. We take a look below at the various forms of liability management in decades past, and track its evolution into its current form to predict how the next development might take shape.

Liability Management Eras

The Early Years

The 1980s and 1990s were characterized by financial instability stemming from the savings and loan crisis, high interest rates, and deregulation, alongside a surge in high-yield bond activity and leveraged buyouts (LBOs) spurred by the creation of the junk bond market a decade earlier. As distressed companies explored ways to manage leverage, LMEs took early forms through exchange offers and consent solicitations designed primarily to lower principal, extend maturities or modify interest rates. Such structures resulted in the emergence of early case law in the realm of liability management, such as Katz v. Oak Industries, which blessed the use of exit consents in an exchange offer or consent solicitation, notwithstanding the coercive effects of this now common technique.

In the 2000s, LMEs remained front and center amidst the burst of the dot-com bubble and the Great Recession as borrowers struggled under the weight of unsustainable debt loads. Borrowers continued to use structured exchange offers and “amend and extends” as part of broader refinancing initiatives to increase liquidity and extend runway during the financial crisis to stave off the disruptions (and expense) of Chapter 11. Flexible covenant and so-called “covenant-lite” terms proliferated in both bond debt and credit facilities, giving borrowers more flexibility to restructure outstanding debt obligations. Out-of-court restructurings gained in popularity as an alternative to filing for Chapter 11 and laid the foundation for a more aggressive

approach to liability management as an alternative.

Leveling Up

Beginning in the 2010s, the landscape of LMEs changed forever. Borrowers began taking advantage of a historically low interest rate environment through proactive refinancings of their outstanding debt. Extended periods of low interest rates fueled intense lender competition, leading to unprecedented borrower-friendly debt documents with weakened protections for creditors. Such terms, collectively, resulted in loosened covenants and new technology that provided flexibility for distressed borrowers to maneuver around restrictive covenants in pursuit of creative capital solutions. Such solutions are embodied today by three general transaction types (or some combination thereof): dropdowns, uptiers, and double-dips.

Dropdowns are typically structured so the borrower can move material assets to an unrestricted subsidiary or non-guarantor restricted subsidiary (which results in the assets being removed from the existing collateral package). After this initial step, those assets are used as credit support to issue new, structurally senior debt (i.e. debt that has a higher priority in repayment due to its position within the company's capital structure, rather than explicit contractual seniority). Dropdowns are unique in that they generally do not require existing creditor approval so long as the borrower can find third party capital sources willing to provide the new debt and fit the "drop down" within their existing covenant package. In 2016, Weil represented J. Crew as it famously implemented a dropdown transaction by transferring material intellectual property assets to an unrestricted subsidiary, which subsequently used those newly-acquired assets as collateral support for new financing. J. Crew moved the assets outside of the creditor group by leveraging flexible investment baskets to raise new money without needing to obtain creditor consents notwithstanding that the transferred IP would no longer benefit the existing creditors.

"LMEs will continue to develop and adapt to market conditions and results of recent litigation, however it is clear that borrowers will need to consider these solutions (or even more creative solutions!) when facing distressed conditions."

Uptiers are two-step transactions where a majority or supermajority of participating existing creditors amend their debt documents to subordinate the liens on existing collateral to a new issuance of superpriority debt, and then exchange their subordinated debt for such new debt at the expense of non-participating creditors (NB: this may be done in the same credit agreement, a "side car" with intercreditor arrangements or on more of a "synthetic" basis by pairing with the "drop down" described above). In 2020, Weil represented Serta when they executed an uptier transaction with the consent of two of its creditor groups by amending its existing credit agreements to modify lien priorities and allowing participating creditors to exchange into new superpriority debt. Boardriders (2020) and Incora (2023) were other notable examples of uptiers that followed Serta. Litigation followed each of these transactions as non-participating creditors challenged the transactions on various grounds. That said, we continue to see non-pro rata uptiering transactions in the market.

Double-Dips are structured transactions that allow distressed

borrowers to raise new capital while leveraging their existing capital structure for enhanced collateral coverage. In these deals, a borrower (often an unrestricted subsidiary) incurs new debt secured by its assets and guaranteed by the credit group—this is the first dip. The borrower then uses the proceeds to fund an intercompany loan to the existing group (e.g. for purposes of buying back the existing debt likely at a discount), which creates a receivable for the borrower that is pledged to the lenders as additional collateral. This gives the new lenders a second claim against the group (in addition to any "exclusive collateral"), improving their position relative to other creditors. In 2023, several distressed borrowers executed double-dip transactions, including At Home, Trinseo and WheelPros, signaling the growing adoption of this liability management strategy.

Importantly, these three general categories of LMEs are not mutually exclusive, meaning some deal structures may blend elements of each. As an example, Weil represented AMC Entertainment in a liability management transaction in July 2024 which utilized components of each of these structures.

The Next Era

It may be that the next era of liability management takes a more collaborative approach in an effort to avoid the burden of litigation associated with the more adversarial strategies embodied by the tactics of some previous LMEs (a so called LME 2.0), but this remains to be seen. While we have seen some transactions trend towards a more collaborative approach, we are also still seeing LMEs which continue to push boundaries and leverage new technologies.

We are also beginning to see the growing influence of private credit markets on traditional lending structures, as alternative sources of capital become available to borrowers. At the same time, private credit solutions may come with tightened covenants and less flexibility in debt documentation to be leveraged in downside scenarios as well as smaller groups of lenders who are potentially less interested in "in group" / "out group" dynamics as repeat players.

LMEs will continue to develop and adapt to market conditions and results of recent litigation, however it is clear that borrowers will need to consider these solutions (or even more creative solutions!) when facing distressed conditions. We anticipate that we will continue to see LME both with existing creditors, but also leveraging off of the potential for a "deal away" with lenders who are not currently in the capital stack.

LME Blockers

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Partner
Co-Head of Banking & Finance

In this article, we look at evolving lender protections that "block" LMEs – their impact on borrowers and strategies to navigate them.

As LME has become a mainstream mechanism for addressing capital structure and operational challenges for companies, it is not surprising that a new lexicon has developed around it. LMEs generally involve bespoke strategies tailored to a specific business, which has led to many of these transaction structures being identified by reference to the initial business that utilized a particular set of structuring tools. Likewise lenders are referring to these transactions by name in connection with the implementation of "blocker" protections in new and amended debt issuances. A standard approach to the initial review and engagement both by borrowers and financial investors on LME matters has developed and usually includes an initial analysis on the feasibility to consummate a transaction that looks similar to previous ones or a combination of the same. Notable examples include:

"J.Crew" or "Drop Down" Transactions

Rely on investment capacity to move assets such as entire business units, monetizable intellectual property or real property outside of the existing lender group's collateral package and to unrestricted subsidiaries and/or non-guarantors in order to separately finance such assets and create additional liquidity. The initial J.Crew transaction also included a license to J.Crew of the intellectual property that was "dropped down" to permit the existing business to continue to benefit.

"Chewy" Transactions

Create financeable assets by placing them in a guarantor entity, the equity of which is then partially sold to an affiliate or third party. Formulations of release provisions in certain debt documents require an automatic release of the Guarantor and all of its assets once the entity is no longer wholly-owned.

"Serta" or "Uptier" Transactions

Consist of two customary pieces (i) lenders entering into new debt documents (whether in the same facility or in a "side car") which are then able to "prime" the existing debt documents with the consent of the applicable threshold of lenders (typically 50.1%) and (ii) having the lenders who provide such new debt agree to exchange their existing debt for the new "priming" debt with new terms in reliance on the "open market" buy back provisions of a credit agreement (NB: following the Fifth Circuit ruling in Serta, we have seen alternative structuring in deals where there is only an "open market" exception).

This may be accompanied by actions to strip out the covenants or other protections of the original debt that is subordinated (i.e. the "stub" tranche of debt which is not exchanged).

"At Home" or "Double Dip" Transactions

In connection with a "Drop Down" transaction, the proceeds of any financing raised at the newly capitalized entity are lent by that entity back to the restricted group via an intercompany loan which is guaranteed and supported by assets of the restricted group, therefore allowing the lenders to the new entity to be secured by (i) the assets of the new entity – the first "dip", (ii) a pledge of the secured intercompany loan (benefiting from support from the restricted group) and (iii) the guarantee and credit support provided by the obligors of the existing debt with respect to new debt – the second "dip". Together, the dips create two separate claims against the original obligors.

"Pari Plus"

A variation on a Double Dip transaction where the loan provided to the newly capitalized entity also obtains the benefit of collateral and guarantees by members of the restricted group who are not otherwise guarantors of the existing debt on an exclusive basis – such that the new lenders have a pari passu claim against the original obligors (by virtue of one or both "dips") and a sole claim against the exclusive guarantors / collateral (the "plus").

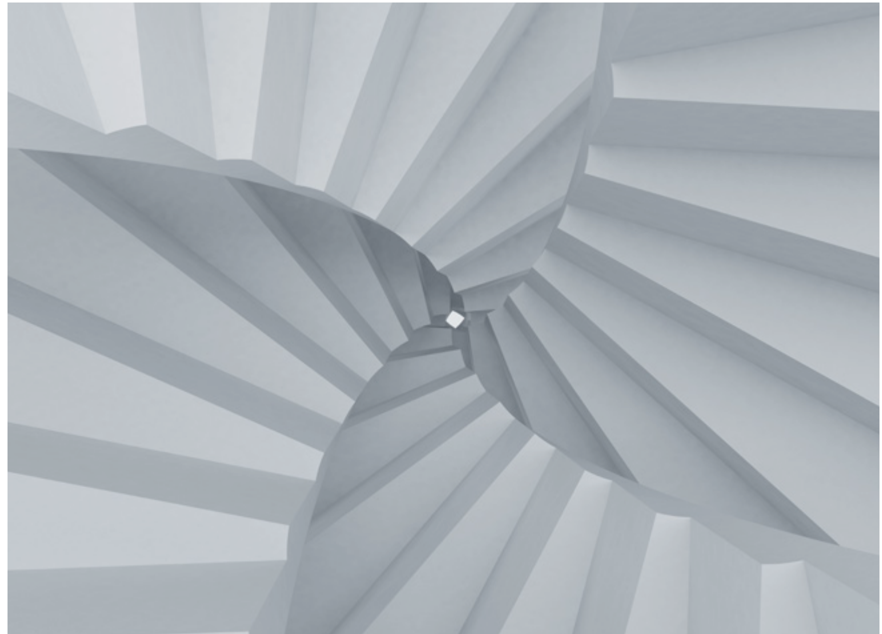
As result of the development of this toolkit and the continued evolution of LME, direct and syndicated lenders have been successful in constructing and implementing accompanying "blockers" (i.e. "J.Crew blockers", "Serta blockers", "Envision blockers", etc.) which purport to restrict or limit future borrowers from undertaking similar transactions. These blocker provisions are negotiated in connection with new financings as early as the term sheet stage and continue to evolve to keep up with more intricate liability management solutions developed by counsel and advisors.

"These blocker provisions are negotiated in connection with new financings as early as the term sheet stage and continue to evolve to keep up with more intricate liability management solutions developed by counsel and advisors."

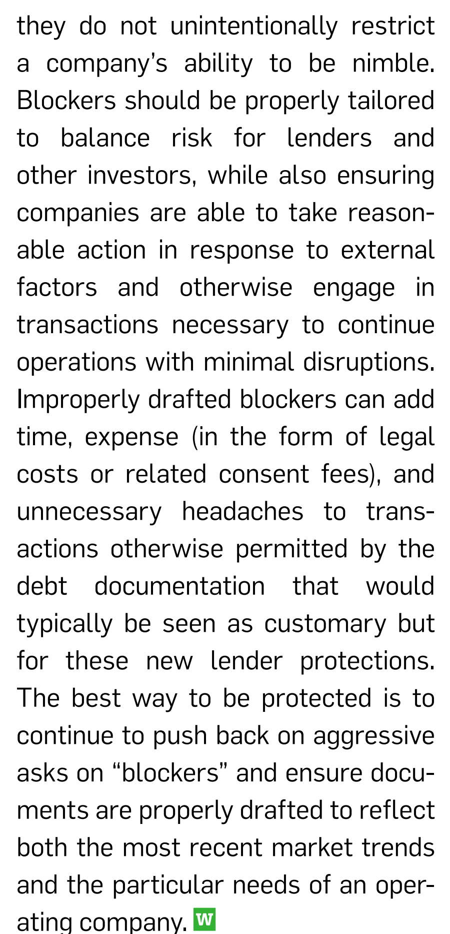
These blocker provisions, while customary, can create unintended risks and consequences for sponsors and portfolio companies. For example, a customary "Drop Down" blocker limits the ability of a company to invest or contribute material intellectual property to an unrestricted subsidiary. These provisions are sometimes drafted in an overbroad manner that may inhibit the ability of a company to transfer any assets to non-loan party subsidiaries, whether in connection with normal operations, permitted securitizations or other contemplated sale transactions. Additionally, a poorly drafted blocker may limit such subsidiaries from developing their own valuable intellectual property or receiving purported "material" intellectual property from the company that is only useful in connection with the other assets being contributed. The potential overreach here can be avoided by ensuring restrictions are narrowly tailored to material intellectual property and limited only to intellectual property material to the restricted group (i.e. the remaining business unit after the relevant contribution).

In response to the initial set of "Uptier" transactions, lender voting provisions have been updated to require a 100% vote to amend a debt agreement in a manner that subordinates the rights or claims of the lenders to new senior priority debt. Similar to the "Drop

Down" blockers, these subordination restrictions can result in unintended effects and restrictions on what would normally be considered ordinary course. For example, these subordination provisions often contain exceptions for debt offered to all lenders on a pro rata basis, customary debtor in possession credit facilities, capital leases and other items that typically "prime" credit agreements with respect to certain types of collateral. Any provision without the proper exceptions could limit a company's ability to (i) incur necessary DIP financing (ii) increase capital lease capacity or (iii) to the extent required by an insurance company, provide appropriate liens related to the financing of insurance premiums. While many of these items are not controversial if raised and discussed with financing sources prior to execution of the transaction documents, they often cannot be fixed without an accompanying enhanced threshold for voting at a later date.



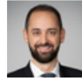
Additional blockers include restrictions on the investment and restricted payment capacity that can be utilized to contribute assets to unrestricted subsidiaries, limitations on the ability of unrestricted subsidiaries to provide debt to the restricted group (and therefore on-lend the proceeds of a Drop Down transaction to consummate a Double DIP, pari plus or other transaction), and limitations on releasing a subsidiary from its guarantee and collateral requirements in connection with a partial transfer. A more recent development has come in the form of an "Omni-Blocker", which purports to restrict the borrower's ability to enter into any transaction that is not offered to all of the lenders on a pro rata basis. Omni-Blockers are in their infancy and have not gained traction as a holistic solution to all potential liability management risk. They also run the risk of being overbearing, overbroad and imposing restrictions on a company that would prohibit the ability to the company to operate in the ordinary course or similar manner without consistent engagement with the lender group. For these reasons, the so called Omni-Blockers have only been adopted in a limited number of credit facilities which are "locked down" because the new facility itself was the product of an LME transaction.



As strategic LME and related blocker provisions continue to evolve, sponsors and their advisors should ensure they do not unintentionally restrict a company's ability to be nimble. Blockers should be properly tailored to balance risk for lenders and other investors, while also ensuring companies are able to take reasonable action in response to external factors and otherwise engage in transactions necessary to continue operations with minimal disruptions. Improperly drafted blockers can add time, expense (in the form of legal costs or related consent fees), and unnecessary headaches to transactions otherwise permitted by the debt documentation that would typically be seen as customary but for these new lender protections. The best way to be protected is to continue to push back on aggressive asks on "blockers" and ensure documents are properly drafted to reflect both the most recent market trends and the particular needs of an operating company. W

Checking the Co-Op

Chase Bentley
Partner
Restructuring


Abe Rosen
Associate
Restructuring

In this article, we analyze lender cooperation agreements as a shield against LMEs – and the strategies borrowers use to push back.

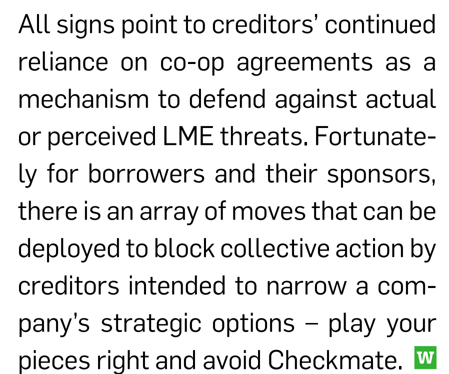
For several years, borrowers and their lenders have engaged in a game of chess we now dub as LMEs. First, we saw borrowers move assets outside of the credit group, pledging them as collateral for new capital, and lenders countered with what became known as the J. Crew Blocker. Next, borrowers responded by pitting lenders against each other in non-pro rata exchanges, and again lenders answered, this time with the Serta Blocker. In the latest iteration of this contest of strategy and skill, it is the lenders who have declared "Check" on the borrowers' King by forming groups bound by cooperation agreements (or "co-ops") that create a united front against potential LMEs or coercive exchanges.

The game, however, is far from over, as borrowers now try to fracture or even pre-empt these creditor coalitions through NDAs and blockers of their own. In this article, we explore some of the tactics borrowers can employ to combat lender co-ops and keep options open for strategic transactions that would otherwise hit a roadblock due to the restrictions attendant to these creditor alliances.

- **Winning the Opening.** Lenders seem to be organizing earlier and earlier, sometimes 18 to 24 months ahead of a given debt maturity and long before a borrower is willing to acknowledge that it may need to address capital structure or operational issues down the road. So, how does a borrower get ahead of hasty creditors locking arms when an NDA may be viewed as the first crack in the dam, leading to an inevitable restructuring? The solution that some borrowers have used (or at least tried to use) is an express co-op blocker in the debt documentation at origination (see Stepstone Group refinancing in December 2024). This head-on, pre-emptive strategy has so far met substantial resistance in syndication processes, but time will tell if the market among lenders becomes competitive enough to let the provision slip through on an oversubscribed deal.
- **You are Disqualified.** Another proactive approach taken by borrowers when combating lender organization, albeit not directly targeting co-ops, is the designation of certain entities as "Disqualified Lenders" within debt documents. While these provisions, known as DQ Lists, originated as a means to prevent competitors of the borrower from acquiring the debt as a backdoor to obtaining access to proprietary and confidential information about the borrower's business, over time they have morphed to also cover certain types of institutions that borrowers do not want to see in their capital structure. In the provision's most aggressive form, trades made in violation of DQ List are often times declared void ab initio. The DQ Lists themselves can range from categorical prohibitions (i.e., any distressed investor) to a specific list of institutions that can number in the hundreds, as

well as evergreen lists, which give the borrower discretion to update from time-to-time.

- **Recovering From a Blunder.** For borrowers that didn't try, or otherwise weren't able, to pre-empt the co-op directly in their debt documentation, there is always the NDA option. Whether creditors seek to form a group in response to a company-initiated process, or they are proactive in banding together before getting restricted, the NDA is still an effective tool for the borrower. Ultimately, co-op groups want to do a deal with the company – the act of forming a group is meant to deter coercive non-pro rata deals by way of creating a blocking position and thereby making it impossible, or at least challenging, for the company to secure the necessary consent thresholds for a proposed transaction, not to drive the company into a deal-away or a costly in-court restructuring. Because the co-op group wants to engage, and the borrower is a necessary party that controls the flow of information about the business, the borrower can use the NDA process to its advantage. Common NDA provisions used to undermine or prevent the formation of co-ops include:
  - ***Express Prohibition on Co-ops.*** Similar to its credit agreement cousin, the outright co-op blocker in NDAs has been met with significant pushback from creditors (see Kloeckner Pentaplast and Pfleiderer each in 2024). Companies that delay creditor engagement until the precipice of a restructuring should expect that rebuff to be the norm. However, with the luxury of time comes the ability to wait out the term of an already-formed co-op group, and with it the potential to use a blocker to ensure the group does not reassemble.
  - ***Restrictions on Communications.*** Absent a blanket prohibition on co-ops or similar arrangements among creditors, a borrower can still use standard disclosure restrictions to manipulate permitted communications among lenders. A standard NDA will prevent parties from disclosing confidential information to anyone outside the NDA sanctum, but can be tightened further to require express consent of the company to the lender's disclosure to any third party, regardless of the existence of a similar NDA. The definition of confidential information itself is also a lever that companies can use to restrict lenders. In more restrictive NDAs, even the existence of the NDA can be considered confidential information and prohibit lenders from disclosing to non-participating parties the fact that negotiations are being undertaken, thereby impeding creditor organization.
  - ***Standstills.*** Regular-way NDAs typically include a quid pro quo between the company and the recipient of confidential information. Plainly stated: "If I agree to give you my information, and we talk about doing a transaction together, then you agree you won't sue me if I decide to do a transaction with someone else." These provisions, called standstills, often also prohibit the recipient from buying or selling debt or securities of the company for a period of time. In the world of distressed debt, such an agreement is not table stakes, but instead is hotly negotiated and often times not permitted at all by a lender party to the NDA. If a borrower is able to secure a standstill, it should expect the provision to be a temporary reprieve to provide runway for negotiations, often falling away in conjunction with the required cleansing of confidential information disclosed to the lender. While standstill are useful tools for negotiating with co-op groups, they prove even more handy when entered into with minority lenders, where the company has a deal in-hand with a majority co-op group and is seeking to secure participation by minority lenders, often times on reduced economics, in lieu of those lenders challenging the contemplated transaction in court.



All signs point to creditors' continued reliance on co-op agreements as a mechanism to defend against actual or perceived LME threats. Fortunately for borrowers and their sponsors, there is an array of moves that can be deployed to block collective action by creditors intended to narrow a company's strategic options – play your pieces right and avoid Checkmate.

Liability Management in Europe

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In this article, we take a comparative look into European vs. U.S. LMEs – key legal differences, creditor rights, and restructuring tactics.

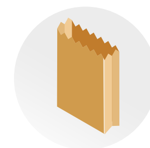
Some might say that European monarchs invented the art of coercion centuries ago – although none would argue with the fact the artform has been elevated when it comes to liability management in the U.S.

Nonetheless, the European financial markets have a recent history littered with interesting LMEs – Redwood in 2002 (non pro rata treatment of leveraged loans), Assenagon in the post-Financial Crisis era (the seminal European case on coercive exchange offers and exit consents in Europe) and Ideal Standard in 2014 (a non pro rata exchange of NY law bonds) are but a few examples. The market follows with interest developments around the non pro rata uptier exchange implemented by Hunkemoller last year, as minority creditors seek to challenge the deal via the NY courts.

In this article we highlight some interesting nuances that arise in European LMEs compared to the typical U.S. position:

- Sacred / money rights under NY law high yield bonds issued in Europe are typically 90% matters, rather than 100% (as is standard in the U.S.) – this creates more scope to design incentive structures to reach the consensual threshold in order to drag along hold-outs

- However, high yield bonds in the U.S. market typically allow for release of guarantees and collateral at a lower threshold (usually 2/3 or 75%), whereas in Europe these are still 90% matters – meaning different approaches need to be taken to structuring LMEs at the outset



- 'No payment for consent' clauses (at issue in Hunkemoller) are nowadays typically absent from high-yield bonds in Europe (although making somewhat of a comeback!) – this creates scope for non pro rata incentives to be paid to supportive creditors

“We closely track developments in stress/distress cycles in Europe with our proprietary *Weil European Distress Index* to help anticipate our clients’ need for critical pre-restructuring tools like liability management and proactively develop solutions including leveraging off our cross-border and cross-disciplinary teams”

- English law inter-creditor agreements in typical European LBO structures can create additional trip-wires to navigate vis-à-vis their NY-law cousins – for example, common collateral undertakings, sacred rights on ranking of priority and turnover trusts need to be navigated when structuring

- Debt buy-back mechanisms in European-style facility agreements often differ from the typical NY-law credit agreement – frequently only applying to the Restricted Group, enabling broader scope for non pro rata buy backs and ‘synthetic uptiers’

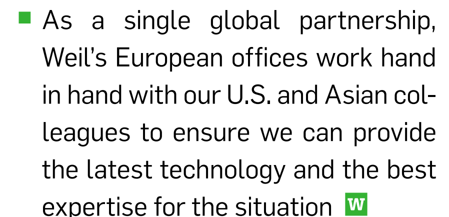
- European LBO structures will typically exclude a wide range of jurisdictions and asset types from the scope of guarantees and collateral (by virtue of limited security jurisdictions, agreed security principles and otherwise) – potentially leaving scope for additional guarantors and material non-collateral assets to be pledged for new financings

- Despite some harmonisation across the EU member states, each European jurisdiction has its own legal framework (including relating to director duties) which needs to be navigated when designing LMEs – highlighting the importance of early planning and the need for advisers with deep cross-border experience

- LMEs in Europe can often be ‘stapled’ to a European restructuring process (such as an English scheme of arrangement) – providing surgical, non-insolvency procedures to implement transactions at lower consent thresholds (e.g., 75%) and remove hold out risk

As with the U.S., pursuing successful LMEs in Europe requires detailed analysis, early planning and cross-discipline expertise

- Weil’s European offering is extremely well placed to assist with the design and implementation of successful LMEs in Europe, with top tier private equity, finance, capital markets, restructuring, corporate and risk advisory teams in the key European markets of London, Paris, Munich and Frankfurt
- We closely track developments in stress/distress cycles in Europe with our proprietary *Weil European Distress Index* to help anticipate our clients’ need for critical pre-restructuring tools like liability management and proactively develop solutions including leveraging off our cross-border and cross-disciplinary teams



- As a single global partnership, Weil’s European offices work hand in hand with our U.S. and Asian colleagues to ensure we can provide the latest technology and the best expertise for the situation

CTA REPORTING OBLIGATIONS ELIMINATED FOR U.S. ENTITIES

Carson Parks
Associate
Private Equity

Loyal readers of Sponsor Sync are familiar with the Corporate Transparency Act's formerly broad scope: all entities formed in a US state or registered to do business in a US state were required to file "Beneficial Ownership Information" reports, unless they qualify for one of twenty-three exemptions. The scale of the reporting requirement was unprecedented in the US, and the result was the wild ride of injunctions, extended deadlines and appeals shown in the graphic below.

In an interim final rule announced by FinCEN on March 21, this broad scope was dramatically reduced. **All CTA reporting requirements were removed for entities formed in a US state**. The CTA's reporting requirements now apply only to "foreign reporting companies" (foreign entities that are registered to do business in the US), and foreign reporting companies do not need to report any information of their beneficial owners that are US persons. The deadline for foreign entities to report was extended to April 25, 2025.

CTA Reporting Requirements in Effect | CTA Enjoined | FinCEN Updating Guidance

JAN. 1, 2024
CTA filing obligations begin for non-exempt entities created/registered in 2024

DEC. 3, 2024
US District Court E.D. Tex. issues a nationwide preliminary injunction in *Top Cop Shop*

STOP

DEC. 23, 2024
Fifth Circuit stays the *Top Cop Shop* injunction

DEC. 26, 2024
Fifth Circuit vacates its stay of the *Top Cop Shop* injunction

STOP

JAN. 1, 2025
Scheduled deadline for initial Beneficial Owner Information Reports for entities formed before 2024

JAN. 7, 2024
US District Court E.D. Tex. issues another nationwide preliminary injunction in *Smith*

STOP

JAN. 23, 2025
Supreme Court stays the *Top Cop Shop* injunction (but not *Smith*)

FEB. 17, 2025
U.S. District Court E.D. Tex. lifts the *Smith* injunction

FinCEN extends initial filing deadline until March 21, 2025

On March 21, 2025, FinCEN (i) eliminated reporting for US entities and (ii) eliminated the requirement for foreign entities to report information of U.S. persons

Glenn's Corner

ON THE MEANING OF "MATERIAL"

Glenn D. West
Retired Partner
Private Equity

The adjective "material" is ubiquitous in business acquisition agreements. Designed to ensure that whatever is being represented or covenanted will not be deemed breached unless the impact of any inaccuracy or failure to perform is actually significant (which is itself a word that fails to convey a clear cut standard), the word "material" is fraught with an uncertain meaning as applied to a particular set of circumstances.

I was recently asked by one of my faithful readers whether I had ever written anything about the use of the term "material" as a qualifier in a purchase agreement. The answer was "of course I have."[1] But perhaps a reminder is necessary. And conveniently, Vice Chancellor Laster, in a recent Delaware Court of Chancery decision, In re *Dura Medic Holdings, Inc. Consolidated Litigation*,[2] had occasion to reiterate Delaware's approach to determining the meaning of the word "material" when it is used as an adjective qualifying a covenant or representation.

It is tempting to view the word material standing alone (or when used in the phrase "in all material respects") as having a similar meaning to the term "material" when use in the phrase "material adverse effect." But legally the two have nothing to do with one another. Caselaw has declared that "material" when used in the phrase "material adverse effect" requires not only a truly significant (in the sense of really, really bad) negative impact, but also a negative impact that is "durationally significant."[3] The word "material" standing alone, or as used in the phrase "in all material respects," however, has a different meaning. In *Dura Medic Holdings*, Vice Chancellor Laster reminds us that:

> *When used to qualify a representation, the adjective "material" "seeks to exclude small,* de minimis, *and nitpicky issues that should not derail an acquisition." For the breach of a representation to be material, there need only be a "substantial likelihood that the … fact [of breach] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information." That interpretation "strives to limit [a contract term with a materiality qualifier] to issues that are significant in the context of the parties' contract, even if the breaches are not severe enough to excuse a counterparty's performance under a common law analysis."*[4]

In other words, a "materiality" qualifier imposes a much lower standard

"But how 'material' simply means more than 'de minimis' on the one hand, but also means important enough to have 'significantly altered the "total mix of information"' upon which a counterparty relied in entering in to the purchase and sale agreement, is far from clear."

for measuring the significance of a breach than does the term "material adverse effect." And it specifically serves to lessen the high bar that the common law imposes for permitting a counterparty to treat the other party's breach as significant enough to excuse that counterparty's own performance. But how "material" simply means more than "*de minimis*" on the one hand, but also means important enough to have "significantly altered the 'total mix of information'" upon which a counterparty relied in entering in to the purchase and sale agreement, is far from clear. One could well wonder when a breach would not be deemed "material" as a practical matter.[5] Indeed, according to Ken Adams, one of the foremost authorities on syntactic ambiguity and contract drafting clarity generally, the word "*material* is not only vague but also ambiguous."[6]

This is particularly true given the fact that the "significantly altered the 'total mix of information'" standard for determining materiality appears to have been borrowed from the United Supreme Court decision of *TSC Industries, Inc. v. Northway, Inc.*[7] *TSC Industries* involved the determination of what was material in the context of securities fraud, specifically allegations that a proxy statement "was materially misleading." In that context, the Court held that:

> *The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with* Mills' *general description of materiality as a requirement that "the defect have a significant* propensity *to affect the voting process."* It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. *What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.*[8]

So important enough to have been significant in the "deliberations" being made by the recipient of the information, but not important enough to have actually affected the decision that was made. Huh? Ken Adams has suggested that the "significantly altered the 'total mix of information'" standard is just another way of saying "nontrivial," with the other understanding of "material" (the common law definition) being equated to his term "*dealbreaker*."[9] After all, the whole point of a materiality threshold is to lessen the "*dealbreaker*" requirement the common law imposes for a counterparty's contract breach to excuse the other parties performance.[10] But that stark dichotomy between materiality meaning simply "nontrivial," and the common law meaning of an actual "*dealbreaker*," is not what most

transactional lawyers are seeking to convey with the word "material." Instead, it's something a little more than the merely "nontrivial" meaning and a lot less than the "dealbreaker" meaning.

Another faithful reader of my contract musings pointed out that "[i]n the securities fraud context, courts in [the Second] Circuit have 'typically' used five percent as 'the numerical threshold … for quantitative materiality.'"[11] Setting aside that materiality in the securities law context also requires a qualitative analysis,[12] courts seem to have applied the quantitative 5% rule alone in cases not involving securities fraud. Indeed, in *Stone Key Partners LLC v. Extreme Steel, Inc.*,[13] the court applied that 5% rule to determine, in a dispute over whether a financial advisor was entitled to a fee, that a sale of less than 4% of a company's "total assets" did not constitute a "sale of a *material* portion of the assets or operations of the Company and its subsidiaries taken as a whole."[14]

Five percent seems intuitively to be well past nontrivial, but well below *dealbreaker* status. And recall that Vice Chancellor Laster used a decline of 20% of equity value as sufficient to declare a material adverse effect in *Akorn, Inc. v. Fresenius Kabi, AG*.[15] And

the material required for a material adverse effect seems closer aligned to the Ken Adams' *dealbreaker* concept.[16] But is 1% still trivial, and 2% nontrivial for purposes of determining material in other contexts? Who knows.

So, to repeat what I have in fact said before on this subject:

> If a matter will matter it may be best to recast a material liability, a material contract or a material litigation as a liability, contract or litigation involving (or that potentially could involve) [and impact of] more than a specified dollar amount [or specified percentage of equity value, net income or assets] (below which dollar [or percentage] threshold any such liability, contract or litigation would be considered insignificant [or immaterial]). But, … [s]ometimes the vague, if not ambiguous, "material" is all you can get and is perhaps good enough (but at least know that the term is fraught with uncertainty).[17]

Keep on musing.

ENDNOTES

U.S. LEVERAGED FINANCE MARKET UPDATE

1 SIFMA, US Corporate Bonds: Issuance, Trading Volume, Outstanding, available at https://share.hsforms.com/1cLnJJ_PhTDSEjA4VhfBe7wct3d3.

2 Harriet Clarfelt and Will Schmitt, Corporate borrowers kick off 2025 with record-setting $83bn bond bonanza (FINANCIAL TIMES, January 9, 2025).

3 Ben Watson, February 2025 US Leveraged Highlights (DEBTWIRE, March 10, 2025), available at https://www.acuris.com/document-repository/document/exw7wUpQd.

4 US Credit Markets Weekly Wrap (PITCHBOOK, March 27, 2025).

5 John Atkins, Q1 US HY Wrap: Fed prods primary after tariffs upend projections (PITCHBOOK, March 24, 2025).

6 Rachel Graf, Junk Bonds Win Over Investors Seeking Calm From Market Storm (BLOOMBERG, March 26, 2025).

7 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

8 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

9 March Wrap: Loan returns veer into the red amid volatility, shifting technical (PITCHBOOK, April 1, 2025).

10 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

11 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

12 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

13 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

14 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

15 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

16 KPMG, M&A Outlook 2025: Picking Up Momentum, available at https://kpmg.com/xx/en/our-insights/value-creation/m-and-a-outlook-2025.html.

17 McKinsey & Company, M&A Annual Report: Is the Wave Finally Arriving?, available at https://www.mckinsey.com/capabilities/m-and-a/our-insights/top-m-and-a-trends.

18 Monthly Wrap: Leveraged Loans Set Another Record; M&A Percolates (PITCHBOOK, Feb. 5, 2025).

19 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

20 LCD PitchBook, Interactive High-Yield Report, available at https://files.pitchbook.com/website/files/xls/US_Interactive_High-Yield_Bond_Volume_Report.xlsx.

21 Bloomberg, Private Equity Has a Plan If IPOs Don't Work: Add Debt (Jan. 21, 2025), available at https://www.bloomberg.com/news/articles/2025-01-21/private-equity-has-a-plan-if-ipos-sales-don-t-work-more-debt.

22 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025)..

23 PE Sponsors Rush Leveraged Loan Market for Dividend Deals (PITCHBOOK, March 6, 2025).

24 LCD PitchBook, Interactive High-Yield Report, available at https://files.pitchbook.com/website/files/xls/US_Interactive_High-Yield_Bond_Volume_Report.xlsx.

25 Bloomberg, Private Equity Has a Plan If IPOs Don't Work: Add Debt (Jan. 21, 2025), available at https://www.bloomberg.com/news/articles/2025-01-21/private-equity-has-a-plan-if-ipos-sales-don-t-work-more-debt.

26 Momentum Slows in February, Interest Returns Offset Market Value Loss (PITCHBOOK, March 6, 2025).

27 LCD PitchBook, Interactive High-Yield Report, available at https://files.pitchbook.com/website/files/xls/US_Interactive_High-Yield_Bond_Volume_Report.xlsx.

28 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

29 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

30 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

31 Q1 Leveraged Loan Wrap: Market cools after hot start to the year (PITCHBOOK, March 27, 2025).

32 Ronan Martin, US Firms Tapping Europe's Cheaper Bond Market Like It's 2007 (BLOOMBERG, February 12, 2025).

33 Timothy Rahill and Marine Leleux, US Dollar Credit Supply (ING GROUP, April 1, 2025); Will Schmitt, US junk bonds slide as Donald Trump's tariffs spark economic worries (FINANCIAL TIMES, March 13, 2025).

34 LCD PitchBook, Interactive High-Yield Report, available at https://files.pitchbook.com/website/files/xls/US_Interactive_High-Yield_Bond_Volume_Report.xlsx.

35 Abhinav Ramnarayan, Denitsa Tsekova, and Aaron Weinman, Massive Unwind Makes US Junk Bonds Riskier Bet Than Europe's (BLOOMBERG, March 11, 2025).

ENDNOTES

36 Shankar Ramakrishnan and Laura Matthews, US companies swap dollar bonds into euros to lower funding costs (REUTERS, February 20, 2025).

37 Bloomberg (updated as of 9 April 2025).

38 Morningstar, DBRS, Prolonged U.S. Tariffs May Amplify Divergence in Middle Market Credit Quality, available at https://dbrs.morningstar.com/research/449115/prolonged-us-tariffs-may-amplify-divergence-in-middle-market-credit-quality.

39 Tariffs Set To Drag Down Weak Borrowers, Impede M&A: Morningstar, DBRS (PITCHBOOK, March 4, 2025).

THE CONTINUED RISE OF THE CONTINUATION FUND

1 Bain & Company Global Private Equity Report 2025.

2 Bain & Company Global Private Equity Report 2025.

3 Bain & Company Global Private Equity Report 2025.

4 The focus of this article is on recent trends in GP-led secondary transactions. For additional commentary on differences between LP-led and GP-led transactions, see The Rise of the Continuation Fund, Weil Sponsor Sync, Spring 2024 issue.

5 Lazard Private Capital Advisory: Secondary Market Report 2024.

6 Lazard Private Capital Advisory: Secondary Market Report 2024.

7 PJT Partners: FY 2024 Secondary Market Update Investor Roadmap.

8 Lazard Private Capital Advisory: Secondary Market Report 2024.

9 Evercore Private Capital Advisory: FY 2024 Secondary Market Review.

10 Evercore Private Capital Advisory: FY 2024 Secondary Market Review.

11 PJT Partners: FY 2024 Secondary Market Update Investor Roadmap.

12 Lazard Private Capital Advisory: Secondary Market Report 2024.

13 Lazard Private Capital Advisory: Secondary Market Report 2024.

PARTNER PERSPECTIVES— THINKING OUTSIDE THE BOX: NAV FINANCE FOR MANAGEMENT COMPANIES

1 Source: Preqin

2 Source: Pitchbook - pitchbook.com/blog/what-is-gp-stakes-investing

IDENTIFYING THE LANDMINES OF FRANCHISED BUSINESSES

1 Pitchbook data for private equity deals for US franchise businesses, as of March 26, 2025.

GLENN'S CORNER: ON THE MEANING OF "MATERIAL"

1 See Glenn West, Defining "Material"—What Matter Will Matter?, Weil Global Private Equity Watch, Jan. 13, 2020, https://privateequity.weil.com/insights/defining-material-what-matter-will-matter/.

2 In re Dura Medic Holdings, Inc. Consolidated Litigation, 2025 WL 559233, at *17 (Del Ch. Feb. 20, 2025).

3 Glenn D. West, What Constitutes a Material Adverse Effect: The Latest Judicial Pronouncement, Bus. L. Today (Dec. 4, 2024), https://businesslawtoday.org/2024/12/what-constitutes-a-material-adverse-effect-latest-judicial-pronouncement/.

4 In re Dura Medic Holdings, Inc. Consolidated Litigation, 2025 WL 559233, at *17 (Del Ch. Feb. 20, 2025).

5 In my prior article, Defining "Material"—What Matter Will Matter?, West, supra note 1, I do note one case where such a determination was made.

6 Kenneth A. Adams, The Word Material Is Ambiguous in Contracts, Why That's a Problem, and How to Fix It, 21 Scribes J. Leg. Writing 85 (2023-24).

7 426 U.S. 438 (1976). See Adams, supra note 6, at 85-86.

8 426 U.S. at 449.

9 Adams, supra note 6, at 92-93 ("Because the TSC Industries standard treats a fact as material if it would have been worth paying attention to, whether or not it would have caused a reasonable investor to change their vote, it's reasonable to equate that standard with nontrivial.").

10 Id. at 85, 93.

11 Stone Key Partners LLC v. Extreme Steel, Inc., 333 F.Supp.3d 316, 333 (S.D.N.Y. 2018), aff'd 788 Fed App'x 50 (2d Cir. 2019).

12 See SEC, Staff Accounting Bulletin No. 99, 64 Fed.Reg. 45150 (Aug. 12, 1999).

13 333 F.Supp.3d 316 (S.D.N.Y. 2018), aff'd 788 Fed App'x 50 (2d Cir. 2019).

14 Id. at 333.

15 Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *74-76 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).

16 See Adams, supra note 6, at 95 ("Given what's required to establish material breach under common law, it's reasonable to equate that standard with dealbreaker. The same goes for the IBP standard because it requires "a strong showing" to invoke a MAE exception.").

17 West, supra note 1.

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