Debevoise & Plimpton

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From the Editors

A number of regulatory developments under the Trump administration have been favorable to the private equity industry, including a more deal-friendly approach to antitrust and efforts to foster retail access to private investments. But in many ways, the macroeconomic picture remains uncertain—reinforcing the value of solid execution in conserving assets and mitigating risk. The Fall 2025 *Private Equity Review* discusses several developments and issues you may find helpful to consider.

Merger Remedies and Prior Approval Requirements: Policy Reversals Bring Opportunity

With a more welcoming approach to merger remedies and less onerous post-deal constraints on parties that have been subject to enforcement orders, the Trump administration is creating a more transaction-friendly landscape, with welcome implications for private equity dealmakers.

Liability Transfer Transactions: Opportunities for Funds Buying and Selling Mass Tort Exposure

A portfolio company's exposure to long-tail mass tort litigation can present a significant transactional challenge. Selling the liability to a liability management company provides an effective way of removing the liability from the company's balance sheet—and, if properly managed, can be a lucrative investment for the company acquiring that exposure.

The $401,000 Question: How Can Fund Sponsors Tap Defined Contribution Capital?

A recent executive order seeks to expand access to private investments for individual retirement account holders. To capture that investment capital, fund sponsors must offer solutions that meet the liquidity needs of defined contribution participants.

Trademark Monitoring: An Ounce of Prevention

Strong trademarks and brands often represent a significant portion of enterprise value, but sponsors and portcos sometimes treat brand protection as an afterthought. An ongoing trademark monitoring program can be a cost-effective way of proactively protecting these important assets.

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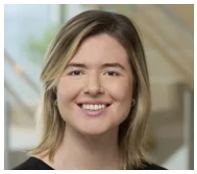
What's Inside

Spring 2025 Issue Editors

Paul S. Bird
psbird@debevoise.com



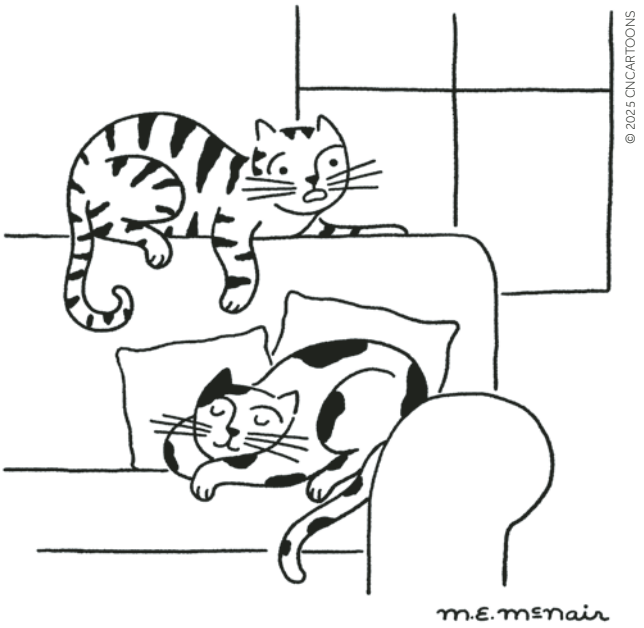
Yana M. Mereminsky
ymwmeremi@debevoise.com

Key Governance Considerations in PIPE Transactions

Private investment in public equity (PIPE) transactions can present an attractive investment opportunity for private equity funds. But sponsor-backed PIPEs can raise a number of key governance issues that need to be carefully negotiated.

Advertising Self-Regulatory Body Sets Its Sights on Private Equity Healthcare and Consumer Product Portfolio Companies

The National Advertising Division (NAD), the U.S. advertising industry's self-regulatory body, is increasing its attention on the artificial intelligence, financial services and healthcare industries—all areas with a high PE presence. Understanding the NAD and its workings can provide sponsors and portfolio companies with actionable offensive and defensive insights.



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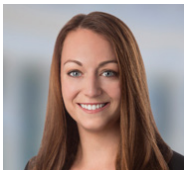
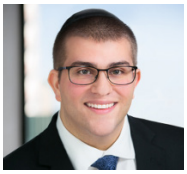
Merger Remedies and Prior Approval Requirements: Policy Reversals Bring Opportunity


Tim Cornell
Partner


Ted Hassi
Partner


Michael Schaper
Partner


Leah Martin
Counsel


Adam C. Saunders
Associate

The most significant change in U.S. antitrust policy since the Trump administration took office can be seen in how regulators are now approaching merger remedies and, for parties to deals under consent orders, prior approval requirements. These changes alter how private capital should assess acquisitions, divestitures and sales of portfolio companies. They are also likely to revive the appetite for mergers—including some that likely would have faced costly and protracted litigation under the previous administration and, as a result, may not have been agreed to in the first place.

From Litigation to Remedies

Antitrust agencies under the previous administration were skeptical that traditional remedies to potential antitrust concerns in a proposed merger could be effective, preferring instead to litigate what they deemed problematic mergers as part of a larger effort to discourage mergers altogether. By contrast, the Trump antitrust agencies have embraced a more deal-friendly approach, favoring settlements that enable more deals to proceed. The Trump antitrust agencies have made it clear that they prefer countering potentially problematic mergers with structural remedies, such as divestitures, rather than with litigation.

This policy shift can be seen in multiple cases during the past summer where remedies were accepted despite significant competitive concerns: Synopsys' acquisition of Ansys, Hewlett Packard's acquisition of Juniper Networks, Alimentation Couche-Tard's (ACT) acquisition of GetGo Café + Market from Giant Eagle, Keysight Technologies' acquisition of Spirent Communications, and Safran's acquisition of Collins Aerospace.

However, while the agencies are pro-deal, when a remedy is needed to address potential harms to competition, that remedy must provide robust and effective structural solutions, not superficial fixes. Agencies' expectations for remedies include:

- **Divestitures of Standalone Business Lines.** Preferred remedies involve comprehensive divestiture of standalone or discrete business lines or units. Such divestitures should include all tangible and intangible assets that make the divested business viable, incentivized and able to compete vigorously with the seller, including personnel, intellectual property, manufacturing lines, supply chain infrastructure, IT systems, R&D facilities and input agreements with third parties. Behavioral remedies, on the other hand, such as agreeing to limit certain commercial practices or to not discriminate

against competitors, may be accepted in limited cases but will remain the exception, as they are often difficult and costly to enforce.

- **No Entanglements with the Seller.** Generally, the divested business unit should also be free of entanglements from the seller because of the risk that the seller could undermine the business for its own gain after the divestiture. Any transitional ties should be short lived with a defined path to independence.
- **Early Proposals.** Agency leadership has been explicit that the time to propose remedies is early in the process and not on the eve of a merger challenge trial. The agencies are less willing to accept 11th-hour divestiture proposals, in part because they cannot vet the sufficiency of the proposal on short notice.

This approach largely restores pre-Biden practices and aligns U.S. policy with international norms, facilitating smoother resolution of global deals.

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- **Upfront Viable Divestiture Buyer.** The agencies expect to be presented upfront with a viable divestiture buyer who has the capability to successfully operate the divested assets (i.e., has the resources, industry expertise and operational readiness necessary to maintain or restore competition in the relevant market). At the same time, the buyer's acquisition of the divestiture assets must not create new anticompetitive concerns. This combination of requirements typically means that an acceptable buyer is either (i) a strong player in an adjacent or complementary space, (ii) a strong competitor with no current presence in the divested business's geographic footprint or (iii) a small competitor in the same geography.

For example, in Synopsys/Ansys, the Federal Trade Commission (FTC) coordinated closely with authorities in the European Union, United Kingdom, Japan and South Korea in the development of the remedy. Similarly, the Antitrust Division of the U.S. Department of Justice (DOJ) and the UK Competition and Markets Authority each announced their acceptance of remedies in Safran/Collins on the same day.

Importantly, the return to remedies means renewed opportunities for private capital looking to expand a portfolio company or acquire a new standalone business. It also provides a broader range of potential acceptable buyers for private capital looking to sell a portfolio company. Staying alert to acquisition activity and engaging with regulators can help secure a position as the preferred divestiture buyer.

From Prior Approval to Prior Notification

Another notable development in the FTC's approach to mergers can be seen in the agency's handling of deals subject to an FTC merger enforcement order setting forth conditions under which the deal can proceed. In 2021, the Biden FTC adopted a Policy Statement requiring (i) parties to merger enforcement settlements to obtain "prior approval" for any future transaction affecting any relevant market affected by the merger (or potentially broader markets) for a minimum of 10 years and (ii) divestiture buyers to obtain "prior approval" for any sale of the divested assets for a minimum of 10 years.

The prior-approval requirement was fraught with problems for acquisitive companies that were party to deals subject to enforcement orders since the requirement applied even to subsequent transactions that were below the HSR filing threshold for premerger notification. Further, the timeline protections set forth in the HSR Act, in which parties were free to close a deal 30 days after filing absent a government response, did not apply, leaving deals to languish in the approval queue. Not surprisingly, these requirements also complicated the process of signing up a divestiture buyer.

Although the FTC has not formally rescinded the 2021 Policy Statement, it appears that the Trump FTC no

The apparent reversion to prior notification loosens some of the merger handcuffs placed on dealmakers by the last administration and further indicates that the merger control regulators are keener on seeing deals consummated than deterring their occurrence.

longer adheres to it. Instead, the prior-approval requirement is being replaced with a less-onerous "prior-notification" requirement. For example, in the June 2025 consent order regarding ACT's acquisition of 270 retail fuel outlets from Giant Eagle, the FTC required the divestiture of 35 ACT-owned gas stations across Indiana, Ohio and Pennsylvania and that ACT for a period of 10 years would provide written notification to the FTC at least 30 days prior to consummation of any direct or indirect acquisition of any of the gas stations identified in a non-public list and, if the FTC requested additional information, that ACT would not consummate the transaction until 30 days after providing it to the FTC. Similarly, the FTC replaced the prior-approval requirement in the consent order regarding the acquisition of EP Energy by EnCap with a prior-notification requirement, noting that "[a] prior-approval requirement is an extraordinary remedy because it reverses the ordinary operations of the antitrust laws."

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Liability Transfer Transactions: Opportunities for Funds Buying and Selling Mass Tort Exposure

Morgan A. Davis
Partner

Mark P. Goodman
Partner

Andrew G. Jamieson
Partner

Maura Kathleen Monaghan
Partner

Jacob W. Stahl
Counsel

Kaitlyn McGill
Associate

Adriana Kranjac Rielly
Associate

For PE sponsors, a target's potential exposure to mass tort litigation can present a significant challenge in an acquisition, given the potential for the substantial, ongoing and unpredictable costs associated with defending and resolving a large volume of claims—including defense costs, settlements and trial verdicts—that may persist for the foreseeable future. Traditionally, PE sponsors, using econometric modeling to assess the ongoing costs of the mass tort litigation, have sought to ring-fence these risks through a combination of indemnities, escrows and insurance products. More recently, litigation liability transactions, in which an entity sells its litigation exposure to a liability management company, have emerged as an innovative vehicle by which PE sponsors (and strategic companies) can offload mass tort exposure. These transactions also present an attractive opportunity for buyers that acquire mass tort exposure at a premium over the expected costs and then successfully invest the assets available to cover the liability and the associated litigation for a healthy return on capital.

Liability transfer transactions typically are structured as follows: the seller uses a divisional merger or similar transaction to segregate the relevant mass tort liability into a new legal entity and contributes an amount of cash equal to the present value of the liability. The buyer typically agrees to contribute an amount of cash of its own to provide additional coverage for the liability and reflect its confidence in the long-term viability of the transaction. The buyer typically then acquires the new legal entity, which includes the liability being transferred and the assets supporting the liability. The buyer will also provide the seller with an indemnity so that the seller is protected in case mass tort plaintiffs seek to pursue the original owner of the liability. Such transactions typically include detailed protocols to mitigate against the risk of fraudulent conveyance allegations, including: (i) obtaining a solvency opinion by a respected firm regarding the entity being sold; (ii) restrictions on the types of investments the buyer can make with the funds obtained via the transaction (typically for a period of at least seven years); and (iii) limitations on the buyer's ability to distribute the proceeds of invested funds for a period of time and/or in circumstances in which the remaining funds are insufficient to cover anticipated future exposure.

For example, in August 2022, Crane Holdings formed a subsidiary that contained all of Crane's asbestos and related legacy liabilities and then sold that subsidiary to Spruce Lake Liability Management. To fund the transfer, Crane contributed about $550 million, while Spruce Lake added $83 million of its own capital.

After closing, Spruce Lake took full control of the subsidiary and assumed responsibility for all of Crane's asbestos liabilities, fully indemnifying Crane and removing those obligations from Crane's balance sheet. Crane's President and CEO stated that the deal "provides finality and certainty to investors regarding asbestos obligations, and it removes the distraction of asbestos related risks. Further, eliminating ongoing payments for asbestos related defense and indemnity costs will increase annual free cash flow available for us to invest in our business, both organically and inorganically." Similarly, Ingersoll Rand Inc. transferred equity interests of three wholly owned subsidiaries that held its asbestos liabilities to Onyx TopCo LLC. According to its September 2024 Form 10-Q, the three entities were capitalized with a total of $188.5 million. SPX Technologies entered into a similar transaction with Canvas Holdco LLC (an entity formed by a joint venture of Global Risk Capital LLC and an affiliate of Premia Holdings Ltd). As reported in its December 2024 10-K, SPX contributed $138.8 million to the divested subsidiaries, and Canvas made an $8 million capital contribution to the divested subsidiaries.

Liability transfer transactions originally became popular in the context of asbestos liability because purchasers can predict asbestos-related costs with a relative degree of confidence. Asbestos-related liabilities can usually be reliably estimated through an econometric analysis because: (i) decades' worth of data regarding the characteristics and behavior of asbestos plaintiffs exist, allowing for reliable estimates of the aggregate liability, and (ii) most companies ceased using asbestos decades ago, so the exposed population is contained and will ultimately decline over time.

> ...liability transfer transactions are being used to manage mass tort risk beyond the context of asbestos, particularly where there is sufficient data to conduct a reliable econometric assessment of litigation exposure.

Increasingly, however, liability transfer transactions are being used to manage mass tort risk beyond the context of asbestos, particularly where there is sufficient data to conduct a reliable econometric assessment of litigation exposure. As these types of transactions may involve large sums of money, the deal teams for each side—supported by experienced counsel who understand mass tort litigation and complex transactions—will generally want to design bespoke arrangements that meet the specific needs of the deal.

For PE sponsors, liability transfer transactions may be an appropriate strategy at different points in the lifecycle of a portfolio company. If the sponsor wishes to have the target company offload mass tort liability at the time of acquisition, a liability transfer transaction can be synchronized with a closing—provided that the sponsor is comfortable with making the large capital outlay (directly and/or through the acquired entity) that is necessary for such a transaction. However, synchronizing a liability-transfer transaction with a closing can be challenging—particularly regarding deal confidentiality—if it requires searching for a party to acquire the liability at the same time as broader deal negotiations are taking place. Alternatively, a sponsor may consider a liability transfer transaction at some point after the purchase, including to remove litigation overhang before sale or IPO.

Liability transfer transactions also present a lucrative opportunity for a company that is willing to purchase such risks, because the buyer receives a large sum of investment capital upfront and can charge fees to manage both the investment capital and the underlying litigation. The transaction can thus be highly profitable if the return on capital exceeds the costs associated with the acquired mass tort litigation. It is critical for the buyer to have experienced national coordinating counsel who can employ strategies that mitigate litigation risk, which typically include arrangements with leading mass tort firms with the goal of resolving most cases via settlement rather than potentially costly mass tort litigation.

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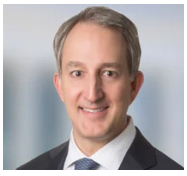
The $401,000 Question: How Can Fund Sponsors Tap Defined Contribution Capital?

Vadim Avdeychik
Partner

Sheena Paul
Partner



Marc Ponchione
Partner

Daniel Jaret
Associate

With closed-end commingled private capital assets under management having grown nearly 20-fold since the turn of the millennium, the next phase of expansion appears poised to come from broadening access beyond the traditional institutional investor base. To this end, fund sponsors are increasingly complementing traditional structures with open-end vehicles, separately managed accounts and sources of permanent capital—strategies that have helped private markets reach $22 trillion in aggregate assets under management. Building on this momentum, retail distribution represents yet a further frontier of growth, with the potential to unlock new pools of long-term capital and to diversify investor participation in private markets in a way that builds on the democratization of public-market investing that took place decades earlier.

One area receiving particular attention in the drive to provide retail access is the defined contribution (DC) segment of the retirement market. This segment has the potential to provide individual retirement accounts with exposure to private market investment strategies, especially in light of recent developments. Executive Order 14330, issued on August 7, 2025, declares it "is the policy of the United States that every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets." The executive order further states that the Trump administration will relieve regulatory burdens and litigation risks in connection with such investments.

Opening up even a fraction of this $13 trillion pool of capital to private market investment could be pivotal to the industry's ability to provide individual retirement account holders access to investment opportunities long enjoyed by institutional investors. While the interplay of federal securities laws and ERISA regimes generally does not currently permit sponsors to add 401(k) sleeves to their private closed-end fund structures, sponsors may be able to structure future funds to accommodate DC capital alongside traditional institutional investors.

Asset Allocation Funds: A Promising Pathway

One promising pathway by which private capital exposure can be introduced to DC platforms is the asset allocation fund (AAF)—a type of fund, sponsored by a third-party manager, that invests in a diversified mix of asset classes to meet investment goals of target investors. AAFs are a common offering on DC

platforms, and while AAFs currently can include private capital exposure, ERISA plan fiduciaries have generally shied away from including AAFs with private capital exposure on such platforms. Part of this reluctance is due to litigation risk. In the past, the Department of Labor (DOL) has taken steps to address this risk. In 2020, DOL issued regulatory guidance noting that plan fiduciaries can, upon engaging in an "objective, thorough, and analytical process," include private equity as an AAF component. However, in 2021, DOL supplemented its 2020 guidance, stating that its prior guidance should not be interpreted to suggest that private equity is generally appropriate for typical 401(k) plans. Most recently, five days after the executive order was issued, DOL withdrew its 2021 guidance. While the industry welcomes recent DOL activity, we believe uncertainty will remain until further steps are taken to alleviate litigation risk.

> Sponsors can provide a solution to the liquidity challenge by expanding beyond traditional closed-end private funds to offer products that permit recurring capital commitments and pretermination liquidity.

The Challenge of Liquidity

Even if litigation risk is mitigated, AAFs seeking to include private capital exposure will need to confront another challenge. Closed-end private funds generally require an upfront commitment and a lockup of investor capital for seven to 12 years (or longer), providing very limited ability to withdraw capital before the term expires. DC AAFs, on the other hand, are generally structured to provide daily liquidity, both to enable employees to contribute portions of their periodic earnings and to facilitate withdrawals due to retirement and other life-changing events. To meet these liquidity requirements, AAF managers that include closed-end private fund investments will be compelled to select relatively liquid assets to comprise the balance of the asset mix, and they will need the private fund products they do include to provide greater liquidity than is typically available in closed-end buyout funds.

Accordingly, we believe AAFs offering closed-end private capital exposure will require more active management than AAFs comprising only publicly traded securities. Managers will need to pair private fund investments with sufficient liquid assets to support AAFs' necessary liquidity. DOL has suggested that fiduciaries consider following the SEC's liquidity rule, requiring registered open-end investment companies to cap illiquid investments at 15% of net assets. Absent definitive regulatory guidance, AAF managers, together with plan fiduciaries, will need to determine the appropriate asset mix, which will in part depend on the underlying liquidity of the funds being included. For example, including exposure to buyout funds, which often make proceeds available later in their terms upon investment disposition, will generally require a greater portion of liquid investments in the asset mix than would be needed alongside investments in credit funds, which provide current proceeds from underlying credit investments throughout their terms.

Looking Beyond Closed-End Funds

Sponsors can provide a solution to the liquidity challenge by expanding beyond traditional closed-end private funds to offer products that permit recurring capital commitments and pretermination liquidity. Indeed, to meet AAF liquidity requirements, private funds into which AAFs invest will likely need to be structured as open-end or evergreen. Open-end funds are typically operated at net asset value and facilitate regular closings on subscriber capital and regular redemption rights. Multi-tranche evergreen funds more closely resemble traditional closed-end funds, with subscriptions and liquidity occurring between tranches rather than on a calendar basis. Each tranche is akin to a closed-end fund, and the successive staging of tranches permits sponsors to repeatedly raise funds under evergreen umbrella structures. Open-end fund mechanics are generally more conducive for the recurring liquidity that AAF managers need, but multi-tranche vehicles—particularly in the credit space—could

also work given the liquidity available throughout tranche terms and the ability for managers to increase commitments to subsequent tranches in connection with DC inflows.

Private fund sponsors have long sought to expand the universe of their potential investors to include retail capital. The executive order has brought that goal one step closer to reality.

Considerations in Raising Combined DC and Institutional Investor Funds

Sponsors are highly attuned to the size of the funds they raise relative to their predecessor funds and funds raised by their competitors. While greater structuring flexibility will be available for sponsors to raise fund products dedicated exclusively to 401(k) investors, bringing DC subscriptions into private funds that comply with federal securities laws and ERISA regimes, alongside traditional institutional investors, will be an enticing option.

Embracing an Indefinite Term

For private fund managers used to offering closed-end products, multi-tranche products will be more similar to their existing offerings than open-end structures, which may be appealing from a fund-documentation perspective for both sponsors and their existing investors. Fund administration will be generally similar between closed-end and multi-tranche structures, as compared to NAV-based unit pricing utilized by open-end funds, which require frequent valuation and provide for different economics. In addition, sponsors looking to raise DC capital will be keen to retain investors from their predecessor closed-end funds, who will be familiar with closed-end fund documents and who may be more receptive to pivoting to multi-tranche structures than to the more significant changes required with open-end funds.

Working with AAF Managers and Plan Fiduciaries

Although the Executive Order provides support for the regulatory changes necessary to facilitate retail participation in private funds, the contours of those changes are still unknown. Even so, ERISA fiduciaries will likely continue to require "objective, thorough, and analytical process[es]" to offer AAFs that include private capital investments. Fiduciaries not as familiar with private capital will need to understand the complexities of these products and may outsource certain functions to third parties. Sponsors will need to hire internal experts that understand the DC retirement space to work with plan fiduciaries to educate them regarding the nuances of including private investments on DC platforms.

It will also be prudent for sponsors to develop relationships with traditional distribution partners who understand this market and who can facilitate allocations by AAF managers in their funds, like the partnerships recently announced between State Street and Apollo, between Voya and Blue Owl and between Empower and a number of sponsors. Given the scale of the largest AAFs and the DC plans to which they are offered, inclusion in even just one such fund has the potential to provide sponsors with exposure to significant additional capital.

Preparing for the Expansion into DC

Private fund sponsors have long sought to expand the universe of their potential investors to include retail capital. The executive order has brought that goal one step closer to reality. Under more permissive regulatory treatment, AAF managers will be less constrained from including private fund exposure in their funds. By working with AAF managers and plan fiduciaries, private fund sponsors may be able to bring in DC subscriptions alongside the institutional investors that have traditionally comprised their funds. Threading this needle has the potential both to unlock substantial new pools of capital and to provide retirement investors private markets access long enjoyed by institutional investors.

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Trademark Monitoring: An Ounce of Prevention


Megan K. Bannigan
Partner


David H. Bernstein
Partner


Christopher S. Ford
Counsel


Jared I. Kagan
Counsel


Kate Saba
Counsel


Daniel N. Cohen
Associate

Strong trademarks and brands often represent a significant portion of enterprise value and can be critical levers at exit for sponsors and portfolio companies. Yet, sponsors and portcos sometimes treat brand protection—one of the most direct ways to preserve that value—as an afterthought, reacting only after issues arise. Instead, proactive brand protection should be a regular part of a company's operations.

Ongoing trademark monitoring and domain name monitoring are important elements of a proactive brand protection strategy. Monitoring solutions are relatively straightforward to implement, and, when executed properly, act as early-warning systems by scanning for potential risks to the business (and its customers); surfacing would-be infringement that can be nipped in the bud before it develops into a costly dispute; and enabling timely, efficient responses that protect exclusivity and enhance brand equity.

Below, we outline what trademark monitoring and domain name monitoring entails, the risks of failing to implement effective monitoring, the business considerations supporting implementation, and practical guidance for sponsors and portfolio companies seeking to build or strengthen trademark and domain name monitoring programs.

Trademark and Domain Name Monitoring Systems

Trademark monitoring can be set up with commercial watch services (such as Corsearch, CompuMark or Markify) to identify new third-party trademark filings or uses that may conflict with a company's existing marks. Brand owners can configure "watch terms"—for example, their house mark, product names or close variations—which serve as the basis for the monitoring program. These services then aggregate data from the U.S. Patent and Trademark Office (USPTO) and foreign registries, as well as state trademark registries and business name filings, online marketplaces, app stores and social media platforms, and compare that data against the watch terms to identify third-party uses similar to the watch terms.

When a potentially confusing mark or use is identified, the system alerts the brand owner, which enables the brand owner to make early, informed decisions about next steps. Responses might include opposing an application, initiating a cancellation proceeding or sending a cease-and-desist letter.

Domain name monitoring services (such as MarkMonitor or Corsearch) perform a parallel function. They continuously scan new domain name registrations across generic top-level domains (gTLDs) such as .com, .net or

.biz, as well as in country code top-level domains (ccTLDs) such as .co, .tv, .us, .uk, .de and .cn, to detect domains that mimic or misspell a brand's existing names (e.g., "Facebok.pw" or "WEIISFARG0.com"). When flagged, brand owners can act promptly. Possible responses include informal resolution, formal action under the Uniform Domain-Name Dispute-Resolution Policy (UDRP) or Uniform Rapid Suspension System (URS), or a litigation under trademark laws or the Anticybersquatting Consumer Protection Act (ACPA).

Both trademark and domain name monitoring services are generally low-cost and priced on a per-term basis. When used proactively, they can prevent potentially substantial downstream expenses.

Legal and Business Risks of Failing to Monitor

Failing to monitor trademarks and domain names may expose a company to significant legal and commercial risk, from diminished enforceability to reduced exit valuations. It can also affect goodwill and reputation if consumers blame the company for allowing them to be defrauded by an infringing mark or deceptive domain name.

Delay and Acquiescence. A company that neglects to police its marks may find it difficult to enforce rights to those marks later. Courts may find that a rights holder "slept on its rights," limiting available remedies. Regular monitoring and prompt enforcement help ensure that trademark claims remain viable.

"Crowded Field" Evidence. One of the most potent arguments a brand owner can make in litigation against a similar mark is that the similar mark is likely—or already has—led to "consumer confusion" in the marketplace. However, if defendants can counter that the market is already saturated with similar marks, that weakens the distinctiveness of the asserted mark and thus makes it more difficult for a brand owner to argue that a third party's similar mark could lead to consumer confusion. A proliferation of marks that are confusingly similar to a brand owner's mark can narrow the scope of protection and may make enforcement more challenging as time goes on. Proactive monitoring and action can help preserve exclusivity, minimize the number of similar third-party marks and thus reduce the effectiveness of a "crowded field" argument by a potential infringer.

Difficulty Proving Secondary Meaning. When people speak of a "registered trademark," they generally mean a mark on USPTO's Principal Register. The USPTO also maintains a Supplemental Register for descriptive marks that are not associated with a single source; the Supplemental Register provides more limited rights than the Principal Register.

However, with sufficient usage over time, a descriptive mark can acquire distinctiveness or secondary meaning. When that happens, a brand owner can apply to move the mark to the Principal Register. (A well-known example of a mark that made such a move is "Best Buy.")

Failing to monitor trademarks and domain names may expose a company to significant legal and commercial risk, from diminished enforceability to reduced exit valuations.

Enforcement history is one factor the USPTO considers when evaluating whether a mark has achieved secondary meaning. Companies that fail to monitor or enforce against unauthorized use may face an added hurdle in trying to demonstrate that their marks have acquired distinctiveness, limiting the scope of their protection and overall value.

Fraud Risk. Malicious actors regularly use domain names similar to those of established businesses when seeking to defraud customers or phish employees as the start of a cyberattack. Similar domain names can also be used in fraud attempts targeting various aspects of fund operations, including LPs, sponsors and portfolio companies or their customers. Fraud that is successful may not only harm a company's customers but may also harm the company's reputation if the company's lax trademark enforcement allowed the fraud to proliferate. Proactive monitoring can spot these issues quickly and make it more difficult for fraudsters to succeed.

Diligence Discounts. During exit, acquirers may discount valuations if diligence reveals weak trademark enforcement. Overlapping marks or unmonitored domain names can signal risk, rebrand costs or future disputes—all of which may reduce a buyer's offer.

The legal and business risks of failing to monitor trademarks are not theoretical. Consider the following real-world, anonymized client examples:

- **Failure to Monitor Foreign Use.** Company A registered trademarks for its brand in the United States but not abroad. Consequently, it did not monitor foreign use. A potential acquirer during due diligence discovered several identical marks in foreign markets, which reduced Company A's brand value and complicated the transaction.
- **Failure to Monitor Foreign Registration.** Private Equity Sponsor A does fundraising in various countries outside the United States but did not monitor trademark registrations in European countries. A competing private equity company adopted and registered the same name in one of those countries. Sponsor A only became aware of the registration years later, when confusion arose during a fundraising period, but by then the competing company had years of use and substantial goodwill, which severely limited Sponsor A's ability to challenge the infringing use of its name. (This example underscores the fact that sponsors should ensure that their own marks are monitored as well.)
- **Failure to Monitor U.S. Registrations Based on Foreign Rights.** Company A owned a U.S. trademark for a beverage. Company B, which held similar rights abroad, later registered in the U.S. based on its foreign registration. Because Company A failed to monitor USPTO filings, it missed Company B's application and did not learn about it until years later. When Company A finally learned about Company B operating in the United States, its position was significantly weakened when it finally brought suit.
- **Failure to Monitor Common Names.** Company A's product developed a popular colloquial name distinct from its registered mark. The company monitored only its official brand name, missing use of the colloquial term by a former customer who launched a competing product. The oversight led to expensive litigation that could have been avoided through broader monitoring parameters.

The Business Case for Proactive Monitoring

In addition to mitigating legal exposure, proactive monitoring also delivers tangible business benefits:

Low-Cost Resolution. Timely discovery of potential infringements allows for swift, inexpensive enforcement—often through a cease-and-desist letter, opposition proceeding or UDRP complaint—rather than costly federal litigation.

Preservation of Exclusivity and Brand Equity. Regular enforcement helps maintain a mark's distinctiveness and commercial value, protecting a key intangible asset that factors heavily into diligence and valuation.

Stronger Position at Exit. Demonstrating consistent monitoring and enforcement during diligence gives sponsors and portfolio companies a credible basis to counter buyer concerns about IP risk and valuation.

Practical Guidance for Implementation

Establishing an effective monitoring program requires thoughtful design and disciplined execution. The following practices can help sponsors and portfolio companies build scalable, value-preserving systems:

Create a Trademark Inventory and Implement Tiered Monitoring. Develop a complete inventory of all trademarks—registered and unregistered—along with slogans, logos, trade dress and domain names. Assign monitoring "tiers" based on importance and risk: core marks may receive global, continuous monitoring, while secondary marks can be monitored periodically or within specific geographic regions. When compiling watch terms, be sure to include similar terms and colloquial names that might have developed organically in the marketplace.

For sponsors and portfolio companies, the business case is clear: proactive monitoring helps detect potential infringements early, reduces enforcement costs and strengthens brand exclusivity and valuation.

Develop Templates. Standardize enforcement documents—such as cease-and-desist letters, Trademark Trial and Appeal Board oppositions and UDRP complaints—so they can be deployed quickly with minimal customization for any given at-issue mark. This reduces response time and overall cost.

Document and Centralize Enforcement Records. Maintain detailed records of enforcement actions and outcomes. Centralized documentation supports consistency, facilitates future diligence and helps demonstrate successful policing if litigation arises. At the time of exit, centralized records can more easily be gathered into a data room and will help make due diligence more efficient.

Take a Measured Approach. Not every similar mark warrants enforcement. Over-asserting rights can dilute credibility. Focus on uses that are truly confusingly similar and that overlap with the company's goods or services.

Conclusion

Trademark and domain name monitoring are, at their core, forms of asset management designed to protect and enhance brand value. For sponsors and portfolio companies, the business case is clear: proactive monitoring helps detect potential infringements early, reduces enforcement costs and strengthens brand exclusivity and valuation.

A centralized, disciplined monitoring program—guided by the practical steps above—provides repeatable, scalable protection across a portfolio. In an environment where buyers scrutinize IP diligence and opportunistic actors move quickly, trademark and domain monitoring represent a low-cost, high-reward investment that should be an integral part of every portfolio company's brand management strategy.

Debevoise & Plimpton

Key Governance Considerations in PIPE Transactions


Christopher Anthony
Partner


Uri Herzberg
Partner


Eric T. Juergens
Partner


Gordon Moodie
Partner


Amy Pereira
Associate

Private investment in public equity (PIPE) transactions can be a fast and cost-effective way for companies to raise capital relative to other options—and can present an attractive investment opportunity for private equity funds. However, sponsor-backed PIPEs can raise a number of key governance issues that need to be carefully negotiated. The governance rights afforded to the sponsor typically reflect the anticipated length and nature of the relationship between the sponsor and the issuer, as well as the size of the sponsor's investment in the issuer, and may implicate SEC regulations, stock exchange rules and state laws. Below are nine key governance issues that regularly arise in sponsor-backed PIPEs.

1. **Is the Issuance of Securities Authorized Under the Charter?** At the outset of a PIPE transaction, the sponsor should confirm with the issuer that it has sufficient authorized but unissued common stock to consummate the transaction or, if it is issuing a different type of security (such as preferred stock), that such security is authorized to be issued under the issuer's certificate of incorporation. Where the charter includes "blank check" preferred, the board may designate a new series by resolution, and sponsors should confirm whether a separate class vote is required if terms could adversely affect existing classes and that the share reserve covers the full as-converted amount. If sufficient shares are not available, or the type of security being contemplated is not authorized, the issuer would need to seek stockholder approval to amend its charter, which can have significant timing and structural implications for the transaction.
2. **Are There Contractual Limitations to Be Considered?** The structuring of the PIPE transaction must take into account limitations under the issuer's existing debt and other senior securities, such as restricted payments limitations, incurrence tests and change-of-control definitions tied to voting power that a PIPE could inadvertently trigger. There may also be other contractual agreements that place limitations on the terms of the PIPE, including by restricting dividend rights, redemption provisions or conversion features. The sponsor should confirm with the issuer that the structure of the PIPE is permitted under the agreements to which the issuer is a party. Where the investor or its upstream owner is a non-U.S. person, and the investment includes a board/observer or broad information rights, the parties should also consider whether CFIUS review is advisable.
3. **Are Board Representation Rights Desired?** In many cases, the sponsor will negotiate the right to minority or proportional board representation. Board observer rights may also be granted, either in addition to or instead

of board representation. Typically, board representation rights fall away if the sponsor's ownership interest falls below a certain negotiated level. Depending on the issuer's charter, a sponsor-appointed director may be directly appointed to the board by a resolution of the board at closing, or that person may need to be nominated and approved by the issuer's stockholders at the next annual stockholder meeting. Board representation can provide sponsors with greater access to information and the ability to influence the strategic direction of the issuer, but representation also brings with it fiduciary duties and potential liability for the director. Sponsors and issuers should also align on committee participation, observer NDAs and MNPI management/cleansing processes. If the sponsor has portfolio companies that arguably compete with the issuer, Section 8 of the Clayton Act regarding overlapping directors should also be considered.

4. **What Voting and Consent Rights Are Required?** Sponsors are sometimes granted consent or veto rights over certain corporate actions. In the context of PIPE transactions, these rights are typically limited to protecting the economic and structural position of the investment. For example, sponsors may have the right to veto amendments to organizational documents that would adversely affect their preferred equity or violate the certificate of designations, or to veto the issuance of new preferred equity that is senior to or pari passu with their own.

5. **Is the Issuer Requesting a Standstill or a Lockup?** Nearly all PIPE transactions include a "standstill" period during which the sponsor and its affiliates are prohibited from making unsolicited bids and open-market purchases of the issuer's securities. The standstill period is often the longer of (i) a fixed period following the closing and (ii) a period following the expiration of board nomination or observer rights.

The issuer typically negotiates a "lockup" period during which the sponsor is prohibited from transferring the issuer's securities for a specified period following the closing of the PIPE transaction. The lockup is designed to protect the market price of the issuer's stock and ensure alignment on a longer-term investment. Lockup periods generally range from 12 to 24 months but may vary depending on deal terms. In some cases, the lockup may permit the staggered release of securities for resale over time.

6. **What Information Rights Does the Sponsor Require?** The issuer may grant the sponsor certain information rights, the scope of which can vary depending on the size of the sponsor's investment and whether it has board representation. Because the sponsor is acquiring securities in a public company, the information rights granted in a PIPE transaction are generally narrower than those in private company financings since much of the issuer's information is already publicly disclosed through SEC filings.

7. **Is Stockholder Approval Required?** A key question to be answered in connection with structuring a PIPE transaction is whether stockholder approval under stock exchange rules is needed for the issuance.

A key question to be answered in connection with structuring a PIPE transaction is whether stockholder approval under stock exchange rules is needed for the issuance.

Two rules in particular warrant close attention:

The 20% Rule: Under stock exchange rules, stockholder approval is required for any issuance of 20% or more of the common stock (or securities convertible into or exercisable for common stock) or voting power outstanding prior to the issuance, in any transaction other than a public offering, that is for less than the lower of: (i) the closing price of the common stock immediately preceding the transaction or (ii) the average closing price of the common stock for the five trading days immediately preceding the transaction. If the PIPE is being

issued in connection with an acquisition, and the potential issuance size exceeds the 20% pre-issuance threshold, stockholder approval is required even where the issuance price exceeds the minimum price threshold. If a PIPE meets the exchange's standard for a public offering for cash, the 20% rule will not apply. However, where a single sponsor or a small group of sponsors provides the funding, the transaction will typically not qualify as a public offering for cash and thus will remain subject to the 20% approval requirement.

If the purpose of the funding allows, sponsors may structure their investment in two steps: a 19.9% or less tranche that can close immediately, and the balance contingent upon obtaining stockholder approval. Alternatively, sponsors making a convertible preferred stock investment that would otherwise require a stockholder vote may agree to cap conversion and as-converted voting of the preferred stock at 19.9% until the stockholder vote is obtained. However, utilization of a conversion cap to avoid shareholder approval must be structured in a manner that complies with stock exchange listing rules and doesn't run afoul of state corporate law requirements. Counsel should be consulted if a conversion cap is being considered to avoid the need for a shareholder vote prior to the closing of a PIPE investment.

When determining whether a change of control will occur, the exchanges will look to all facts and circumstances surrounding the transaction.

Change of Control: Stockholder approval will be required if the transaction is of sufficient size to constitute a "change of control" under stock exchange rules—even in situations where a sponsor may not view the investment as a traditional control transaction. When determining whether a change of control will occur, the exchanges will look to all facts and circumstances surrounding the transaction. NYSE guidance suggests that change of control is typically a concern when the transaction results in an investor or group reaching 35-40% ownership. Nasdaq, on the other hand, considers a change of control to occur when, as a result of the issuance, an investor or a group would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or voting power, and such ownership or voting power would be the largest ownership position.

In addition, certain related party transactions may require stockholder approval under the stock exchange rules.

8. **What Is the Path to Liquidity and Exit?** A critical consideration for the sponsor is how to secure liquidity and how, in time, an exit will be effectuated. A sponsor will often seek registration rights in the form of (i) demand registration rights requiring the company to register the sale of acquired shares pursuant to a resale registration statement and (ii) piggyback registration rights that allow the sponsor to join in a registered primary offering by the company or a secondary offering by other company stockholders.

   In the absence of registration, the most commonly used exemption for the resale of securities by investors is Section 4(a)(1) of the Securities Act of 1933, as amended. To ensure the availability of the Section 4(a)(1) exemption, an investor selling "restricted" securities (i.e., securities acquired in unregistered transactions) or "control" securities (i.e., securities held by an affiliate of the issuer) will typically seek to comply with the relevant provisions of Rule 144 of the Securities Act. However, it is important to remember that Rule 144 precludes the sale of restricted securities during the applicable holding period (which is either six months or one year, depending on

the relevant facts) and subjects the sale of control securities to volume and manner of sale limitations.

Restricted or control securities may be resold pursuant to a different exemption from the registration requirements of the Securities Act. However, reliance on any such exemption limits the pool of potential investors to institutional and certain sophisticated investors and frequently causes purchasers to demand a "liquidity discount" on the purchase price since the securities will remain restricted in the hands of the purchaser.

9. **What Are the SEC Filing Obligations?** Sponsors should be prepared to comply with SEC disclosure requirements following the closing of a PIPE transaction. If the sponsor acquires beneficial ownership of more than 5% of a class of the issuer's registered equity securities, it will become subject to ongoing reporting requirements under Section 13 of the Securities Exchange Act of 1934, as amended, and the sponsor must file a Schedule 13D or, in certain limited circumstances, a Schedule 13G. Recent amendments have accelerated certain 13D/13G timelines and clarified amendment timing. Coordination between investor and issuer counsel is important where voting/support agreements, derivatives or cooperation terms could affect "group" analysis or the choice between a Schedule 13D and a Schedule 13G.

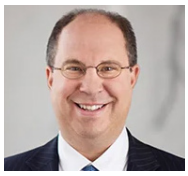
If the sponsor acquires beneficial ownership of more than 10% of a class of the issuer's registered equity securities, it will also become subject to Section 16 of the Exchange Act. Section 16 imposes ongoing reporting obligations, including the filing of an initial Form 3 and subsequent Form 4s to report changes in ownership, as well as liability for the disgorgement of any "short swing" profits within a six-month period.

Finally, the election of a director to the issuer's board may trigger separate SEC disclosure obligations for the issuer and for the director. The sponsor should confirm with the issuer that all such director filings will be handled by the issuer.

Debevoise & Plimpton

Advertising Self-Regulatory Body Sets Its Sights on Private Equity Healthcare and Consumer Product Portfolio Companies

David H. Bernstein
Partner



Paul D. Rubin
Partner

Jared I. Kagan
Counsel

Melissa Runsten
Counsel

Private equity portfolio companies are a growing area of focus for the BBB National Programs' National Advertising Division (NAD), the U.S. advertising industry's self-regulatory body. As addressed below, within the last six months the NAD has ruled on at least two cases challenging private equity-backed portfolio companies, and the NAD has announced that it will continue to pursue appropriate cases against PE portfolio companies.

The NAD seeks to ensure that advertising claims are truthful and accurate for consumers, thus promoting fair competition for advertisers. The NAD assesses the truth and accuracy of claims made in national advertising in response to challenges by competitors, as well as through inquiries opened on its own initiative (known as "monitoring cases"). While NAD itself does not have enforcement capabilities, most companies voluntarily comply with NAD recommendations because noncompliance will lead to a referral to the Federal Trade Commission (FTC) or Food and Drug Administration (FDA) for investigation and enforcement.

The NAD believes private equity would benefit by understanding the role and function of the NAD for two interrelated reasons. First, private equity portfolio companies may take advertising risks that could subject them to NAD challenge, and PE firms should be aware of this possibility and the potential consequences (including discontinuation of claims or referrals to the FTC or FDA). Second, portfolio companies may benefit from bringing their own NAD challenges against competitors for false or misleading advertising.

At the NAD's 2025 Annual Conference, NAD Director Phyllis Hurwitz Marcus said she expects the NAD to expand its work with private equity firms in the coming years. Although the NAD is not specifically targeting private equity firms or portfolio companies and in fact does not take private equity ownership into account when choosing its own monitoring cases, the NAD does expect more cases in this area as portfolio companies become more active in the advertising space.

The NAD has recently focused its internal monitoring efforts on advertising claims for products and services related to artificial intelligence, financial services and healthcare, which are also areas in which private equity firms

have been active. Additionally, various pharmaceutical companies have filed NAD challenges against advertising disseminated by compounding pharmacies, particularly those marketing GLP-1 medications or other weight loss products. We provide additional details on these hot-button areas below.

- **Artificial Intelligence (AI):** The NAD employs a full-time attorney focused on monitoring artificial intelligence claims, which it views as ripe for oversight because consumers often cannot evaluate the truthfulness of the claims themselves. In recent cases, the NAD has focused on misrepresentations of AI capabilities, availability or timing of features, and lack of adequate disclosures. For example, in an April 2025 monitoring case, the NAD found a company's "Available Now" claims misleading where some AI-powered features were not actually live at launch. The NAD recommended that the company modify or discontinue those claims and improve disclosures.

  In a separate May 2025 monitoring case, the NAD evaluated claims for an AI-powered digital assistant product. The NAD determined that certain express functionality claims—for example, that the digital assistant can "synthesize and summarize large amounts of data"—were adequately supported, but it flagged other marketing statements as misleading. The NAD recommended that the company qualify or discontinue claims implying seamless cross-app functionality (e.g., "working seamlessly across all your data") and productivity claims (e.g., "67 % … of users are more productive") that lacked sufficient support.

- **Financial Services:** Recent cases underscore the principle that claims made for financial products or services (e.g., those used in fintech, investment services or lending) must be grounded in robust substantiation, avoid overstated qualifiers like "lowest" or "best" and include clear, consumer-friendly disclosures that explain limitations or assumptions. In a September 2025 case, for example, the NAD reviewed a competitor's challenge to a fintech company offering 401(k) plans and retirement plan software. The competitor challenged a claim of "~$140 million ARR," arguing the claim could mislead readers because its calculation included subscription fees, AUM revenue, and backlog bookings—reflecting a practice that is not commonly accepted. The NAD found the company's claim was not improper but said the claim needed a clear disclosure explaining how the figure was derived.

- **Healthcare:** The NAD generally takes a strict, evidence-based approach to healthcare and wellness claims, requiring that advertisers possess competent and reliable scientific evidence—often well-controlled human clinical studies—before making claims about a product's health-related benefits. The NAD closely scrutinizes both express and implied health claims, particularly those suggesting long-term health benefits, "clinically proven" results or disease prevention outcomes. For example, in an August 2025 monitoring case, the NAD challenged claims made by a company offering executive physicals, including claims that clients can "live the longest, most fulfilling life" and that the service ensures a longer, disease-free life. The NAD concluded that the company did not present sufficient reliable scientific evidence in support of the claimed health benefits, including the early detection of serious diseases. The NAD recommended discontinuation or modification of the claims; after the company declined to submit a statement of intent to comply, the case was referred to the FTC.

> The NAD has recently focused its internal monitoring efforts on advertising claims for products and services related to artificial intelligence, financial services and healthcare, which are also areas in which private equity firms have been active.

The NAD is also fielding challenges regarding compounded peptide and weight-loss drug claims, typically prompted by major pharmaceutical companies seeking to ensure fair competition and consumer clarity in the rapidly expanding compounding market. For example, one company challenged a compounding pharmacy over claims for its compounded tirzepatide product, alleging that the pharmacy's marketing overstated safety and efficacy and implied equivalence to FDA-approved GLP-1 medications. The pharmacy chose to voluntarily discontinue the claims before a full NAD review took place. Similar cases have been brought by different pharmaceutical companies against other compounding pharmacies.

In addition to NAD actions in the PE-intensive industries described above, there have been at least two recent cases involving established companies bringing advertising challenges against smaller PE-backed enterprises. In a June 2025 challenge brought by a bottled water trade association, the NAD determined that a PE-backed company that markets and sells purified water in plant-based cartons provided a reasonable basis for its claims regarding recyclability, tree planting and certain environmental impact. However, the NAD recommended that the company modify or discontinue other claims related to renewable materials and sustainable sourcing.

In an April 2025 case, a prominent consumer product company challenged claims made by a PE-backed oral care company. NAD recommended that the PE-backed company discontinue certain teeth remineralization, teeth whitening and mouthwash claims on the grounds that the company did not possess the necessary evidence to support the claims. The company appealed the NAD decision to the National Advertising Review Board (NARB), the appellate body for NAD. NARB largely upheld NAD's findings, recommending that the company discontinue its remineralization, whitening and prebiotic ingredient "fresher breath" claims because the company lacked competent and reliable scientific support (e.g., no testing of its own formulated products, no causal connection shown) and because neither the FDA nor the American Dental Association supported the applicable claims. The PE-backed company publicly stated that, though it "strongly disagrees" with the NARB's conclusions, it will comply with the ruling while continuing to invest in research.

For private equity firms and portfolio companies, NAD serves as both a risk management tool and competitive lever. Its decisions spotlight evolving standards for advertising, helping sponsors anticipate regulatory exposure across portfolio companies. Just as importantly, NAD's challenge process provides a low-cost, strategic avenue to contest misleading claims by competitors, leveling the playing field and protecting portfolio value. Integrating NAD awareness into diligence and compliance can enhance both brand integrity and exit preparedness.

About the Debevoise Private Equity Group

A trusted partner and legal advisor to a majority of the world's largest private equity firms, Debevoise & Plimpton LLP has been a market leader in the Private Equity industry for over 40 years. The firm's Private Equity Group brings together the diverse skills and capabilities of more than 500 lawyers around the world from a multitude of practice areas, working together to advise our clients across the entire private equity life cycle. The Group's strong track record, leading-edge insights, deep bench and commitment to unified, agile teams are why, year after year, clients quoted in *Chambers Global, Chambers USA, The Legal 500* and *PEI* cite Debevoise for our close-knit partnership, breadth of resources and relentless focus on results.

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