Debevoise & Plimpton

The Private Equity Report Quarterly

Spring 2026 | Volume 26, Issue 1

From the Editors

While the private equity industry is operating under more favorable conditions than in recent years, sponsors must continue to adapt to an environment shaped by regulatory fragmentation, technological disruption and ongoing innovation in fund structures and dealmaking. The Spring 2026 issue of the Private Equity Report explores these dynamics in depth, offering practical insights on developments spanning merger control, tax reform, AI-related risk, secondaries, insurance partnerships and evolving product structures across global markets.

Same Asset, New Vehicle, Old Duties: Fiduciary Duty Risks in Continuation Vehicle Transactions

Continuation vehicle transactions are drawing increasing scrutiny as conflicts inherent in sponsor-led secondaries come into focus. Emerging litigation and investor challenges suggest that LPAC approval alone may not suffice, prompting sponsors to adopt more robust disclosure and procedural safeguards to mitigate fiduciary duty risk.

The Operating Company Model: A Different Path to Private Markets in Private Wealth

The operating company model offers sponsors a flexible pathway to provide private-wealth investors access to private markets outside the 1940 Act regime. But maintaining that status requires careful structuring, asset classification and ongoing monitoring to avoid inadvertently triggering investment company regulation.

EU Regulatory Reform Jumpstarts Evergreen Funds

Reforms under ELTIF 2.0 are driving rapid growth in evergreen fund structures across Europe, expanding access of retail investors to private markets. But while these vehicles offer distribution advantages and flexibility, they also introduce liquidity, regulatory and structuring challenges that sponsors must carefully manage.

Navigating Your Strategic Relationship with an Insurer, from LOI to Effective Date

Strategic relationships between life and annuity insurance companies and private equity firms meet the complementary strategic needs of both sides. However, translating the commercial understanding into a structured transaction requires balancing a number of complex legal, business and regulatory risks.

The Chaotic State of U.S. Merger Control

Recent shifts in U.S. merger control have created a rapidly evolving and uncertain landscape for dealmakers. With expanded—and now vacated, if only temporarily—HSR requirements, new defense-related notification obligations, and emerging state-level "mini-HSR" regimes, sponsors must navigate a more fragmented and dynamic premerger review process.

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What's Inside

Navigating the UK's New Carried Interest Tax Regime

The UK's new carried interest regime introduces a trading-based tax framework that increases complexity for sponsors and carry holders. New rules on qualifying carry, cross-border application and advance tax payments add compliance, structuring and cash-flow considerations across fund strategies.

Protecting Privilege in Cyber Incident Response: Key Lessons from Litigation

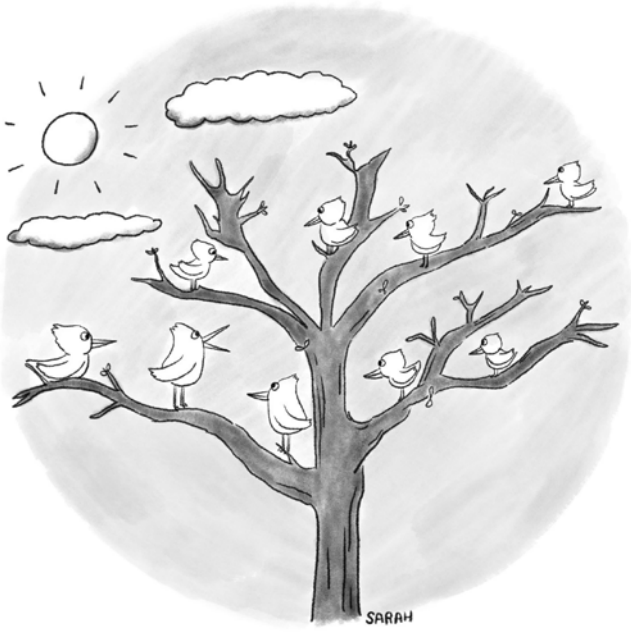
Whether incident response investigations conducted by third-party vendors are protected from discovery often depends on a court's analysis of a number of factors in the relationships between the vendor, the company and counsel. Advance awareness of the issues courts examine can help a company's in-house counsel keep investigations privileged.

AI Washing: The Latest False Advertising Battleground

Companies are increasingly relying on AI-related claims in their marketing and other materials, drawing the scrutiny of regulators and private plaintiffs. For private equity sponsors, a portfolio company's AI washing can create diligence, governance and exit risks, making careful substantiation of AI capabilities and marketing claims essential throughout the investment life cycle.

Deal Risks in the New Space Race

As private equity investment accelerates in the commercial space sector, sponsors must navigate divergent EU and U.S. regulatory regimes. Evolving rules on authorization, security and operations heighten diligence demands, making early, cross-border compliance planning critical to managing risk, costs and long-term value creation.



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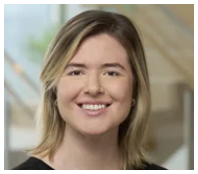

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This report is a publication of
Debevoise & Plimpton LLP

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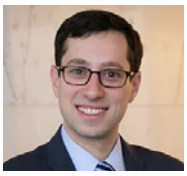
Same Asset, New Vehicle, Old Duties: Fiduciary Duty Risks in Continuation Vehicle Transactions



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Introduction

Continuation vehicle (CV) transactions have become a prominent feature of private equity, drawing attention from limited partners, regulators, courts and the financial press. Despite that focus, few have paid adequate attention to the conflicts that may arise due to the transaction structures and how those conflicts implicate fiduciary duties. This article addresses those issues directly, surveying emerging critiques of CVs and a recent Delaware dispute to highlight the fiduciary duty issues that could shape these transactions in the future.

Emerging Critiques of CV Transactions

CV transactions have grown substantially in both number and scale over the past decade, with an estimated $100 billion in these transactions through 2025. This growth has prompted questions about whether CV transactions reflect broader economic inefficiencies in private equity and whether the pursuit of a CV transaction is, at least sometimes, guided by considerations other than maximizing returns for a fund's original LPs, or whether they are simply another useful tool for sponsors and LPs to extend strong investments. CV skeptics have asked whether the sponsor can be on both sides of the deal—selling the asset from the legacy fund and acquiring it through the continuation vehicle—and have charged that such transactions sometimes use questionable valuations or unrealistic projections that benefit the sponsor to the detriment of the original investors. Proponents argue that these transactions are subject to meaningful market checks and investor protections, including LPAC approval, third-party validation and the ability of investors to exit at a negotiated price.

In addition to defending CV deals as a useful tool for ongoing investment, private equity sponsors have responded to CV critiques by emphasizing procedural safeguards and investor choice. For a conflicted transaction to proceed, fund limited partnership agreements (LPAs) typically require the consent of the LP advisory committee (LPAC). Investors are also able to scrutinize the portfolio company's financials and assess the cash-out price. Accordingly, proponents of CV transactions argue that if investors do not believe the particular investment presents sufficient upside potential even after the LPAC approves the transaction, they can always cash out.

Historically, investors have appeared to side with the proponents of CV transactions, participating in a significant uptick in deal volume and number and rarely, if ever, challenging CV transactions in court. To the extent there have been disputes, sponsors and dissenting LPs have settled without resort to public litigation. However, recent developments suggest that might be changing. Even with the procedural protections most CVs offer, LPs may be less willing to accept, and more willing to challenge, sponsor-driven secondary transactions that they perceive as unfair even where an LPAC signs off on the transaction.

If LPs become more aggressive in challenging CV transactions, we expect them to rely on a combination of contractual rights and fiduciary principles as the bases for their objections. Contractually, LPs may look to LPAC approval rights, disclosure obligations and consent mechanisms required by fund LPAs to challenge whether the LPAC approval was obtained in accordance with contractual obligations. LPs may also increasingly turn to fiduciary duty principles to challenge CV transactions they believe were structured unfairly or when they believe the sponsor is on both sides of the transaction and is receiving a non-ratable benefit, as we explore below.

Fiduciary Duties in CV Transactions: ADIC v. EMG

When a controlling shareholder stands on both sides of a transaction, Delaware courts typically apply the "entire fairness" standard of review, a fact-intensive inquiry examining both fair dealing (the approval process) and fair price (the economic terms). In a recent first-of-its-kind dispute, an LP argued that this standard should apply in the CV context. *ADIC v. EMG*, No. 2025-1389-NAC (Del. Ch. Dec. 3, 2025) Dkt. No. 1 (Verified Complaint for Preliminary Injunction in Aid of Arbitration). Abu Dhabi Investment Council (ADIC) filed suit in Delaware against Energy & Minerals Group (EMG) seeking to stay a CV transaction aid in arbitration, as required by the LPA. Although the arbitration was confidential, ADIC's public filings provide insight into how an LP might challenge an LPAC-approved transaction.

Continuation vehicle (CV) transactions have become a prominent feature of private equity, drawing attention from limited partners, regulators, courts and the financial press.

ADIC's challenge focused on the conflicted nature of the transaction. ADIC alleged that EMG proposed to sell a fund asset to an EMG-sponsored CV and would benefit from the transaction, including through a reset of carried interest and management fees. The transaction offered no true "status quo" option—rolling investors would be subject to the CV's terms and could not maintain their exposure on the same terms as the legacy fund. EMG also imposed a cap on rolling participation.

Because EMG was on both sides of the transaction, LPAC approval was required under the LPA. However, ADIC alleges this was secured through a flawed process. According to the complaint, EMG rushed an initial failed vote without furnishing key information, then solicited consents individually from LPs, providing inconsistent information to different LPs, discouraging communication among LPs and refusing requests for additional projections. One LPAC member later purportedly rescinded its approval after receiving additional information. Id. Dkt. No. 54 (Brief in Support of Preliminary Injunction).

ADIC also alleged that the disclosures to LPs contained misrepresentations and omissions about the fund asset's valuation and prospects and were inconsistent with information provided to prospective CV investors.

The parties ultimately stipulated to dismiss the action after an arbitrator found in favor of EMG in a nonpublic proceeding, *id.* Dkt. No. 60 (Granted Stipulation and [Proposed] Order of Dismissal with Prejudice). The case nevertheless underscores the litigation risk associated with CV transactions and the limits of relying solely on LPAC approval and investor election mechanics to guard against claims of unfairness.

The conflicts that can arise out of continuation vehicle transactions are likely to attract scrutiny from investors, regulators and, increasingly, courts.

More Robust Procedural Protections May Protect CV Transactions from Scrutiny

ADIC v. EMG suggests that LPAC approval alone may not, in all cases, cleanse conflicts in CV transactions or resolve investor concerns. A motivated LP could argue that LPAC approval was not obtained in accordance with the LPA, rendering it contractually ineffective. Such claims would likely rely on the implied covenant of good faith and fair dealing, arguing that a sponsor cannot obtain LPAC approval through dishonest means and thereby defeat the purpose of that safeguard. The claim might allege that the LPAC's decision was not fully informed due to withheld information or not independent due to sponsor pressure.

In advancing these arguments, an LP would likely draw on fiduciary duty principles developed in the shareholder litigation context. In that context, a conflicted transaction can be "cleansed" by an informed vote by a majority of disinterested shareholders. Even where such vote is obtained, plaintiffs often challenge it as uninformed. If the LPA does not waive fiduciary duties, a motivated LP could also invoke background fiduciary duty law to seek entire fairness review, forcing the sponsor to argue that such a standard does not apply.

Practical Guidelines for Sponsors

The conflicts that can arise out of continuation vehicle transactions are likely to attract scrutiny from investors, regulators and, increasingly, courts. While *ADIC v. EMG* did not result in a public merits decision, the allegations and broader Delaware trends highlight several practical considerations related to these transactions:

Assess conflicts early in any potential CV transactions. Sponsors should be aware that these transactions may be evaluated as self-dealing and structure the process accordingly, keeping in mind existing Delaware jurisprudence on controller transactions.

Prioritize clear, consistent and timely disclosure. Sponsors should ensure that all material information, particularly regarding valuation, process and sponsor incentives, is disclosed fully and consistently across investor groups, with sufficient time for evaluation.

Ensure the investor election is meaningful. The choice between liquidity and rollover should be real in practice. Sponsors should carefully consider whether caps, differential economics or transaction timing could be viewed as pressuring investors toward a particular outcome.

Implement a disciplined and well-documented process. LPAC engagement should be structured, timely and supported by adequate information. Sponsors should document decision-making carefully and avoid ad hoc or informal vote solicitation practices that could later be characterized as coercive.

Use independent validation mechanisms where appropriate. Fairness opinions, market checks and disinterested approvals can help support the transaction and are most effective when integrated into a broader, credible process.

Although scrutiny of these transactions may be increasing, the collective principles governing their review, including conflict management, disclosure and process, remain familiar.

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The Operating Company Model: A Different Path to Private Markets in Private Wealth

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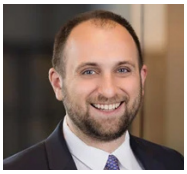

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Introduction

For sponsors seeking to offer private wealth investors access to private markets outside of a fund registered under the Investment Company Act of 1940, as amended, the operating company (OpCo) structure offers a unique access point. The OpCo structure can provide access to a range of asset classes, including private equity, infrastructure and asset-backed assets and flexible economics. An OpCo is structured to fall outside the definition of an "investment company" under the 1940 Act and, accordingly, may provide a greater degree of regulatory flexibility than other structures that either register under the 1940 Act or rely on other exclusions from "investment company" status. This article explains how to utilize an OpCo structure and examines its principal benefits and drawbacks.

To see how OpCos can be structured to fall outside the definition of an investment company, it is necessary to examine the two principal paths in the 1940 Act by which an issuer may be deemed an investment company—and thus, how the issuer might be excluded from such a designation. The first path, Section 3(a)(1)(A), focuses on whether the issuer is primarily engaged in the business of investing, reinvesting or trading in securities, while the second, Section 3(a)(1)(C), looks to whether the issuer holds investment securities in excess of the statutory 40% threshold on an unconsolidated basis. Although the two provisions are related, they address different questions and should be analyzed separately.

Section 3(a)(1)(A): The Primary Engagement Test

Section 3(a)(1)(A) under the 1940 Act defines an "investment company" as any issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities. Determining whether an issuer engages in these activities depends not only on the composition of an issuer's assets but also on the nature of its business and how it presents itself to investors.[1] The primary test used to make this determination was promulgated by the U.S. Securities and Exchange Commission in its decision in Tonopah Mining Co. (26 S.E.C. 426 (1947)), which analyzes the following five factors: (1) an issuer's historical development, (2) its public representations of policy, (3) the activities of its officers and directors, (4) the nature of its present assets and (5) the sources

1. *See, e.g., SEC v. National Presto Industries, Inc.*, 486 F.3d 305 (7th Cir. 2007).

of its present income (together, the "Tonopah Factors"). In the case of an OpCo structure, the threshold question under Section 3(a)(1)(A) is, therefore, whether the issuer is primarily engaged in an operating business, directly or through majority-owned subsidiaries, rather than in the business of investing in securities. That inquiry comes before, and is distinct from, the separate asset-based analysis under Section 3(a)(1)(C), including the 40% test, which we discuss next.

Section 3(a)(1)(C): The 40% Test

Section 3(a)(1)(C) under the 1940 Act defines an "investment company" as any issuer that is engaged, or proposes to engage, in the business of investing, reinvesting, owning, holding or trading in securities and that owns or proposes to acquire "investment securities" having a value exceeding 40% of the value of its total assets (exclusive of U.S. government securities and cash items) on an unconsolidated basis.

Importantly, Section 3(a)(2) provides that the term "investment securities" does not include securities issued by majority-owned subsidiaries of the owner (i.e., where the parent owns 50% or more of the outstanding voting securities) provided that such subsidiaries are not themselves investment companies and are not relying on the exclusions from the definition of investment company in Section 3(c)(1) or 3(c)(7) of the 1940 Act.

OpCo structures take advantage of this "carve out" provided for in Section 3(a)(2) by organizing as holding companies that conduct business through majority-owned subsidiaries, each of which qualifies for an exception from the 1940 Act other than the exceptions in Sections 3(c)(1) and 3(c)(7). The OpCo can utilize this structure to keep its investment securities below 40% of total assets and therefore fall outside the 1940 Act's definition.

An OpCo is structured to fall outside the definition of an "investment company" under the 1940 Act and, accordingly, may provide a greater degree of regulatory flexibility than other structures that either register under the 1940 Act or rely on other exclusions from "investment company" status.

The Asset Classification Framework: Good Basket, Bad Basket

In applying the Section 3(a)(1)(C) 40% test and the definition of "investment securities" in Section 3(a)(2), an OpCo's assets are often grouped into "good" and "bad" baskets. The good basket generally consists of securities issued by majority-owned subsidiaries that are not investment companies and are not relying on Sections 3(c)(1) or 3(c)(7). The bad basket generally consists of securities issued by subsidiaries that rely on Section 3(c)(1) or 3(c)(7), as well as minority equity interests and debt investments that constitute investment securities.

One key implication of this classification framework is that, because the 40% test is applied at the OpCo level on an unconsolidated basis, leverage incurred at the subsidiary level can expand a subsidiary's asset base without necessarily increasing the value of the parent's investment in that subsidiary and therefore may permit growth of the subsidiary's portfolio without a corresponding increase in the parent's bad basket.

Good basket subsidiaries generally qualify for exception from the 1940 Act in one of two ways: due to the type of assets held and due to their form. The following high-level summary of applicable exclusions from the 1940 Act is intended only as a guide and should be considered together with analysis of applicable SEC rules, regulations and guidance.

Asset-Based Exclusions

Section 3(c)(3) and Rule 3a-6—Insurance Companies. U.S. and foreign insurance companies (as defined under the 1940 Act), respectively.

Section 3(c)(4) — Small Loan Companies. A person substantially all of whose business is confined to making small loans, industrial banking or similar businesses.

Sections 3(c)(5)(A) — Purchasers of Sales Financing. Any person who is not engaged in issuing redeemable securities and who is primarily engaged in purchasing or otherwise acquiring "notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price merchandise, insurance, and services."

Sections 3(c)(5)(B) — Originators of Sales Financing. Any person who is not engaged in issuing redeemable securities and who is primarily engaged in "making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services."

Section 3(c)(5)(C) — Real Estate. Any person who is not engaged in issuing redeemable securities and who is primarily engaged in purchasing or otherwise acquiring "mortgages and other liens on and interests in real estate."

Section 3(c)(6) — Holding Company. Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4) and (5) of Section 3(c), or in one or more of such businesses (from which not less than 25% of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding or trading in securities.

Section 3(c)(9) — Energy and Mineral Companies. Any person "substantially all of whose business consists of owning or holding oil, gas or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases or fractional interests."

Form-Based Exclusions

Asset Management Subsidiaries. Companies organized primarily to provide asset management services. (Note that minority ownership of or debt investments in asset managers would not qualify.)

Rule 3a-7 Subsidiaries. Issuers of fixed-income or other non-redeemable securities whose holders receive payments depending primarily on the cash flow from "eligible assets"—financial assets that by their terms convert into cash within a finite time period, including secured and unsecured loans, mezzanine loans, preferred equity with a fixed maturity and CLO debt tranches. The issuer is limited in its ability to buy and sell assets and must engage a trustee.

Benefits and Drawbacks

The OpCo structure offers certain advantages over a fund that is registered under the 1940 Act:

- not subject to 1940 Act restrictions on affiliate transactions, leverage, custody and board composition;
- ability to issue multiple share classes with varied management and performance fee structures, including performance fees on capital gains, by class;
- reporting under the Securities Exchange Act of 1934 only;
- potential freedom from the 25% ERISA limitation on ownership by benefit plans, IRAs, and other tax-exempt investors; and
- access to hard assets (aviation, infrastructure, real estate) and consumer credit strategies (auto loans, student loans, litigation finance, peer-to-peer loans) through a single holding company vehicle.

The drawbacks are:

- Significant investor and intermediary education is required, as the structure is unfamiliar compared to funds registered under the 1940 Act.
- No secondary trading absent an exchange listing; limited liquidity for investors.
- Sales are limited to "accredited investors" absent a Securities Act of 1933 registered offering.
- Subscription agreements are required, and securities are not NSCC eligible, creating distribution friction.
- Continuous structuring and monitoring obligations are required to maintain operating company status at every tier of the structure.

Conclusion

The OpCo structure can be a useful vehicle for sponsors seeking access to alternative asset classes outside of the 1940 Act's regulatory regime. Success requires disciplined entity-by-entity analysis of the 40% test on an unconsolidated basis, careful good/bad basket management and integration of tax efficiency from Day One. The consequences of inadvertently crossing the investment company threshold are severe, and continuous monitoring is essential. For sponsors and their counsel prepared to invest in structuring work, the OpCo framework offers commercial, operational and investor-level flexibility that is harder to replicate in a 1940 Act registered fund.

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EU Regulatory Reform Jumpstarts Evergreen Funds

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Over the past year, evergreen fund structures have seen a notable rise in popularity within the alternative investment space, which has traditionally been dominated by closed-ended partnerships. In the European Union, reforms to the regulatory framework for long-term investment funds aimed at retail investors—known as ELTIFs—have been a key driver of this trend.

Revival of the ELTIF Product Category

Following the market's lukewarm response to the original ELTIF framework, ELTIF 2.0—and the subsequent adoption of regulatory technical standards in October 2024—appears to have successfully revitalized this product category. In 2025, 113 ELTIFs were launched—approximately double the number recorded in 2024 under the original ELTIF framework—with 45 of these adopting semiliquid evergreen structures. Assets under management in ELTIFs grew by more than 50% year on year.

Shift Towards Evergreen Structures

While most ELTIFs remain closed ended, the revised framework explicitly permits evergreen structures. Although the ELTIF market remains fragmented due to local regulatory and tax incentives, Luxembourg continues to be the leading domicile for evergreen funds in Europe, including ELTIFs, and particularly for internationally active sponsors. Other jurisdictions, notably France, Italy and, recently, Spain, have also experienced increased activity in new ELTIF launches.

Facilitating Private Credit Strategies

Professional ELTIFs have been used to facilitate loan origination in jurisdictions such as France and Italy, where regulatory constraints have historically limited direct lending by alternative investment funds. However, forthcoming changes under AIFMD II are expected to ease these restrictions more broadly across EU AIFs.

Appeal to Retail and Private Wealth Investors

One of the key advantages of the ELTIF structure is its ability to be marketed to retail and private wealth investors across Europe. Compared to institutional investors, private investors tend to place greater emphasis on liquidity—an area where evergreen structures are better positioned to respond.

The removal in ELTIF 2.0 of the EUR 10,000 minimum investment requirement has further enhanced accessibility, making the product particularly attractive for bank distribution channels and digital wealth

platforms. Evergreen ELTIFs also benefit from continuous distribution, without the constraints of fixed subscription periods or closing dates.

Regulatory Trade-Offs and Requirements

The ELTIF marketing passport to retail investors comes with more prescriptive investment and borrowing restrictions compared to non-ELTIF structures. In addition, distribution to retail investors entails enhanced governance, disclosure and suitability assessment requirements.

Another Evergreen Fund Structure: UCI Part II Regime

Another widely used regime for evergreen fund structures targeting a broader investor base is the UCI Part II framework, which is well suited to alternative investments and is not subject to specific eligibility requirements regarding the underlying assets.

However, compared to ELTIFs, a standard UCI Part II fund without the ELTIF label has a key drawback: it does not benefit from a marketing passport to retail investors across the European Union. While Luxembourg law allows UCI Part II funds to accept capital from nonprofessional investors, cross-border marketing in Europe remains more complex. In the absence of the ELTIF label, such funds may be marketed to EU professional investors under the EU marketing passport and to nonprofessional EU investors only in accordance with the national marketing rules of each target jurisdiction.

Despite this limitation, UCI Part II funds remain widely used. In practice, they are often combined with ELTIF labels. For example, they may be established as umbrella funds with multiple sub-funds, which can be either open-ended or closed-ended, and may or may not carry the ELTIF label.

One of the key advantages of the ELTIF structure is its ability to be marketed to retail and private wealth investors across Europe.

Liquidity Challenges and Structural Considerations

Despite their advantages, evergreen structures face an inherent tension between liquidity expectations and illiquid investment strategies. Managers must strike a balance between maintaining sufficient liquidity buffers to meet redemption requests and avoiding excessive cash drag that may negatively impact returns.

As a result, evergreen structures are generally better suited to strategies that generate stable cash flows, such as private debt and secondaries. Private equity strategies, which typically provide less regular distributions, are less naturally aligned with evergreen formats. However, ELTIFs may still be used effectively as captive fund-of-funds structures, investing in a combination of affiliated vintage funds (to generate cash flows) and new funds, and since the adoption of ELTIF 2.0, co-investing in assets alongside other parallel funds managed by the same manager.

Although evergreen funds are open ended in principle, those that invest in illiquid assets typically offer only limited liquidity and are more accurately described as semi-open ended. This may create a mismatch with retail investor expectations, highlighting the importance of clear and transparent disclosure and education of sales intermediaries.

AIFMD II further introduces a requirement for managers to select at least two liquidity management tools (LMTs) from a prescribed list and provides that redemptions may be suspended in extraordinary circumstances. The use of such tools—such as redemption gates or suspensions—may carry heightened reputational risks, even when implemented in the best interests of investors.

Incentives for Solvency II Investors

The ELTIF regime also offers specific advantages for regulated institutional investors. For example, insurers subject to the Solvency II framework may benefit from reduced capital charges for investments in qualifying long-term equity assets. Where such investments are made through ELTIFs, eligibility criteria can be assessed at the fund level. Even where full qualification is not achieved, capital requirements may still be lower than for direct investments.

The growing adoption of evergreen fund structures—particularly in combination with the ELTIF label—marks a significant development in the European alternative investment landscape.

National-Level Incentives

Various national jurisdictions have established additional incentives to support ELTIF adoption. In France, ELTIFs may be used within unit-linked life insurance products, which benefit from favorable tax treatment where investments are held for at least eight years. In this context, ELTIFs must be structured through French-law vehicles in order to qualify as eligible underlying assets. In a master-feeder setup, this constraint extends to both vehicles. However, these funds may be managed by EU AIFMs, which do not need to be established in France. ELTIFs may also be used within French retirement savings plans (PER), where similar structuring considerations generally apply for insurance-based PER. By contrast, French equity savings plans (PEA and PEA-PME) offer tax advantages after five years and are not limited to French-law ELTIFs. Foreign ELTIFs may also be used, provided they meet the applicable eligibility criteria.

Italy similarly provides tax incentives for long-term ELTIFs that invest substantially in domestic companies. In Germany, the proposed replacement of the government-subsidized private pension scheme (*Riester-Rente*) with retirement savings accounts (*Altersvorsorgedepot*) is expected to include ELTIFs as eligible investments, which could further support market growth. At present, successful distribution in Germany remains closely tied to access to established banking networks.

Conclusion

The growing adoption of evergreen fund structures—particularly in combination with the ELTIF label—marks a significant development in the European alternative investment landscape. However, structural challenges, most notably around liquidity management and investor expectations, persist. The long-term success of these products will depend on how effectively managers address these issues, ensure clear disclosure and target an appropriate investor base.

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Navigating Your Strategic Relationship with an Insurer, from LOI to Effective Date

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Introduction

Strategic relationships between insurance companies and sponsors have become a distinct part of the insurance industry landscape, marrying the parties' complementary strategic needs: insurance companies obtain access to complex asset classes and enhanced returns, while sponsors benefit from long-term, long-duration capital. But while these transactions are commercially attractive, they are also highly structured, heavily negotiated and operationally intensive.

In their basic form, these strategic relationships include an equity investment by the sponsor in the insurance company's parent and the simultaneous entry by the sponsor and the insurance company into a long-term investment management relationship, typically focusing on complex and illiquid asset classes. This relationship is effectuated by the terms of three key documents: an equity purchase agreement, a commitment letter defining the long-term relationship, and an investment management agreement (IMA). However, the path from commercial understanding to definitive documents and to an effective, operational relationship is often a winding one, dotted with potential land mines. This note highlights the key issues sponsors should consider during their journey.

Regulatory Analysis: A Question of "Control"

The most critical gating question in structuring a strategic relationship between a sponsor and an insurance company is whether the sponsor is willing to "control" the insurance company from an insurance regulatory perspective. Becoming a controlling person of an insurance company has numerous implications for the sponsor, including both up-front and ongoing regulatory requirements. Up front, the sponsor must navigate an involved approval process (which may significantly delay the transaction). On a go-forward basis, a control person is subject to periodic reporting obligations and requirements to obtain regulatory approval before entering into arrangements with the insurer. If the sponsor is willing to become a control person, the entire transaction will be subject to regulatory scrutiny. If the sponsor prefers to remain below the control threshold, the strategic relationship must be carefully structured to avoid an unintended finding of control.

In the United States, state insurance law presumes that control exists if a person directly or indirectly holds 10% or more of the voting securities of any

insurer. However, the control analysis is not purely quantitative—the National Association of Insurance Commissioners and certain state regulators have reiterated their view that control should be evaluated on the totality of the facts and circumstances; in other words, a person can be found to "control" an insurance company while holding less than 10% of the voting securities if other factors, such as non-customary minority shareholder rights or IMAs with onerous or costly termination provisions, allow a person to exercise a controlling influence over the insurer.

Because the insurance regulatory control analysis is not black and white, regulators encourage parties to consult with them early in the process. Where the facts present a close call, the sponsor may consider pursuing a disclaimer of control (which may or may not be granted, depending on the facts).

> The most critical gating question in structuring a strategic relationship between a sponsor and an insurance company is whether the sponsor is willing to "control" the insurance company from an insurance regulatory perspective.

Equity Investment: Aligning Interests While Limiting Regulatory Risk

As noted, an equity investment by the sponsor into the insurance company parent is a cornerstone of the parties' strategic relationship. This serves a dual purpose—providing the insurer with growth capital and aligning the parties' long-term incentives. To that end, the parties are likely to agree to a minimum equity hold period with restrictions on transfer thereafter. Parties also sometimes consider minority investments by the insurance company in the sponsor as an alternate or additional way of aligning interests.

Minority investments by the sponsor are most commonly structured as purchases of common equity. Where the sponsor is seeking to avoid the presumption of control, the parties will typically cap the sponsor's voting ownership at 9.9%. To avoid other indicia of control, the equity purchase agreement is likely to include: (i) minimal governance rights; (ii) no board seat or, in some cases, a board observer (depending on overall risk analysis); and (iii) standstill provisions or voting agreements.

Commitment Letter: Driving Economics

The commitment letter tends to be the most heavily negotiated document and the primary driver of value for the sponsor. It is usually entered into by the sponsor and the insurance holding company—importantly, the insurance company itself is not a party to, or bound by, the commitment letter.

A defining feature of the commitment letter is the insurance holding company's guarantee of a minimum management fee rate or, more commonly, a minimum fee stream, to the sponsor. While this creates economic certainty for the sponsor, it also introduces important questions around the treatment of unallocated or undeployed capital. For example, the parties must grapple with questions such as: (i) the treatment of cash; (ii) the insurance company's obligation to transfer sufficient AUM to the sponsor to meet the minimum fee stream; and (iii) the sponsor's efforts to deploy capital.

Another defining feature of the commitment letter is duration of the arrangement. Typically, the insurance holding company will agree not to permit an insurance company subsidiary to terminate an IMA with the sponsor during a fixed term, generally ranging from five to 10 years (with potential for automatic renewals). Termination may be permitted during the term "for cause," e.g., material, uncured breach of the IMA or material, uncured underperformance by the sponsor. The menu of termination rights is highly negotiated, with the definition of material underperformance often being especially fraught. If termination occurs during the fixed term but outside the limited menu of termination rights, the sponsor is generally entitled to damages, which may be based on the expected fee stream over the fixed term.

The commitment letter may include other highly negotiated terms as well. For example, the sponsor may request exclusivity over select asset classes to obtain assurances regarding the level and growth of AUM for those classes; the insurer is likely to resist, as this could create dependence on the sponsor and potentially subject the insurer to non-market fees. On the flip side, the insurer may request that the sponsor not enter into similar arrangements with the insurer's competitors to obtain comfort over the quantity and quality of investment opportunities. The sponsor will naturally resist granting exclusivity that will limit its own growth opportunities.

An insurance company client is also likely to request most-favored-nation (MFN) protections. Sponsors are often willing to grant standard MFN protections over commingled funds, but the MFN negotiations become more complicated—and contentious—if an insurer requests an MFN over IMAs or separately managed accounts. A sponsor will need to think carefully about ripple effects across its businesses if it agrees to such an MFN.

Finally, the approach to conflicts is another area where the sponsor's ordinary course practices and the insurance company's relatively conservative expectations may differ.

IMAs: Plain Vanilla but Not Necessarily Simple

The IMA executed at the insurance company level is primarily an operational document and should include "plain vanilla" terms customary for insurance clients, including in respect of fees and termination rights. Nonetheless, several provisions are likely to be highly negotiated, including the following:

(i) **Expenses.** Sponsors typically seek broad reimbursement rights, in part to align with practices for non-insurance clients. However, insurance companies will expect to conduct diligence on expenses, and there may be significant pushback from the insurer—including, at the most extreme end, a request that fee rates be "all in."

From a sponsor's perspective, strategic relationships with insurance companies offer compelling opportunities to access permanent capital and source relatively illiquid investments.

(ii) **Investment Guidelines.** The investment guidelines will be largely based on the insurance company's regulatory requirements. Insurance companies often expect their asset managers to have a degree of familiarity with applicable insurance law, so there may be negotiation over each party's responsibility for monitoring and updating the investment guidelines to ensure compliance with law.

(iii) **Flexibility vs. Certainty.** Another point of tension is that sponsors typically require visibility into committed capital for pipeline planning, while insurers will typically seek to retain flexibility to adjust allocations across entities and asset classes to satisfy regulatory requirements and react to changes in insurance liabilities.

It is also worth noting that insurance companies may have specific structural needs for their investments due to statutory accounting rules, risk-based capital treatment, concentration limits, Schedule Y affiliate treatment and other insurance-law constraints. Insurers expect their asset managers to work with them to address their needs, but this introduces additional costs and operational complexity for the sponsor. This may also form part of IMA negotiations.

Operational Readiness: A Potential Trap

After the documentation is finalized, there may still be significant work needed to operationalize the relationship prior to the effective date. Accordingly, the parties must allow sufficient lead time between signing of the definitive agreements and effectiveness of the relationship.

Reporting requirements, in particular, can present a challenge. For example, the sponsor will likely covenant to produce reports that

the insurer can use for its statutory accounting and other regulatory purposes—in many cases, this reporting is developed specifically for insurance clients. The sponsor will also be required to track compliance with the investment guidelines, which may be across multiple insurance company affiliates, and to track investment performance based on heavily negotiated tests. And from a technical perspective, the sponsor must ensure that its IT systems are able to interface with the insurance company's systems in delivering reports. Other operational challenges may include valuation of assets and monitoring across the sponsor's businesses for potential MFN triggers (to the extent an MFN is granted).

Because of the operational complexity in serving insurance company clients, these investment management relationships tend to be "high touch" in nature, with continuous communication between the sponsor and the insurance client for the duration of the arrangement.

Conclusion

From a sponsor's perspective, strategic relationships with insurance companies offer compelling opportunities to access permanent capital and source relatively illiquid investments. However, care must be taken to structure the transaction in a way that accomplishes the sponsor's economic goals, does not create undue regulatory risk to the sponsor, and satisfies the insurance company's regulatory requirements. Successfully navigating the journey from proposal to an operational arrangement requires careful management of regulatory considerations from the start, thoughtful alignment of the parties' incentives, clear allocation of risk in the contracts, and robust operational planning to support bespoke mandates.

Debevoise & Plimpton

The Chaotic State of U.S. Merger Control


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The first quarter of 2026 has seen significant developments for M&A transactions that require a filing under the Hart–Scott–Rodino (HSR) Act. To comply with the HSR Act, transacting parties must notify the U.S. Department of Justice, Antitrust Division (DOJ) and the U.S. Federal Trade Commission (FTC) of their intended transaction if certain thresholds are met. In the past year, the rules and requirements for those notifications were greatly expanded, and then just in the past few months, challenged, overturned and now pending appeal.

HSR Rules Overturned

Enacted in 1976, the HSR Act sets forth the thresholds for when transacting parties must file premerger notifications with the federal antitrust agencies. In October 2024, the FTC issued a Final Rule adopting the most extensive revisions to the HSR Rules since the HSR Act's original enactment. The Final Rule, which went into effect in February 2025, substantially expanded the prior rule by requiring parties to submit significantly more information and documents than previously required. According to the FTC, the new filing requirements were expected to increase the time required to complete a premerger filing by more than 60 hours on average and by more than 100 hours for more complex transactions. These predictions came to fruition and the time, and cost, to complete an HSR filing more than tripled in many cases.

On February 12, 2026, a year after the Final Rule went into effect, a federal court vacated the FTC's Final Rule in *Chamber of Commerce v. FTC*, finding that the Final Rule exceeded the FTC's statutory authority (Case No. 6:25-cv-9-JDK). The FTC has since filed an appeal with the Fifth Circuit Court of Appeals. While the Fifth Circuit initially granted the FTC a temporary administrative stay, the court ultimately denied the FTC's motion for a stay pending appeal on March 19, 2026.

Following that decision, the FTC, through its Premerger Notification Office (PNO), confirmed that it is now accepting HSR filings using the Form and Instructions that were in place before the Final Rule went into effect. Despite the New Rules being vacated in their entirety, the PNO also said that it will continue to accept filings submitted under the February 10, 2025 Form and Instructions if parties voluntarily choose to use them.

Returning to the pre-February 2025 HSR Form and Instructions will reduce both the cost and amount of time necessary to submit an HSR filing to the FTC because it requires entities to conduct less data collection and produce fewer documents.

The appeal of the federal district court's decision is still pending at this time, meaning the vacating of the 2025 HSR Form and Instructions could be reversed; although, this does not appear likely. The FTC and DOJ have already released a Request for Public Comment to collect information regarding the efficacy of the New Rules and other potential disclosure obligations. Some expect a new version of the Rules could be released as early as the end of this year.

> In the past year, the rules and requirements for those notifications were greatly expanded, and then just in the past few months, challenged, overturned and now pending appeal.

U.S. Department of War to Review Defense-Related Transactions

The FTC has recently published guidance that certain transactions that are notifiable under the HSR Act will also need to be proactively disclosed to the U.S. Department of War (DOW)[1] going forward. The DOW's Office of Industrial Base Policy has published additional guidance, setting forth the four scenarios under which a transaction must be reported to the DOW:

1. **Defense Directed Business.** One or more of the parties has had, currently has or intends to have a contract with the DOW, or to perform as a subcontractor on a DOW contract.
2. **Critical Technologies.** The transaction involves technology related to one of the following: (i) Applied Artificial Intelligence; (ii) Biomanufacturing; (iii) Contested Logistics Technologies; (iv) Quantum and Battlefield Information; (v) Scaled Hypersonics; or (vi) Scaled Directed Energy.
3. **Defense Industrial Base Sector.** The transaction involves the research and development, or the design, production, delivery or maintenance, of military weapons systems, subsystems and components or parts. (Visit here for more information on the Sector.)
4. **Intellectual Property.** One or more of the parties has patents, trademarks, copyright protections or trade secrets relating to the above Critical Technologies or Defense Industrial Base Sector categories.

This marks a shift from prior practice, where the DOW typically requested HSR materials for transactions in which it had an interest. As of this new guidance, parties must affirmatively email the DOW, M&A Division, to inform the DOW about a transaction that requires premerger review and confirm that the parties have filed such HSR notification. These notifications should be submitted concurrently with the transaction's standard HSR filing.

While a brief analysis must be conducted in advance of each HSR filing to determine whether the parties must notify the DOW, this new requirement will not impose an additional waiting period on the transacting parties, nor does it require that any additional fees be paid. Because the requirement is new, it remains unclear how actively the DOW will use these notifications to identify transactions for further review.

California, Indiana and Other States to Require HSR Filings

California has joined Colorado and Washington as the third state to require the submission of HSR filings to the State Attorney General following the passage of state legislation. Indiana's version of the similar requirement will likely go into effect prior to California's, but technically, it has not yet been signed into law. These states have primarily adopted statutory language mirroring the Uniform Antitrust Pre-Merger Notification Act (UAPNA) in statutes that are colloquially referred to as "mini-HSR Acts."

The filing requirement in California will apply to any HSR filings made to the FTC and DOJ on or after January 1, 2027. Indiana's bill is drafted to go into effect for all filings made after June 29, 2026. As in Washington and Colorado,

1. The official title of the agency is the U.S. Department of Defense, but pursuant to Executive Order 14347, the current administration is referring to the agency as the U.S. Department of War. *See* Exec. Order No. 14347 (Sept. 5, 2025).

Parties should involve sophisticated antitrust counsel early to navigate these myriad changes and assess whether additional notification obligations or related enforcement risk may apply to their transactions.

a filing will be required only if a party has its principal business in the relevant state or annual net sales in the state greater than approximately $26.78 million. If either threshold is met, the HSR form must be submitted to the State Attorney General promptly after filing HSR—within one business day for California and contemporaneously in Indiana. Noncompliance can result in civil penalties that vary by state, but California has the highest of up to $25,000 per day after written notice and a three-business day period to cure.

More states will likely follow in the footsteps of California, Indiana, Colorado and Washington. So far, Hawaii, New York, West Virginia and Washington, D.C., have taken steps to enact mini-HSR Acts. Notably, New York's proposed legislation would be even more expansive, likely requiring significantly more notifications than California, Colorado or Washington, which more closely followed the UAPNA. New York's mini-HSR Act, as drafted, would require *any* entity that conducts business within New York to submit its HSR form to the New York Attorney General, forgoing a revenue threshold such as those that exist in the other statutes. State filing requirements generally are not expected to materially increase filing costs, nor do they affect the federal 30-day waiting period necessary under the HSR Act.

The primary intention for states in requiring the submission of HSR filings is to gain access to information that is otherwise confidential to assess transactions that could affect commerce within the state. Transacting parties should be aware that states may seek to challenge transactions they believe could substantially lessen competition, including by coordinating with the DOJ or FTC or filing their own lawsuit. A coalition of 13 states have moved to block the merger between Nexstar Media Group and Tegna, despite the FTC and DOJ clearing the transaction under the HSR Act. A federal judge has issued a preliminary injunction to pause the merger while the lawsuit proceeds. State-led actions like these are likely to increase as more mini-HSR Acts promulgate.

Parties should involve sophisticated antitrust counsel early to navigate these myriad changes and assess whether additional notification obligations or related enforcement risk may apply to their transactions.

Debevoise & Plimpton

Navigating the UK's New Carried Interest Tax Regime

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Following consultation beginning in 2024 and several legislative iterations, the new UK carried interest regime is now in force for carried interest distributions made from April 2026. The new regime remains largely in line with draft legislation published in 2025 but will increase complexity for many taxpayers. This article (i) explains the final position; (ii) considers the implications for certain fund strategies; (iii) explores areas of continued tension on application to non-UK residents; and (iv) examines the cash flow and compliance consequences for carry-holders dealing with "payments on account" and "making tax digital" regimes for the first time.

Overview of the New Regime

Prior to April 2026, carried interest was treated as profits arising from investment activity and therefore taxed at rates that were based on the nature of the underlying proceeds, with rates of up to 32%, 39.35% or 45% (in 2025/26) depending upon whether the carry was distributed out of underlying capital returns, dividend income or interest income, respectively.

The core change under the new rules is that carried interest will be taxed as profits arising from a deemed trading activity and thus will fall entirely within the income tax regime and subject to Class 4 National Insurance Contributions (NICs), which are generally imposed on the self-employed. Employer NICs will not be due. This means that carry will, in principle, be taxed at 45% for additional rate taxpayers with a further 2% NIC, taking the overall top rate to 47%. However, "qualifying" carried interest (QCI) will be eligible for a partial tax exemption that reduces the taxable amount by 27.5%, resulting in an effective tax rate of just over 34%.

Whether or not carried interest is QCI will be determined by referring to the average holding period (AHP) rules based on those used in the previous income-based carried interest (IBCI) regime. In short, if a fund holds its investments for an average of at least 40 months, its AHP is therefore at least 40 months and all the carried interest is QCI. If the fund's AHP is less than 36 months, none of the carried interest is QCI. If the AHP is at least 36 months but less than 40 months, a percentage of the carried interest will be QCI depending upon the actual AHP. The IBCI regime was limited in its scope and, importantly, did not apply to employees. Thus, the concept of calculating a fund's AHP will be new for many carry-holders and fund sponsors.

Strategy-Specific Provisions: Credit Funds and Funds of Funds

Special provisions for the calculation of the AHP (in particular, for determining the beginning and end of an investment's holding period) apply to different fund

The new regime remains largely in line with draft legislation published in 2025 but will increase complexity for many taxpayers.

strategies, to reflect differences in how investments are made, held and disposed of in these strategies and enabling the fair application of the AHP rules. While these provisions are fairly intuitive to apply for certain strategies, such as buyout funds, in some other strategies, such as credit and funds of funds, sponsors are likely to encounter complexity in their AHP calculations, but may get an overall better result than under the IBCI regime.

The AHP rules for credit funds under the new regime provide that the holding period of a debt investment starts at the point a fund is unconditionally obliged to advance money, with certain prepayments and restructurings not counting as disposals (which could otherwise unduly shorten the AHP). These and certain other provisions make the regime somewhat more favorable for credit funds, since carry arising from them is more likely to be treated as QCI; under previous draft rules and the IBCI regime, carried interest arising from credit funds was often taxable at higher rates than those applicable to buyout funds.

For funds of funds and secondaries funds, the intent of the special provisions is that the investment to which the AHP is applied is treated as the relevant investee fund, rather than its underlying assets (which would make tracing the AHP *very* complicated). However, these categories are subject to strict entry criteria that may not always be straightforward to apply, particularly for funds that invest in a variety of deal types.

Application to Non-UK Residents

One of the key aspects, and most important challenges, of the new regime is its potential application to non-UK residents. As a matter of UK law, an individual's "trade" (which is deemed to exist in order for such individual's carried interest to be taxed as trading profit) will be treated as occurring in the UK, to the extent that investment management services that give rise to the carry are performed there. This may expose non-UK residents to UK tax under the usual rules relating to trading in the UK by non-residents. Fortunately, the new regime imposes some limitations on its applicability to non-residents. Most importantly, as long as an individual does not spend 60 or more days working in the UK in a tax year, QCI (or carried interest reasonably expected to qualify as QCI) will not be within the scope of UK tax.

However, this still leaves some potential issues for non-UK residents. First, the limitations do not apply to carry that is non-qualifying. Second, and more importantly, not everyone will be in a position to avail themselves of the statutory limitations—for example, those who work in the UK for a year or two (which will bring a portion of their carry into the UK tax net) and then receive a payment of carry after they return home. Absent treaty protection, the individual may be regarded as receiving profits from a trade carried on in the UK, which are subject to UK tax.

The issue of treaty protection remains a matter of contention. His Majesty's Revenue & Customs (HMRC) takes the view that, generally, the "business profits" article applies so that, if there is a "permanent establishment" of the individual's deemed trade, the UK has taxing rights. Many advisers disagree and take the position that a domestic deeming rule cannot be applied to a treaty, which would instead allocate taxing rights to the individual's jurisdiction of residence. Careful advice will be required in this area.

Payments on Account and Making Tax Digital

A key cash flow implication of the new regime is that carry-holders are likely to need to make, in each tax year, advance payments on account (PoAs) of their next year's carried interest tax liability, based on their prior year's carried interest (and certain other income). PoAs apply to individuals for whom less than 80% of whose total income tax and Class 4 NICs liability is withheld at source (i.e., from employment income), subject to a certain de minimis threshold. Capital gains, which formed a significant

proportion of carry under the previous regime, are excluded; however, deemed trading profits (under the new regime) are not excluded. Hence, many carry-holders may not have encountered PoAs before 2026/27. PoAs are due in January and July of each year, with each PoA representing 50% of the previous year's tax liability to which PoA rules apply.

Carry-holders may find it challenging to meet PoAs that are based on the prior year's income where that income includes carry, which is often inconsistent and unpredictable. While taxpayers can request adjustments from HMRC to the amount of a PoA, they may suffer a punitive rate of interest if that reduction turns out to have been excessive; as such, carry-holders will need to approach PoA adjustments with caution.

In addition to the carry changes, April 2026 also sees the introduction of a series of changes to tax compliance and reporting referred to as "making tax digital" (MTD). MTD for income tax requires, among other things, that affected businesses (including sole traders and hence the deemed trade of a carry-holder) keep digital records of income and expenses and report information quarterly to HMRC, as well as making a year-end submission (equivalent to their current tax return) that will include any other income, as well as their final business profit and/or loss. Fortunately, the earliest that carry would be required to be reported under MTD would generally be April 2028, assuming carry is the only "trade" carried on by the individual; the requirement to use MTD does not commence until April after the year in which the trade is first reported in a self-assessment return. The earliest period for which carried interest will be required to be reported as trading profits is the 2026/27 tax year with the relevant self-assessment return being filed in the 2027/28 tax year (i.e., by a January 2028 deadline). It follows that the earliest date carried interest will be required to be reported using MTD for income tax is April 2028.

Conclusion: Increased Complexity

The UK's new carried interest tax regime will pose new challenges for carry-holders and fund sponsors; international issues, in particular, are likely to be the subject of continued debate, since the UK will be an outlier in potentially seeking to tax carried interest arising to non-residents. The AHP rules, especially in relation to certain strategies, will require detailed consideration given the potential complexity of the calculations and fund sponsors will need to consider what information and assistance they provide to carry-holders to determine their carry taxation.

The topics addressed in this article highlight only a subset of the issues facing UK taxpayers under the new carry regime. Moreover, several important elements of the previous law relating to carried interest have been retained. In particular, the disguised investment management fee (DIMF) and employment-related securities (ERS) regimes will continue to apply to carry as they have previously, meaning that QCI status will be only one part of the carried interest tax analysis. The new carry regime also does not affect the taxation of UK individuals' co-investment returns, which will continue to be treated as investment profits (and, therefore, further removed from the taxation of carried interest). Overall, the new regime may affect compliance complexity as much as tax liability.

The UK's new carried interest tax regime will pose new challenges for carry-holders and fund sponsors; international issues, in particular, are likely to be the subject of continued debate, since the UK will be an outlier in potentially seeking to tax carried interest arising to non-residents.

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Protecting Privilege in Cyber Incident Response: Key Lessons from Litigation


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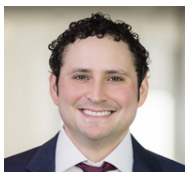
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Overview

Companies responding to data breaches and other cyber incidents must assess whether incident response (IR) investigations conducted by third-party vendors are protected from discovery in litigation under the attorney-client privilege or attorney work-product doctrine. The issue arises most acutely with reports generated by the incident response firm, but other communications with the vendor may also be at risk for discovery if the work of the incident response firm is not part of a privileged investigation. Despite some unfavorable precedent in recent years, there is still a path to navigating the legal minefield around these issues.

In determining whether a given IR document merits protections, courts ultimately examine whether and how counsel directed the IR vendor's work—an exercise that often becomes a multifactorial inquiry that probes all aspects of the relationships between the IR vendor, the company and counsel. Below, we enumerate some of the key factors courts consider when deciding such a question, illustrated by major relevant cases.

Relation to Vendor's Ordinary Work

Courts formerly treated direction by outside counsel as a primary factor in determining whether an IR vendor's report merited protection. For example, in *In re Experian Data Breach Litigation*, the court relied on the fact that the IR vendor's report was initially delivered to outside counsel at outside counsel's direction in finding that "but for the anticipated litigation, the report wouldn't have been prepared in substantially the same form or with the same content." 2017 WL 4325583, at *2-3 (C.D. Cal. May 18, 2017). However, courts are increasingly scrutinizing whether the actual services the IR vendor has provided to lawyers can in fact be differentiated from the vendor's day-to-day services. Absent substantive differences in scope between privileged and ordinary-course work, there is a risk that a court may deny protections.

Beyond ensuring that counsel is directing IR vendors, companies must therefore make efforts to distinguish the actual work IR vendors do from the business-as-usual cybersecurity work many of these same vendors support. Work-product protection may be inapplicable when a vendor's scope of work does not substantively change after outside counsel becomes involved, as that tends to indicate that the IR vendor's work was done in the ordinary course rather than as an aid to the attorneys and in anticipation of litigation.

See, e.g., In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1245 (D. Or. 2017) ("[Mandiant's] scope of work did not change after outside counsel was retained. The only thing that changed was that Mandiant was now directed to report directly to outside counsel and to label all of Mandiant's communications as 'privileged.'").

If companies will be penalized from a privilege standpoint by using the same vendor before and after an incident, it puts them in a Catch-22. Cybersecurity best practices favor engaging IR vendors pre-incident so that they are familiar with a company's systems, processes and technologies, thus enhancing the speed and precision of any subsequent incident response work. For example, the IR firm can pre-deploy sensors, beacons and other technologies, as well as assist with risk assessments and testing, that will let it rapidly gather the technical data needed to diagnose and contain an active breach. But some courts have found that the pre-incident engagement of a vendor may be too similar to the vendor's work during the incident, meaning that the vendor's work product would not have been any different "but for" the litigation and therefore does not merit work-product protection. *See, e.g., In re Cap. One*, 2020 WL 3470261, at *6 (E.D. Va. June 25, 2020).

Budget Source

While it may seem natural to deduct expenses related to the IR vendor from a company's cybersecurity or IT budget, some courts have found that payment from a business function other than the legal department weighs against a finding of privilege, as it tends to suggest the vendor operated in the ordinary course rather than in support of litigation or legal advice. For example, in denying work-product protection, the court observed that "Capital One paid Mandiant for this work from a Capital One fund denominated 'business critical' expenses." *See In re Cap. One*, 2020 WL 3470261, at *1.

To the extent possible, IR vendor fees should be paid out of the legal budget.

Dual Track Investigations

Courts have viewed dual track investigations favorably, where the company conducts separate investigations: one in the ordinary course of business and another in aid of counsel. To preserve privilege, however, the tracks must be actually separate from one another, and the advice rendered must be independent. For example, in *In re Target Corporation Customer Data Security Breach Litigation*, the court found that one investigation was focused "on informing Target's in-house and outside counsel about the breach so that Target's attorneys could provide the company with legal advice," while it conducted a parallel ordinary-course investigation with a separate team. 2015 WL 6777384, at *2-3 (D. Minn. Oct. 23, 2015). Conversely, in *Guo Wengui*, a dual track investigation was insufficient to shield a vendor report from disclosure where one vendor retained by counsel did the majority of incident response work, and there was no evidence that the other vendor, supposedly retained for business continuity purposes, did any work at all on the incident. 338 F.R.D. 7, 11-12 (D.D.C. 2021). Courts may therefore be less likely to protect reports if they find that the true purpose of a dual track approach appears "designed to help shield material from disclosure" without other indicators that it was for legal advice. *Id.* at 13.

Companies responding to data breaches and other cyber incidents must assess whether incident response (IR) investigations conducted by third-party vendors are protected from discovery in litigation under the attorney-client privilege or attorney work-product doctrine.

Scope of Distribution

Even where privilege or work product may attach, courts also consider whether the IR vendor report was shared widely to nonlegal employees or otherwise disclosed to third parties, such as the FBI. *See, e.g., In re Samsung*, 2024 WL 3861330, at *14 (D.N.J. Aug. 19, 2024) ("The breadth of Samsung's involvement or participation in Stroz's process

While courts have increasingly chipped away at protections over vendor incident response reports, companies can still take precautions to attempt to preserve them.

and wide dissemination of the Stroz Analysis undermine[s] Samsung's assertion that Stroz was only retained to provide technical interpretation for the benefit of [outside counsel]."). Courts may also consider broad dissemination to be more consistent with a business purpose than with litigation. Broad distribution of the report can also create waiver issues if, for example, an attorney-client privileged document is shared with a third party to whom the privilege does not extend, such as an insurer.

Takeaways

While courts have increasingly chipped away at protections over vendor incident response reports, companies can still take precautions to attempt to preserve them. In considering how to handle post-incident IR work, consider the following:

- **Who retained the vendor and for what purpose?** Retention by legal counsel—particularly outside counsel—rather than the technology function is more likely to result in a finding of privilege.
- **What was the scope of the vendor's services?** IR services that differ meaningfully from ordinary-course cybersecurity services are more likely to be protected. Ensure the documented scope is focused on work necessary for counsel to assess legal obligations and respond to litigation. Remediation should not be part of that scope.
- **When was the vendor retained?** Pre-incident retention for ordinary-course work may cut against a finding of privilege. If you decide to use the same vendor for proactive work as well as IR work, use separate agreements with different scopes of services.
- **To whom was the report distributed?** Broader distribution, especially to business and technical teams, tends to weigh against a finding that a report merits protections.
- **Who paid the vendor?** Payment by legal rather than the technology function is more likely to result in a finding that protections are merited.
- **Was there a parallel investigation for business continuity?** Multitrack investigations—one by legal and one by the business/technology function—can be an effective path toward protecting the report created by the privileged track.
- **What were the contents of the report, and did it include go-forward remediation recommendations?** The presence of remediation recommendations weighs against finding a report protected, but the absence of such recommendations is not necessarily sufficient to prove a report does merit protections.
- **Was the report in a different form than it otherwise would have been if litigation were not anticipated and/or pending?** In general, the closer a report adheres to legal concerns, especially those informed by actual or imminent litigation, the stronger any claim for protections will be.

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AI Washing: The Latest False Advertising Battleground

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Artificial intelligence has become one of the most powerful terms in a company's marketing arsenal. Phrases like *AI-powered, driven by machine learning* and *intelligent automation* can meaningfully lift a company's valuation, attract customers and differentiate a business in a competitive sale process.

But as AI-related claims have proliferated, so too has scrutiny of the veracity of those claims. Regulators and private plaintiffs are now aggressively challenging "AI washing"—claims that overstate the role, sophistication or capabilities of artificial intelligence in a product or service.

Inflated AI claims can generate substantial legal liability, disrupt exit timelines and, in the worst cases, expose sponsors themselves to scrutiny. This article summarizes the recent trend in cases involving AI washing and offers practical guidance on how to minimize risk.

What Is AI Washing?

AI washing, in its simplest form, is the use of AI-related language in marketing, investor communications or product descriptions that is misleading, unsubstantiated or outright false.

Claims susceptible to charges of AI washing sit along a spectrum. At one end sits defensible puffery, like describing a product as "intelligent" when it uses basic automation. At the other end are fraudulent claims—such as saying that a product is "powered by a proprietary machine learning model" when, in fact, the work is done by human operators—that can give rise to serious potential liability, including criminal charges.

Most AI-washing cases fall somewhere in between these extremes, making risk more difficult to assess. Companies may use AI-adjacent language (such as "algorithmic" or "data driven") in ways designed to imply capabilities that do not exist or refer to models as "proprietary" when they are largely built on a third party's foundation model.

Companies seeking to attract new customers—or new investment—may be most at risk of hyperbolic or exaggerated claims, but the problem of AI washing is not confined to startups. Established, private equity-backed businesses across healthcare, fintech, legal tech, insurance and consumer products have faced scrutiny for the same categories of claims.

Federal and State Regulators Have Been Paying Attention...

The Federal Trade Commission has general oversight authority over deceptive advertising. The FTC has warned that AI-related marketing claims are

subject to the same legal standards as any other advertising claim: they must be truthful, not misleading, and substantiated. In a series of enforcement actions, the FTC under the prior administration made clear that it considers AI washing a deceptive practice. While the current administration has removed some of the FTC's prior guidance documents, a pause in enforcement is not a safe harbor from private or state-level litigation (discussed further below) or a change in federal regulatory priorities down the line.

Marketing claims made by investment advisors fall under the jurisdiction of the Securities and Exchange Commission. The SEC has settled charges against two registered investment advisers—Delphia (USA) Inc. and Global Predictions Inc.—for making false and misleading statements about their use of artificial intelligence. Delphia claimed to use client data to train its AI models for investment decisions; the SEC found those claims were unsubstantiated. Global Predictions represented itself as the "first regulated AI financial advisor," a claim the SEC determined was false. Both firms settled, paying civil penalties to resolve the SEC's allegations. The SEC is also focused on promises made when soliciting investments, charging a founder with fraudulently soliciting investments by claiming the company used AI when human contract employees were actually doing the work.

Inflated AI claims can generate substantial legal liability, disrupt exit timelines and, in the worst cases, expose sponsors themselves to scrutiny.

While federal regulators have been less active under the current administration, most states have "Little FTC Acts" empowering the state's attorney general to police deceptive practices. Several states have initiated investigations into businesses making unsubstantiated AI claims, particularly in healthcare and financial services contexts where AI representations may carry heightened consumer reliance.

...And the Plaintiffs' Bar Is Following Their Lead

Regulatory scrutiny is often followed by private litigation, and AI washing has been no exception. Three categories of private claims are emerging with increasing frequency.

Consumer Class Actions. Where consumers purchase products or services based on AI-related representations that prove false, class-action litigation under state consumer protection statutes (such as California's Unfair Competition Law and Consumer Legal Remedies Act) has followed. Plaintiffs have alleged, for example, that they paid a premium for an "AI-powered" product that was, in substance, no different from (or even worse than) non-AI alternatives. Damages theories could include the price premium attributable to the AI claim, restitution and injunctive relief.

Competitor Claims Under the Lanham Act and NAD. The federal Lanham Act prohibits false advertising in commercial contexts. A company that falsely claims its product is AI driven could face claims from competitors with genuinely AI-powered products, as well as from competitors who (accurately) do not claim to use AI. These suits can be particularly disruptive for portfolio companies engaged in competitive sales processes or seeking to establish market leadership narratives, not just because of the time and attention it takes to deal with litigation, but also because successful Lanham Act plaintiffs can seek injunctions, disgorgement of profits and attorney fees.

Industry self-regulation is also emerging as an important source of scrutiny for AI-related marketing claims. The National Advertising Division (NAD) has recommended that advertisers modify or discontinue claims that overstate whether AI features were currently available, the extent of cross-platform functionality, the productivity benefits users could expect or whether "smart" product attributes were appropriately characterized as AI. The Interactive

Advertising Bureau has issued a series of guidance documents focused on transparency, governance and risk management in AI-driven advertising.

Securities Fraud Litigation. For portfolio companies that are public, or those approaching an IPO or SPAC transaction, AI-related misstatements in investor-facing materials can give rise to securities fraud claims under Rule 10b-5 or Section 11 of the Securities Act, following the roadmap of the SEC's actions discussed above. Even in the private company context, representations made to investors in connection with a financing round may be actionable if AI capabilities are materially overstated.

> As AI capabilities have become material to businesses across virtually every industry, the consequences of overstating them have never been greater.

Why Sponsors Should Care About Portfolio Company Advertising

It might be tempting to view AI washing as a problem for founders, marketing teams or management. But sponsors have important reasons to be aware of this issue at multiple points in the investment life cycle.

Acquisition. Due diligence on AI-related claims is a necessary component of technology-focused transactions. Buyers who rely on a target's AI narrative to justify a valuation premium do not want to find, post-closing, that the AI is largely illusory. Further, legal exposure from the target's past AI practices can transfer with the business and may generate indemnification disputes or post-closing purchase-price adjustments. Prudent diligence includes technical assessments of AI capabilities, substantive review of claim substantiation and scrutiny of customer-facing AI representations.

Ownership. Sponsors are often involved—particularly though representation on portfolio company boards—in the company's strategic direction and go-to-market narratives. A sponsor that encourages, facilitates or ratifies an AI-washing marketing strategy runs a nontrivial risk of being drawn into litigation or regulatory proceedings as a secondary party. In addition, board members and controlling shareholders can find themselves named in shareholder or derivative actions.

Exit. AI capabilities have become a standard element of management presentations and confidential information memoranda in sale processes. This is the other side of the coin from acquisition risk: a buyer who discovers, post-signing or post-closing, that AI representations were materially false may seek to rescind, reduce the purchase price or bring fraud claims. In the IPO context, misrepresentations in offering materials are subject to heightened scrutiny under the federal securities laws. Sponsors should treat AI-related representations in exit materials with the same discipline applied to financial projections.

Takeaways

While the risks outlined above are real, they are also all manageable with the right controls. Sponsors should consider the following steps at the portfolio level:

- **Substantiation comes first.** Every material AI-related claim in marketing, investor or customer materials should be reviewed against the company's actual technology. Be aware of vendor relationships around AI technologies and treat claims based on third-party services with special care.
- **Involve legal and technical teams in claims.** Marketing teams often generate AI-related language without complete visibility into how the technology used by the company actually works. Legal review of AI claims, supported by technical assessments, should be standard practice.
- **Implement a governance policy.** Portfolio companies (particularly in AI-adjacent sectors) should maintain written policies governing AI-related marketing representations and what substantiation is required before a claim is published.

- **Conduct periodic claim audits.** As AI systems evolve and marketing claims are updated, the substantiation that supported a claim at launch may no longer be accurate. Periodic reassessments of AI-related claims, including after product changes, reduce the risk that claims will inadvertently drift into misrepresentations.
- **Do your diligence.** Whether acquiring or divesting, sponsors should treat AI capability assessments as a standard workstream, not an afterthought. Like claim assessment, this requires cross-functional diligence by technical and legal teams with a real understanding of the company's products and services.

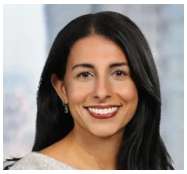
Conclusion

AI washing is not a theoretical concern: it is an active enforcement and litigation priority. Federal and state regulators, plaintiffs' class-action counsel and competitors all treat AI-related misrepresentations as actionable—sponsors and management must as well.

The risks of AI washing arise not only at the portfolio-company level but also at the transaction level, shaping how investments are sourced, structured and exited. As AI capabilities have become material to businesses across virtually every industry, the consequences of overstating them have never been greater. But the fundamental principle remains unchanged: marketing claims must be truthful and substantiated. Paying consistent attention to claim hygiene can meaningfully mitigate these risks.

Debevoise & Plimpton

Deal Risks in the New Space Race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As private capital continues to flow into the commercial space sector, investors face a regulatory environment that is becoming both more active and more fragmented. At the same time, the European Union and the United States are taking differing approaches to the use of regulation to guide commercial space activity. For private equity investors in the space arena, these differing approaches make regulatory diligence increasingly important and complex.

A Growing Market Shaped by Competing Regulatory Priorities

The commercial space sector has grown rapidly in recent years, as technological advances have lowered launch costs and increased demand for satellite communications, earth observation and other space-enabled services. The global space economy is projected to reach approximately $1.8 trillion by 2035, up from $630 billion in 2023. Private capital has played a central role in this growth, with investors deploying roughly $170 billion across more than 1,300 space companies since 2009. In 2025 alone, private investment in the space sector reached $12.4 billion—a 48% increase over the previous year—with more than 110% growth seen in the building and launch segments of the industry. Investment activity spans the core layers of the space economy, including infrastructure, telecommunications and manufacturing. These segments reflect growing demand for satellite communications, earth observation services and space-enabled data across both commercial and government sectors.

Both the European Union and the United States have responded with regulatory frameworks covering the rapidly expanding space economy but, as outlined below, those frameworks have different priorities. The primary intent of the proposed EU Space Act is to establish a unified legal framework among Member States and to promote interoperability of critical space infrastructure. In the United States, however, the priority has been to foster accelerated commercial space-related activity while mitigating against national security threats. For private equity sponsors, these underscore how space-sector regulation is evolving in ways that may simultaneously facilitate commercial activity and increase compliance risk.

Sponsors should identify early in the due diligence process which regulatory regimes may apply to the target and how compliance may affect market access, costs, operations and growth. In a sector where regulation may create both opportunity and friction, careful cross-border regulatory diligence and early compliance planning should form part of transaction structuring and post-closing governance.

Regulatory Developments in the European Union and the United States

On June 25, 2025, the European Commission released a proposal for an EU Space Act, which is expected to become effective on January 1, 2030. The Space Act will regulate space activities by both providers established in the European Union (or controlled by EU providers) and third-country providers offering space-based data or services in the European Union and includes new requirements for spacecraft, launch and in-space operation providers. Lighter regimes apply to certain specialized providers and research institutions.

The proposed new requirements include:

- **Authorization and Registration:** EU space operators must be authorized by an EU Member State, while third-country operators must demonstrate compliance and be registered with the Union Register of Space Objects (URSO), the list of all space operators operating within the European Union.
- **Traffic Management:** New tracking, maneuverability and debris mitigation requirements for spacecraft, launchers and satellites, which may require design modifications.
- **Cybersecurity:** Preventive measures to mitigate system failures or attacks, plus reporting requirements.
- **Environmental Sustainability:** Operators must calculate and report environmental footprint, comply with design requirements and limit light and radio pollution.

On August 13, 2025, six weeks after the European Commission released its proposed Space Act, President Trump signed Executive Order 14335, the objective of which is to increase commercial space launch cadence and novel space activities by 2030. Key features of the Executive Order include the following:

- elimination or expedition of environmental reviews for launch and reentry;
- harmonization and evaluation of states' compliance with federal space regulations; and
- a streamlined mission authorization process under the Outer Space Treaty.

The Federal Communications Commission has also been active in recent months. Its October 2025 proposal on "Space Modernization for the 21st Century" would create a so-called "licensing assembly line," designed to speed reviews through a modular system that would route and resolve applications according to each company's needs.

At the same time, the FCC is increasing its national security-related regulation and enforcement activity. On January 8, 2026, the FCC announced its first-ever enforcement of a mitigation agreement issued by Team Telecom, the interagency committee tasked with assessing national security risks in FCC applications. The FCC settlement addressed a satellite operator violating its mitigation agreement obligations related to unauthorized foreign employee access to communications infrastructure and customer data. Under the settlement, the satellite operator agreed to pay a $175,000 voluntary contribution and implement a robust compliance plan. The action signals that the FCC is closely monitoring compliance with Team Telecom mitigation agreements and actively enforcing these agreements.

In addition, on January 29, 2026, the FCC adopted two sets of new rules that enhance its evaluation of national security concerns in the U.S. communications sector. These new rules include new reporting requirements for FCC license holders and applicants regarding ownership, control and other ties to foreign adversaries, and new rules clarifying the Commission's foreign ownership review process.

Implications for Private Equity Investors

These developments have several implications for private equity investors considering an acquisition in the space sector. First, investors should assess at the outset which regulatory frameworks are likely to apply to the target's business

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and geographic footprint. The proposed Space Act reaches not only EU-based operators but also third-country providers offering space-based data or services in the European Union. In the United States, companies face heightened scrutiny of foreign ownership, data access and national security safeguards, even as implementation remains uncertain and technology may outpace regulatory clarity. Investors should diligence not only where a target operates today, but also which jurisdictions may become relevant as the business scales.

Second, investors should evaluate whether the target has the technical and organizational capacity to manage evolving and potentially conflicting requirements across jurisdictions. The proposed Space Act, in particular, may impose near-term costs through spacecraft redesign, contract renegotiation and new reporting processes, while dual U.S.-EU exposure may create additional challenges where regulatory equivalency remains uncertain. There is also the possibility of having to adapt to regulatory countermeasures one jurisdiction might take against the other. FCC Chairman Brendan Carr, for example, has warned that the United States could consider reciprocal measures if the European Union adopts policies favoring European satellite providers over U.S. competitors.

Finally, investors should treat compliance, transaction structuring and post-closing governance as ongoing tools for managing regulatory and dispute risk. Compliance risk should be viewed as a dynamic operational issue, not a static legal one, because new requirements may increase cost and execution risk over time and may also trigger contractual disputes over cost allocation or claims that regulation is disproportionate or discriminatory. Early planning around regulatory engagement, compliance buildout and governance can help mitigate this exposure as cross-border expectations evolve. Although harmonized EU standards could eventually reduce operating costs and improve safety and sustainability, the cross-border nature of the space industry means that many U.S. actors may remain subject to EU rules regardless of U.S. deregulation, potentially driving either convergence around EU standards or further fragmentation of market access.

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