Debevoise & Plimpton

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From the Editors

Private equity sponsors are confronting a wider range of strategic choices across fundraising, investment structuring and portfolio management, often against a backdrop of increasingly complex legal and commercial considerations. The articles in this issue of the *Private Equity Report* examine how those choices are playing out in practice, with a focus on the structures, processes and risk-management tools sponsors are using to execute transactions, access new pools of capital and respond to emerging challenges.

Recent Structuring Trends in Rated Note Feeders

Rated note feeders continue to evolve as sponsors seek to accommodate insurance company investors while navigating changing regulatory capital requirements. Recent developments—including horizontal structures, subscription facility solutions, reinsurance sidecars and evergreen funds—illustrate how sponsors are adapting these vehicles to new investor demands and more complex fund structures.

Hybrid Capital: Bespoke Solutions for Complex Financing Needs

Hybrid capital is giving private equity sponsors and other capital providers greater flexibility to address financing and structuring challenges that may not easily be solved by conventional debt and common equity. By combining debt-like protections with equity participation, governance rights and other bespoke features, these instruments can support acquisitions, structured equity investments and other complex capital structure, ratings or regulatory needs across a broad range of transactions.

Bridging the Pricing Gap 2.0: The Rise of Closing Facilities in Continuation Vehicles

Closing facilities are becoming an important tool in continuation vehicle transactions, allowing selling fund investors to receive liquidity at closing while giving CV investors greater flexibility in funding their commitments. As their use expands, sponsors and investors are developing sophisticated approaches to collateral and cost allocation.

A More Attractive IPO Exit? How SEC Reforms Could Change PE Sponsor Calculus

With IPO activity showing signs of renewed momentum, the SEC is advancing reforms that could make public market exits more flexible and less burdensome for private equity sponsors. Proposed changes could ease the path to going public, reduce ongoing compliance burdens and give sponsors greater flexibility to monetize retained stakes—all with the potential to reshape the IPO exit calculus.

Insurance and Private Credit Capital Shift Toward Real Estate Debt

Insurance companies are increasing their allocations to real estate credit, while some institutional investors are shifting capital from corporate private credit toward asset-backed strategies. Together, these trends are expanding opportunities for alternative asset managers to raise, deploy and manage capital across the real estate debt market.

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The Limited Partner Exception to Self-Employment Tax After *Soroban* and *Sirius*

Recent decisions from the Second and Fifth Circuits have narrowed the circumstances in which limited partners can exclude partnership income from self-employment tax. The rulings have important implications for private equity sponsors and other investment management businesses, particularly where limited partners play an active role in managing or operating the business.

Taking Down Fraudulent Look-Alike Domains: A Practical Guide

Fraudsters increasingly use look-alike domains, websites and email accounts to impersonate private capital firms and portfolio companies. An effective response to these schemes requires quickly identifying the service providers supporting the scheme, submitting targeted abuse reports and preserving evidence. Sponsors can also reduce risk across their portfolios by establishing a common playbook for detecting, escalating and disrupting fraudulent impersonation.

Trade Secrets in M&A: The Hidden IP Risk

Trade secret risk can be easy to overlook in M&A because, unlike patents, trademarks and copyrights, there is no public registry to search—but recent litigation shows the consequences can be significant. In appropriate cases, sponsors should scrutinize the provenance of key know-how and personnel movements and use NDAs, clean teams and other safeguards to manage exposure.

Regulatory Risk in Cross-Border Investments: Treaty Protection for Private Capital

Investment treaties can provide important protections for private capital investors in response to changes to regulatory frameworks designed to incentivize foreign investment. To maximize those protections, cross-border investors should consider applicable investment treaties when structuring investments.



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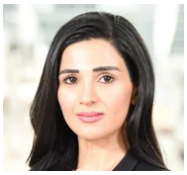
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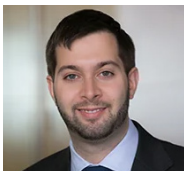
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Recent Trends in Rated Note Feeders


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In recent years, there has been growing interest in rated note structures that combine rated notes and equity interests, particularly as a way to attract insurance company investment in private funds. In a commingled private fund that also includes non-insurance investors, a common approach is to establish a feeder fund that holds an interest in the commingled master fund and issues one or more classes of rated notes and equity interests to its investors. We have seen several trends regarding rated note feeder structures that we discuss below.

For certain U.S. insurance companies, investing in rated note structures can be more desirable than holding a typical equity interest because rated notes may receive more favorable risk-based capital (RBC) treatment under insurance company statutory accounting. This treatment depends on the investment being characterized as a bond under statutory accounting and on RBC rules that generally impose lower asset charges on qualifying rated bonds than on equity investments.

The U.S. National Association of Insurance Commissioners continues to adopt new initiatives to prevent so-called RBC arbitrage, including greater reporting requirements for structured securities, the ability to override the RBC designation of securities held by U.S. insurance companies and the introduction of a 45% RBC asset charge applicable to the first-loss tranche of asset-backed securities (in contrast to the 30% asset charge generally triggered by equity investments). Even with these measures, however, holding the rated notes and equity interest of a rated note structure still typically provides meaningful benefits in the RBC treatment of the overall investment.

Another increasingly popular product in the market is the "collateralized fund obligation" (CFO). CFOs typically invest in a portfolio of funds (unlike rated note feeders, which are typically private funds with a single asset pool) and can include assets with less predictable returns, like interests in equity-focused funds. These have recently gained increasing prominence due to institutional investors seeking rated, capital-efficient access to private funds as well as sponsors requiring flexible liquidity solutions. (We have covered CFOs in more detail in a separate article.)

Horizontal Rated Note Feeders

Historically, investors in rated note feeders have been required to hold tranches of debt and equity issued by the feeder fund in the same proportion—a "vertical strip"—which together indirectly holds an underlying interest in the master fund. This structure results in investors obtaining a more favorable overall RBC charge while replicating, to the extent possible, the economics of investing as

typical limited partners in the master fund. Recently, vertical strip feeders have been receiving closer scrutiny from investors and rating agencies to ensure the rated notes have true debt-like features. Certain of the conventions used in earlier vertical strip feeders that permitted the sponsor to apply analogous concepts to those that apply at the master fund level are now evolving into more conventional debt features.

liability and expenses are allocated between debt and equity. Sponsors contemplating horizontal rated note feeders will want to consider this early in the fundraising process, as it is often helpful, and sometimes necessary, to make changes in the underlying master fund agreements to accommodate features required in a horizontal rated note feeder.

While there is increased demand for rated notes, the investor base for an equity tranche of a horizontal rated note feeder is limited because of its higher risk profile. While we have seen third-party investors, such as family offices and other funds, invest in these equity interests, the equity tranche is often held by the sponsor or sponsor-related investment vehicles. Sponsors sometimes introduce incentives to aid in marketing the equity tranche to third-party investors, such as prioritizing payment of a minimum return on the equity in the payment waterfall ahead of repayment of principal on the debt (subject to meeting overcollateralization tests).

Due to increasing investor demand, some sponsors are offering horizontal rated note feeders, in which the tranches of debt and equity are not required to be held proportionally and may be held by different investors rather than being stapled together.

Due to increasing investor demand, some sponsors are offering horizontal rated note feeders, in which the tranches of debt and equity are not required to be held proportionally and may be held by different investors rather than being stapled together. In these structures, debt investors have priority of repayment on the principal and interest, whereas equity investors effectively own a levered return on a master fund, which itself may have a different leverage profile. Equity holders bear certain responsibilities, such as the requirement to return distributions to fund a partnership's liabilities or to increase funding levels to accommodate recycling needs. Due to the different interests of debt and equity investors, documentation for horizontal rated note feeders introduces additional complexity and is more prescriptive on how funding obligations, priority of payment and

Subscription Facility Considerations

Sponsors often seek to have investor commitments to a rated note feeder included in the borrowing base for the master fund's subscription credit facility. This can create tension with respect to debt commitments, given concerns regarding whether those commitments would be as enforceable (as equity commitments are) in bankruptcy proceedings.

To address this, subscription lenders will generally require a parallel equity commitment alongside the debt commitment, either in the limited partnership agreement or in a separate equity commitment letter. The equity commitment cannot be "springing"—that is, arising only from a default—because such a structure may present enforceability concerns in the event of a fund bankruptcy. Investors must instead acknowledge that, if a capital call is made during a default under the subscription facility, they are obligated to fund the call as an equity contribution under the limited partnership agreement rather than as an advance under the note purchase agreement, with the corresponding note commitment reduced dollar for dollar.

Reinsurance Sidecars

Reinsurance sidecar structures enable an insurance or reinsurance company to transfer a portion of its liabilities to a separately capitalized reinsurance vehicle funded by third-party investors. Investors commit capital to a holding company that owns the operating reinsurance company, which assumes liabilities from the sponsoring insurer or reinsurer. Premiums received in respect of such insurance business are deployed in a portfolio of investments according to an asset management agreement

with an investment manager. As asset managers increasingly sponsor reinsurance sidecars and raise capital for them through traditional fundraising channels, rated note feeders have emerged as a means of attracting regulated investors seeking favorable RBC treatment. Reinsurance sidecars have unique features that require special consideration when establishing rated note feeders.

Given the long-dated nature of insurance liabilities underwritten by sidecars and their highly regulated nature, sidecars do not have defined terms after which they automatically wind-up and liquidate. The maturity date of the rated notes should be aligned with the sidecar's projected terminal date—the outside date by which the sidecar is projected to meet its target return.

To give sidecar investors more certainty regarding liquidity, sponsors often allow investors to elect whether to participate in a liquidity transaction of the sidecar beginning on the date on which the sidecar is projected to meet its target return (typically around 10 years from commencement). Because rated note feeders investing in closed-ended structures do not permit partial redemptions or non-pro rata distributions to noteholders, the rated note feeder must, for any such liquidity transaction, make a single election applicable to all noteholders and specify in the rated note feeder governing documents how such election will be made.

Rated note feeders continue to evolve as sponsors seek to accommodate insurance company investors while adapting to regulatory changes in capital treatment.

Depending on a sidecar's jurisdiction of organization, distributions may be restricted or require additional regulatory approvals while the sidecar is actively underwriting new reinsurance business. The possibility that interest will be fully PIK on the rated notes during the early years of the sidecar's operations may put pressure on the sponsor's ability to obtain a desired rating, as rating agencies will examine the potential for cash interest payments on the notes. Sponsors have successfully navigated this concern through sizing a larger equity tranche, by maintaining an overcollateralization ratio or by using other structural enhancements.

Evergreen Fund Structures

Rated note feeders are increasingly being used with private credit evergreen funds. However, there is a structural mismatch between rated note feeders and evergreen funds. Whereas individual investors in an evergreen master fund may subscribe for and redeem their interests monthly or quarterly, a rated note feeder is structured for a fixed group of investors holding notes that rank *pari passu* within each class and does not permit redemptions at different times.

To address this disparity, a typical rated note feeder obtains liquidity by submitting a request for redemption to the evergreen master fund in respect of the rated note feeder as a whole. If sufficient cash is available, the rated note feeder can apply this cash to repay the rated notes. The maturity date of the notes and redemption timing should be carefully coordinated to mitigate the risk of reaching the note maturity date without having been able to repay the full remaining principal on the notes.

Conclusion

Rated note feeders continue to evolve as sponsors seek to accommodate insurance company investors while adapting to regulatory changes in capital treatment. Horizontal structures, subscription facility solutions, reinsurance sidecars and evergreen funds each present distinct structuring challenges, but they also illustrate the flexibility of the rated note feeder structure. As regulatory requirements and investor demand continue to develop, sponsors are likely to keep refining these structures to expand access to insurance capital.

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Hybrid Capital: Bespoke Solutions for Complex Financing Needs



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Introduction

Private capital providers and private equity sponsors, as well as their portfolio companies, are increasingly turning to hybrid capital—including preferred equity and other bespoke financing instruments—to address financing and structuring challenges that conventional debt and common equity cannot easily solve. These instruments are not a single product or asset class. Rather, they encompass a broad range of highly negotiated financing and investment structures. Where appropriate, their terms are tailored to combine certain debt-like protections and anticipated returns with equity-like governance rights and potential participation in future equity upside.

That flexibility can be particularly valuable when traditional financing alternatives are constrained. Hybrid capital can supplement an acquisition financing package in which a borrower has limited capacity to incur additional traditional debt, provide capital outside an operating company's existing credit group, or address leverage or other restrictions under existing debt arrangements. It can also be used to refinance or extend upcoming maturities or provide liquidity without requiring a sponsor to contribute additional common equity or relinquish control. Unlike a broadly syndicated loan or Rule 144A bond offering, which have standardized market terms, the terms of a hybrid investment can be bespoke and designed around the particular capital structure, transaction objective or ratings or regulatory requirements of the sponsor, company and capital provider.

As credit markets and financing needs continue to evolve, sponsors and other capital providers have become increasingly creative in deploying these instruments. Although structures vary considerably, hybrid instruments generally fall along a continuum from debt-like financing to equity-oriented investments, with many structures combining characteristics of both.

Key Characteristics of Hybrid Capital

Hybrid capital often plays a similar role to junior debt, sitting behind senior debt and ahead of common equity in a company's capital structure. Unlike syndicated loans or capital markets debt, however, hybrid instruments can combine debt- and equity-like features tailored to the needs of a particular transaction. Depending on the structure, returns may take the form of cash or payment-in-kind dividends. Instruments may include call protection,

mandatory redemption or maturity rights. Investors may receive consent rights, information rights or other negotiated rights and protections in lieu of traditional debt covenants and acceleration remedies.

Some hybrid instruments incorporate more equity-like characteristics, including participation in future equity upside and enhanced governance rights. Depending on the structure, investors may receive board representation or observer rights, information rights and consent rights over specified corporate actions. These rights can provide investors with meaningful influence over corporate decision-making and, in certain cases, more extensive participation in the company's governance. Conversion rights, warrants or other equity participation features can also provide exposure to future equity appreciation without requiring an investment in common equity at closing.

Depending on applicable terms, structural location and accounting, ratings and contractual frameworks, hybrid instruments may be treated differently from conventional funded debt for certain purposes. That flexibility can create additional financing capacity or address constraints under existing debt arrangements without immediate dilution of the sponsor's common equity ownership or voting control. At the same time, hybrid instruments can offer capital providers enhanced economics, structural priority over common equity, protective rights or participation in future equity upside. They can also be calibrated to support a desired ratings outcome or address regulatory requirements if certain capital treatment is required by the issuer or investor.

> Unlike syndicated loans or capital markets debt, however, hybrid instruments can combine debt- and equity-like features tailored to the needs of a particular transaction.

The Hybrid Capital Spectrum

Hybrid capital is thus a spectrum rather than a single financing product. At one end, non-convertible preferred equity, holding company PIK notes and other hybrid instruments can function as alternatives to junior debt. At the other end, convertible preferred equity can provide downside protection while preserving substantial equity participation and governance rights. Between those endpoints is an increasingly broad category of bespoke capital solutions designed to address transaction-specific financing, structural, covenant, ratings, regulatory and other considerations. We examine this spectrum in detail below.

There is no single "market" form of hybrid capital. However, hybrid capital transactions can be viewed as falling into three broad categories.

Debt-Like Hybrid Capital

At the debt-like end of the spectrum, non-convertible preferred equity, holding company PIK notes and similar instruments can be used to supplement conventional debt financing for leveraged acquisitions. Where additional senior or junior debt capacity is limited or otherwise unattractive, hybrid capital can bridge a portion of the gap between available debt financing and the capital required to complete the transaction. These instruments may be issued at an upper-level holding company or elsewhere in the capital structure and structured to account for leverage tests, debt-incurrence limitations, ratings considerations, minimum equity requirements or other constraints under the acquisition financing or existing debt arrangements.

Economically, these instruments may resemble mezzanine debt, with features such as cumulative cash or PIK returns, original issue discount or closing fees and call protection. They may also provide for a fixed or accreting liquidation preference. Depending on their terms, the issuer may receive either debt or equity credit for tax, ratings, regulatory or other purposes.

Where the instrument takes the form of preferred equity, however, holders generally do not have the same covenant package or creditor remedies available to conventional lenders, including acceleration and foreclosure rights. In addition, in a downside scenario, the issuer's directors owe no fiduciary duties to

preferred equity holders in respect of their rights, and state laws may in fact prohibit contractually mandated redemptions in the event the issuer does not have the funds to do so or if doing so would impair its capital.

Equity-Oriented Hybrid Capital

Preferred equity has long been a feature of venture capital transactions, where investors rely on the attendant economic, governance and contractual protections to guard against the risks of owning equity in emerging and highly speculative businesses. In private equity transactions, convertible preferred equity and similar instruments can be used in minority and other structured equity investments. These structures can be particularly useful where the parties have differing views of valuation or where an investor is prepared to provide substantial equity capital but is unwilling to assume the same downside risk as a common equity investor.

In a typical convertible preferred structure, the investor receives a liquidation preference providing downside protection through priority over common equity. The investor also has the right to convert into common equity according to negotiated conversion mechanics, which may include anti-dilution protection. Further, if the conversion is priced at the greater of the liquidation preference and the as-converted value, the investor can preserve participation in future equity appreciation. These equity-side instruments often come with substantial governance rights and protections.

Bespoke Hybrid Structures

Many hybrid capital transactions fall between these two endpoints. An instrument may be designed primarily to provide debt-like downside protection and a contractual or preferred return, while also giving the investor participation in future equity value through conversion rights, warrants or a separate equity investment. In other cases, debt-like economics may be combined with bespoke structural, governance, redemption or other features to address the particular requirements of the transaction.

In particular, the requirements of regulated investors or other institutional capital providers may influence the form and terms of an investment. For example, an instrument may be structured to achieve a particular ratings treatment through the calibration of features such as subordination, payment mechanics, maturity or redemption rights and equity participation. Other instruments may be tailored around existing operating-company debt restrictions, regulatory requirements or other transaction-specific considerations.

The flexibility to select and combine these features allows the parties to begin with the financing or structuring problem rather than a predetermined product. By tailoring an instrument to address both the issuer's financing and structural objectives and the requirements of capital providers, parties can facilitate transactions that may not be achievable through conventional financings and thereby expand the available pool of third-party capital.

Conclusion

As sponsors, other private capital providers and issuers increasingly look beyond conventional financing products to address complex capital needs, hybrid capital offers a flexible rather than a one-size-fits-all solution. Successfully deploying these tools requires an integrated understanding of acquisition finance, existing debt arrangements, equity economics and governance, and the transaction's particular structural, ratings, securities law and other regulatory and tax considerations. The continued evolution of these instruments is creating new opportunities for sponsors to tap additional sources of capital and for capital providers to make investments tailored to their particular risk-return, structural and other requirements, in circumstances where traditional debt or common equity alone may not provide an optimal answer.

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Bridging the Pricing Gap 2.0: The Rise of Closing Facilities in Continuation Vehicles

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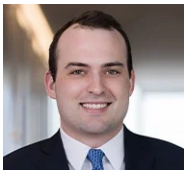

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As the market for continuation vehicles (CVs) continues to evolve, sponsors are increasingly using financing to help bridge the pricing gap between secondary investors and selling fund limited partners seeking liquidity.

Historically, sponsors have used subscription-line and other credit facilities to smooth out capital calls, allowing investor commitments to be drawn less frequently without limiting the sponsor's ability to satisfy funding obligations as they arise. In the CV context, these credit facilities have allowed sponsors to pay certain organizational fees and partnership expenses and to make follow-on investments, without calling limited partners for each individual expense.

Recently, however, sponsors have also begun using these facilities to fund a portion of the purchase price payable by the CV at closing to those selling fund investors seeking liquidity. By deferring a portion of secondary investors' initial capital contributions, this leverage can improve their underwriting economics, potentially enabling those investors to offer more attractive terms. Selling fund investors, meanwhile, receive the full purchase price at closing rather than through a deferred payment.

Because closing facilities can benefit both sides of a CV transaction, a recurring question is who should bear the financing cost. While the market continues to evolve on this point, current practice generally allocates the financing costs onto the CV. CV investors (and especially sophisticated lead investors) are nevertheless pushing for a portion of these costs to be treated as shared transaction costs—in particular, where the alternative would be a more straightforward deferral of a portion of the purchase price.

CV financings are typically "hybrid financings" in which lenders look to credit support from both the undrawn commitments of the CV investors and the assets of the CV. While these financings are often structured as typical subscription credit facilities, they often include NAV-style features, such as a minimum net asset value or loan-to-value covenants, negative pledges and security over the underlying assets. Combining these "look-up" and "look-down" elements can reduce lender risk and produce more favorable pricing and terms than either form of collateral alone.

With lead investors representing a meaningful portion of CV commitments, sponsors often need significant cooperation from secondary investors to satisfy lender diligence requirements (including by providing an investor letter and certain financial information). Likewise, given the significant portion of

As continuation vehicle transactions continue to evolve, closing facilities are becoming an increasingly flexible tool for addressing funding, liquidity and execution challenges.

the borrowing base these investors may represent, lead investors are increasingly involved in negotiating the specifics of the closing facility. Prospective lead investors may begin negotiating the parameters for the closing facility as early as the first-round bid stage, before potential lenders have even been approached. These discussions typically focus on pricing.

For rolling investors—existing investors that retain all or a portion of their portfolio exposure by investing in the CV—the benefits of participating in a closing facility are less straightforward. Because these investors already financed their original acquisition of the portfolio and have elected to roll rather than cash out, their incentives may differ from those of both new secondary investors and those selling fund investors seeking liquidity. Market practice varies as to whether, and how, rolling investors participate in the closing facility. In some CV transactions, the rolling investors will participate in the closing facility *pari passu* with secondary investors. In other transactions, the rolling investors are carved out of the closing facility, either structurally (i.e., through their investing vehicle) or contractually (e.g., pursuant to the CV's operative documents). Each approach has its benefits but may also drive additional complexity.

As continuation vehicle transactions continue to evolve, closing facilities are becoming an increasingly flexible tool for addressing funding, liquidity and execution challenges. Their benefits can extend across the transaction, but the economics ultimately depend on how leverage, costs and recourse are allocated among the selling fund, the CV and its investors. Careful structuring—particularly where lead and rolling investors have different objectives—will remain important as market practice continues to develop.

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A More Attractive IPO Exit? How SEC Reforms Could Change PE Sponsor Calculus


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The public markets are showing signs of renewed momentum. According to the Securities and Exchange Commission, the first half of 2026 saw 208 IPOs raise $137.9 billion, compared with 180 IPOs raising $27.7 billion during the same period in 2025—an increase of approximately 16% in the number of IPOs and approximately 398% in IPO proceeds. At the same time, however, periods of market volatility and continued economic and geopolitical uncertainty have complicated IPO execution and, in some cases, led issuers to defer offerings.

Against this backdrop, SEC Chairman Paul Atkins has advanced a "Make IPOs Great Again" agenda aimed at reducing regulatory barriers to becoming and remaining a public company. If adopted, several of these reforms could improve the IPO exit calculus for private equity sponsors.

Greater Flexibility for Post-IPO Sponsor Sell-Downs

In May, the SEC proposed amendments to the rules and forms governing registered securities offerings. These proposed amendments are intended to enable a significantly broader universe of public companies to access Form S-3 "shelf registration" and the capital markets efficiencies that it provides. The proposed changes would allow issuers to register securities in advance of a transaction and, for issuers eligible to file automatically effective registration statements, to access the market without waiting for SEC staff review or a declaration of effectiveness. For sponsors, expanded and earlier access to shelf registration could facilitate more efficient post-IPO sell-downs and provide greater flexibility to quickly capitalize on favorable market conditions amid periods of market volatility.

Under the proposed amendments, U.S. issuers generally would become eligible to use Form S-3 immediately following an IPO, eliminating several existing eligibility requirements, including the 12-month seasoning period. The amendments would also eliminate Form S-3's transaction requirements, allowing nearly all U.S. issuers to use Form S-3 for shelf offerings in unlimited amounts. The proposal would also replace the current "well-known seasoned issuer" (WKSI) framework for domestic issuers with new "eligible listed issuer" (ELI) and "seasoned eligible listed issuer" (SELI) categories. This move would extend many of the registration and communications benefits currently reserved for WKSIs to a broader universe of exchange-listed issuers.

If the proposal is adopted, the SEC estimates that approximately 74% of existing U.S. Exchange Act reporting issuers would be eligible to file automatically effective shelf registration statements compared with 36% currently. In addition, nearly all U.S. Exchange Act reporting issuers would be able to use Form S-3 for shelf offerings in unlimited amounts, compared with 61% currently. For sponsors, the practical effect could be much shorter lead times and greater flexibility to execute sell-downs as market windows emerge.

For sponsors, the practical effect could be much shorter lead times and greater flexibility to execute sell-downs as market windows emerge.

Reducing the Burdens of Being Public

The SEC has also proposed reforms intended to reduce certain compliance burdens associated with being a public company, particularly during the years immediately following an IPO.

In May, the SEC proposed extending the reduced disclosure obligations and other accommodations currently available to emerging growth companies and smaller reporting companies to a broader range of seasoned and mid-sized public companies. Under the proposal, a newly public company generally would not become a large accelerated filer until it had at least $2 billion in public float and had been an SEC reporting company for at least five years, effectively providing a minimum five-year "IPO on-ramp." Currently, large accelerated filer status is based on public float alone.

Companies classified as non-accelerated filers would benefit from reduced disclosure obligations and other accommodations currently only available to emerging growth companies and smaller reporting companies, including an exemption from the requirement to obtain auditor attestation regarding internal control over financial reporting. Non-accelerated filers would also be exempt from certain executive compensation disclosure and shareholder advisory vote requirements, including requirements to provide compensation discussion and analysis, pay-versus-performance disclosure or CEO pay ratio disclosure and to hold say-on-pay, say-on-frequency and say-on-golden-parachute advisory votes. These filers could also limit compensation disclosure for a smaller group of named executive officers and limit summary compensation table disclosure to two fiscal years and omit several other compensation tables.

Other elements of the SEC's agenda similarly seek to reduce the ongoing burdens of public company status. For example, the SEC has proposed allowing public companies to elect semiannual rather than quarterly reporting.

Separately, the SEC is considering amendments to streamline executive compensation disclosure under Item 402 of Regulation S-K more generally for all filers. Potential changes signaled by Chairman Atkins include reducing the number of executives for whom compensation disclosure is required and simplifying pay-versus-performance disclosure. Depending on its scope, this initiative could reduce ongoing compliance burdens for portfolio companies that ultimately become large accelerated filers.

Beyond these SEC initiatives, the New York Stock Exchange has proposed extending from one year to five years the transition period for newly listed companies to establish an internal audit function. If approved, that change could further reduce the compliance burdens associated with the transition to public company status.

For private equity sponsors, a longer IPO on-ramp and broader public company accommodations could

For PE sponsors, these initiatives, taken together, have the potential to alter the IPO exit calculus at each stage: simplifying the process of going public, reducing certain costs and burdens of remaining public and providing greater flexibility to monetize a retained stake over time.

reduce some of the compliance costs and management burdens associated with public company status during a period when the sponsor may continue to hold a significant stake.

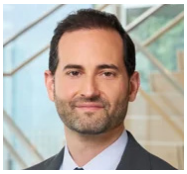
Rethinking the IPO Process

In addition to proposed changes to post-IPO requirements, Chairman Atkins has identified potential reforms to modernize the IPO process itself, although these initiatives remain conceptual and have not yet been reflected in formal SEC rule proposals. Among other things, he has called for simplifying what he described as the "spider web" of Securities Act communication rules to better reflect modern communications practices, as well as encouraging innovation in how companies access the public markets, including alternatives to the traditional firm-commitment underwritten IPO.

For PE sponsors, these initiatives, taken together, have the potential to alter the IPO exit calculus at each stage: simplifying the process of going public, reducing certain costs and burdens of remaining public and providing greater flexibility to monetize a retained stake over time. The proposals remain subject to change, and valuation, market conditions and execution certainty will continue to drive exit decisions. But against a backdrop of renewed IPO activity, the SEC's broader effort to reduce regulatory friction throughout the public company life cycle could make the IPO a more attractive and flexible exit alternative for PE sponsors.

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Insurance and Private Credit Capital Shifts Toward Real Estate Credit



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Two trends are creating new opportunities for alternative asset managers in real estate credit. First, there has been an increased flow of insurance capital toward real estate credit investments, with a growing share of that capital deployed via alternative asset managers. Second, concerns about the impact of AI on certain corporate borrowers, particularly software companies, have prompted some institutional investors to shift their private credit allocation from private corporate credit to private real estate credit. Together, these trends are expanding the pool of capital available for real estate lending and creating opportunities for managers positioned to originate and manage those investments.

The Growing Role of Insurance Capital

Real estate debt has been a fixture in insurance company investment portfolios for most of the nation's history, allowing insurers to match cash flow with their long-term liabilities. Life insurance companies solidified their market share coming out of the mortgage crisis of the 1890s and were the primary source of interregional (i.e., non-local) mortgage credit in the United States until the 1950s, after which mutual savings banks and then securitized mortgages gained market share.

Insurance companies remain significant participants in the market today. Heading into 2026, life insurers held more than $770 billion in U.S. commercial real estate (CRE) debt exposure, accounting for 16% of all outstanding U.S. CRE debt. In 2025, life insurance companies grew their U.S. real estate debt holdings by more than $47 billion, outpacing both banks and agencies. Anecdotally, investment allocators at insurance companies have reported that many of their peers are discussing increasing their investments in real estate debt.

Forces Driving Insurance Demand

Several forces are reinforcing insurers' increased allocation to real estate debt. These include favorable market dynamics, evolving insurance-sector investment needs and regulatory developments that can make certain real estate credit investments more attractive.

Market Dynamics. Since the Global Financial Crisis, commercial real estate debt has delivered relatively stable performance, with continued robust credit standards along with healthier spreads than competing investment products like corporate bonds. Real estate debt can also provide significant diversification, with low long-term correlation to other private credit

strategies. In addition, there has been a vacuum created by the retreat of banks in the wake of regulatory changes during this period. Banks have increasingly focused on more senior positions in the capital stack, including back-leverage facilities secured by mortgage loans and other financing arrangements, such as repurchase transactions.

Insurance Industry Demand. Several developments in the insurance world are also prompting further allocation of insurance capital to real estate debt. The aging U.S. population has led to an increase in annuity sales, with a portion of the assets that insurers hold to match their annuity-related liabilities regularly allocated to real estate debt. Furthermore, the liquidity requirements of certain annuity products are causing investment allocators to branch out from stabilized long-term mortgages in favor of construction and core-plus bridge lending, whose shorter terms can provide a faster return of capital.

Regulatory Tailwinds. Similarly, recent regulatory dynamics in certain jurisdictions have made real estate debt increasingly attractive to insurance allocators. For example, changes to European Union Solvency II regulations coming into force in January 2027 provide insurers with more favorable treatment when investing in senior tranches of securitizations (nearly half of outstanding securitized European debt consists of mortgage-backed debt).

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The Growing Role of Asset Managers

As insurance companies have increased their allocations to real estate debt, a growing share of that capital has been managed through affiliated and third-party asset management platforms. In the past, insurance companies sometimes relied on external "correspondents" to help source and diligence loans but retained a central role in the investment process. Over the past decade, however, more origination and investment management activity has shifted to asset management platforms with established origination capabilities.

This shift has coincided with an increase in strategic relationships between insurance companies and alternative asset managers. These strategic relationships generally take three forms: an insurer may invest through a separately managed account overseen by a third-party asset manager; an insurer may invest in an asset manager (often alongside an allocation of capital to that manager); or an asset manager may invest in an insurer, likewise often accompanied by an investment-management relationship. Recent examples include Mitsui Sumitomo's investment in Barings and Tokio Marine's investment in ACORE Capital, as well as earlier investments by Apollo in Athene and Carlyle in Fortitude Re.

One driver of these relationships is the desire of insurance companies to access more diversified portfolios that include complex, illiquid and higher-yielding investment products. But that is not always the case. In the real estate credit space, insurance companies often invest through asset managers into relatively low-leverage mortgages secured by stabilized properties. The increased convergence between insurance companies and asset managers may therefore also reflect a broader trend toward outsourcing aspects of the investment management function, allowing insurers to rely on an established manager's origination capabilities rather than building those capabilities internally.

The Shift from Corporate to Real Estate Private Credit

Another trend supporting real estate credit activity is the reallocation of institutional capital from corporate private credit to real estate private credit. Private credit strategies have proliferated over the last decade as banks reduced their direct lending

activity. Many institutional investors now have significant allocations to private credit, given its higher yields relative to public markets, flexibility around portfolio construction and often shorter fund lives than private equity.

The software industry represented a significant area of exposure for many private credit lenders, and the rapid emergence of AI has raised questions about the long-term outlook for some software borrowers. In the wake of that disruption, many investors have redirected uncommitted private credit allocation into real estate credit investments, reasoning that such loans originated by private funds and accounts are themselves a form of private credit, though one backed by tangible real estate collateral. Many investors have expressed a preference for real estate debt because of the pairing of hard asset security with the potential to own, operate and create value out of that hard asset.

Recent data reflects this growing interest. Real estate debt accounted for 19% of private credit fundraising in H1 2025, its highest level in five years, with average fund sizes reaching a record $595 million. One survey found that, among surveyed investors planning to increase allocations to private fixed income, 42% planned to increase private real estate debt allocations over the following two years. Another recent survey found that 45% of insurers planned to increase their allocations to private real estate debt, and a leading consulting firm found that 63% of investors expressed a desire to invest in real estate debt in 2025, versus 56% a year earlier.

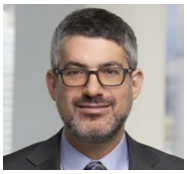
For market participants, understanding the legal, regulatory and commercial forces at play will be increasingly important as capital continues to migrate toward the sector.

Conclusion

These trends point to a continued capital shift to real estate debt investments from both insurance companies as well as private credit institutional investors. Alternative asset managers are well positioned to benefit from both shifts, whether by sourcing and managing real estate credit for insurers or by offering institutional investors access to asset-backed private credit strategies. For market participants, understanding the legal, regulatory and commercial forces at play will be increasingly important as capital continues to migrate toward the sector.

Debevoise & Plimpton

The Limited Partner Exception to Self-Employment Tax After *Soroban* and *Sirius*



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Two recent federal circuit court decisions have significantly limited the application of the "limited partner exception" to U.S. federal self-employment tax, with important implications for private equity sponsors and other investment management businesses. In *Soroban Capital Partners LP v. Commissioner* and *K Alain, L.L.L.P. v. Commissioner* (formerly *Sirius Solutions, L.L.L.P.* and referred to here as *Sirius*), the Second and Fifth Circuits each concluded that limited partner status under state law is not by itself sufficient to exclude a partner's distributive share of partnership income from self-employment tax.

Although the two courts articulated somewhat different standards, both focus on whether a partner participates in managing or running a partnership's business. A third appeal, *Denham Capital Management LP v. Commissioner*, remains pending before the First Circuit.

Background: The Limited Partner Exception

Section 1401 of the Internal Revenue Code imposes a tax on an individual's self-employment income, which generally includes the individual's distributive share of trade or business income of a partnership in which the individual is a partner. For high-earning individuals, the tax on self-employment income is 3.8%, though the actual cost is somewhat mitigated because a portion of the tax is treated as a deductible business expense of the partnership.

Section 1402(a)(13) of the Code—the "LP Exception"—excludes "the distributive share of income or loss of a *limited partner, as such*," from U.S. federal self-employment tax. However, the Code does not define "limited partner, as such." Historically, IRS partnership return instructions have described a limited partner principally by reference to limited liability. Many taxpayers have interpreted the LP Exception similarly, treating partners with limited liability as limited partners for this purpose, regardless of their level of participation in the partnership's business.

The IRS has challenged this interpretation in recent years, including in *Soroban*, *Sirius* and *Denham*, arguing that the LP Exception was intended to protect passive, investment-type returns rather than earnings attributable to a partner's active participation in a business.

Soroban: A Functional Analysis

The dispute in *Soroban* arose from the IRS's examination of an investment management firm's 2016 and 2017 tax returns. Soroban Capital Partners, a Delaware limited partnership, excluded from its reported net earnings subject

to self-employment tax approximately $141.5 million of income allocated to its three principals, each of whom was a state-law limited partner. The individuals received separate guaranteed payments for their services to the partnership, which were included in self-employment income.

On September 17, 2026, the Second Circuit affirmed the Tax Court's decision, holding that the Soroban principals were not "limited partners, as such." Examining the meaning of "limited partner" at the time Congress enacted the statute, the Second Circuit concluded that, in addition to having limited liability, a limited partner must not run, manage or otherwise control the partnership's business. The Second Circuit opinion does not provide guidance on what constitutes impermissible management or control for this purpose.

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In November 2023, the Tax Court ruled in favor of the IRS, holding that the LP Exception does not apply to a partner "who is limited in name only." The Tax Court adopted a functional analysis drawn from prior cases that emphasized an individual's actual activities and the economic source of their income and extended that analysis to state-law limited partnerships. In doing so, the Tax Court rejected Soroban's argument that status as a state-law limited partner alone was sufficient to satisfy the LP Exception.

In a subsequent 2025 decision applying the functional analysis to the facts, the Tax Court concluded that the Soroban principals, who essentially managed and ran Soroban Capital Partners, did not qualify for the LP Exception. The principals worked full-time for Soroban, managed portfolio investments, participated in governing committees and exercised substantial managerial control over the business.

Sirius: A "Significant Role" Test

Sirius involved Sirius Solutions, a Delaware limited liability limited partnership operating a business consulting firm. As in *Soroban*, the IRS challenged Sirius Solutions' treatment of its limited partners' distributive shares for the 2014 through 2016 tax years. Following the Tax Court's 2023 decision in *Soroban*, the parties in *Sirius* stipulated that Sirius' limited partners would not qualify for the LP Exception under the Tax Court's functional analysis. In February 2024, the Tax Court ruled in favor of the IRS, thereby allowing Sirius to appeal the underlying legal standard.

On January 16, 2026, a divided Fifth Circuit panel initially rejected *Soroban* and its functional analysis and held that a limited partner for purposes of the LP Exception was a partner in a state-law limited partnership who had limited liability. In reaching its conclusion, the majority relied on dictionaries contemporaneous with the LP Exception's enactment and legacy IRS and Social Security Administration materials.

In August 2026, in a surprising development following the government's petition for rehearing *en banc*, the Fifth Circuit withdrew its January 2026 opinion and issued a substituted opinion. While still purporting to reject *Soroban*'s passive-investor standard, the new opinion held that a limited partner for purposes of the exclusion from federal self-employment taxes is "a partner who plays no significant role in managing or running a business." The Fifth Circuit provided little guidance on how to apply the "significant role" standard or what level of participation crosses the line into management of the business.

The Fifth Circuit vacated the Tax Court's decision in *Sirius* and remanded for further proceedings under the new standard, without determining whether the Sirius limited partners qualified for the LP Exception.

Denham: A Pending Appeal

Denham is the remaining pending appellate case addressing the LP Exception.

Denham Capital Management, an investment management partnership, challenged IRS adjustments for its 2016 and 2017 tax years. The Tax Court

ruled against Denham in December 2024, applying the functional analysis established in *Soroban*. Denham appealed to the First Circuit in April 2025, and oral argument took place on February 5, 2026. The First Circuit's opinion is still pending.

Implications for Private Equity Sponsors

In addition to the pending opinion in *Denham*, the taxpayers in either *Soroban* or *Sirius* could still petition the Supreme Court for review. However, while the final verdict on the scope of the LP Exception remains pending, the outlook for taxpayers in managerial roles seeking to rely on the LP Exception appears increasingly unfavorable.

As noted above, neither *Soroban* nor *Sirius* provides meaningful guidance on when participation in business decisions crosses into impermissible management, control or running of the business. Though both cases are clear that state-law limited partner status alone is insufficient to establish eligibility for the LP Exception, they also acknowledge that a limited partner may participate in certain non-managerial aspects of a business and still benefit from the LP Exception.

Although the Fifth Circuit's standard differs from the Second Circuit's in looking to whether a limited partner has a "significant role" in running a partnership's business, in practical terms the opinions appear closely aligned. The distinction between the two standards may be more significant for partners whose activities fall short of clearly running or managing the business.

The pending First Circuit decision in *Denham*, together with potential further appellate proceedings in *Soroban* and *Sirius*, may provide further clarity on the boundaries of each Circuit's LP Exception standard. For now, however, the principal message for sponsors is that the availability of the LP Exception increasingly appears to depend not only on a partner's classification under state law, but on what that partner actually does within the limited partnership.

With two federal appellate courts now requiring an examination of a limited partner's managerial role, formal limited partner status alone appears increasingly unlikely to support the LP Exception.

In connection with 2026 tax reporting, taxpayers—especially in the Second and Fifth Circuits—will need to assess whether their participation reaches the impermissible levels described in *Soroban* and *Sirius*. This determination must be made both by individual partners and by the partnership itself, which will need to decide whether to report income on Schedule K-1 as subject to self-employment tax. Sponsors with individuals relying on the LP Exception should review the roles, responsibilities and compensation arrangements of those individuals. Potential problem areas include where a limited partner has operational authority, manages personnel, has authority to legally bind the entity, controls core investment or service decisions or is held out internally or externally as responsible for operating the business.

With two federal appellate courts now requiring an examination of a limited partner's managerial role, formal limited partner status alone appears increasingly unlikely to support the LP Exception.

Debevoise & Plimpton

Taking Down Fraudulent Look-Alike Domains: A Practical Guide



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Combatting fraud is an ongoing challenge, and AI has increased the speed and scale of attacks. That makes it more important than ever to be diligent and quick to respond when fraud vectors are identified.

Fraudsters commonly register look-alike domains that mimic an organization's legitimate domain for use in fraudulent websites or email accounts. These domains are frequently used to impersonate private capital firms in investment scams, as well as businesses across a wide range of industries.

Fortunately, domain name monitoring services can help spot these issues early. This article offers a practical guide to steps sponsors and portfolio companies alike can take to identify and disrupt any fraudulent look-alike domains they identify.

Taking Down Fraudulent Domains

Step One: Identify the Service Providers

The first task in taking down a fraudulent domain, website or email account is to determine which service providers the fraudsters are using to support their activities. **Registrars** manage the domain registration; **hosting providers** store the website; and **email providers** carry messages sent from the domain.

Some fraudsters will use one company for all three services, but more sophisticated actors may use different service providers for each part of the scheme. In addition, **social media platforms** may host accounts or content used to support the fraudulent scheme.

Registrars. ICANN, which coordinates the Internet's unique identifier systems, including domain names and IP addresses, offers a free tool to identify registrars and their abuse contact information. The registrar may also maintain an abuse reporting form on its website. Although the identity of the registrant might be redacted or withheld, a report can still be submitted to the registrar identifying the fraudulent domain.

ICANN-accredited registrars must maintain an accessible abuse channel, acknowledge reports and investigate them promptly. In practice, responsiveness can vary significantly between registrars, but sending and documenting an abuse report is an important first step.

If the registrar does not act following the abuse report, it may be possible to escalate the matter to the registrar's legal or trust-and-safety team. If the registrar does not act, a report can also be submitted to the appropriate **registry operator** responsible for the domain's top-level domain, such as .com or .org. ICANN's Registry Listings identify the operators of generic top-level

domains. Most registry operators publish an abuse contact and, when presented with actionable evidence of abuse and inaction by a registrar, will take appropriate direct action.

Hosting Providers. The ICANN lookup results will also include the domain's nameserver or "NS" records. These records may reveal the hosting provider, although additional research man be required to identify it. If the provider differs from the registrar, it should be sent a separate abuse report.

Live scam or phishing websites can also be reported to Google Safe Browsing and Microsoft SmartScreen. Those services do not suspend the domain, but they may generate browser warnings and reduce victim traffic. Both maintain public unsafe-site reporting channels.

Email Providers. A domain may be set up for email even if no website is active. The email provider can be identified through the domain's mail exchange, or "MX" records. Google offers a tool that can locate MX records, as does MX Toolbox. The results will often identify the provider, although additional research may be required.

Social Media Platforms. A search of the domain name may identify social media or other accounts associated with the fraudulent activity. The fraudulent website may itself contain links to these accounts. Most major social media platforms have an abuse reporting mechanism, often outlined in their terms of service.

Fraudsters commonly register look-alike domains that mimic an organization's legitimate domain for use in fraudulent websites or email accounts. These domains are frequently used to impersonate private capital firms in investment scams, as well as businesses across a wide range of industries.

Step Two: Submit Effective Abuse Reports

Once the relevant service providers have been identified, each should receive a targeted abuse report. The reports should contain a short cover message and screenshots or other evidence of fraudulent activity. It is important to preserve copies of all evidence before sending reports because the underlying website, account or messages may disappear quickly. Assume the complaint may be forwarded to the provider's customer. Reports should therefore exclude unnecessary personal information, confidential deal details and internal confidential or privileged information.

An effective abuse report will identify:

- the exact domain, URLs, sending addresses and reply-to addresses;
- the impersonated company and its legitimate domain;
- representative screenshots, messages, email headers and dates;
- the misconduct and threatened harm, including references to the provider's terms of service and abuse policies where possible; and
- the precise action requested, such as suspension of the domain, website or account.

The focus of the report should be phishing, fraud and impersonation, rather than trademark infringement. Trademark registrations or the company's legitimate domain name should only be used to support the report, because registrars and other platforms ordinarily will not take unilateral action in a dispute framed solely as trademark or other intellectual property infringement, deferring instead to processes such as proceedings under ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP). Leading instead with allegations and evidence of active phishing, fraud or impersonation, rather than framing the matter as an intellectual property dispute, may facilitate a faster response.

The requested relief should be tailored to the provider. A registrar can be asked to suspend the domain, impose an appropriate hold or transfer lock and preserve account records. A hosting provider can be asked to disable the site. An email provider can be asked to suspend the account, and a social media platform or messaging provider can be asked to disable the fraudulent account.

Do not wait for one provider to respond before contacting others. Submit all reports as close together as

possible, and keep a log of recipients, ticket numbers, acknowledgments, follow-ups and results.

These informal actions can disrupt a fraudulent campaign quickly but generally will not provide permanent control of the domain. A UDRP proceeding can be used to secure transfer of a domain name registration, while a claim under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), may be necessary for judicial relief in the United States. Considering those longer-term remedies should not delay immediate provider outreach.

Establishing a Portfolio-Wide Protection Playbook

Sponsors can promote best practices across their portfolio companies by maintaining a common intake and escalation process for fraudulent domains and impersonation schemes. The playbook can designate who is responsible for preserving evidence; identifying the registrar, the hosting provider and the email provider; authorizing outreach; and determining whether banks, insurers, investors, lenders or law enforcement should be notified.

To ensure consistent documentation, the playbook can contain a template worksheet that includes the fraudulent domain, the registrar, the hosting provider, the email provider, other relevant platforms, abuse-report links and the status of each report.

Having processes in place to monitor and respond to fraudulent impersonation is an important component of fraud prevention planning for sponsors and portfolio companies alike.

An effective response framework is best paired with domain-name monitoring and sound recordkeeping around the company's intellectual property and digital assets. Authentic domain records, trademark records, brand-owner authorizations and current internal and external contacts should be kept readily available.

Today's sophisticated threat actors pursue targets of opportunity. Heightened readiness is therefore appropriate around acquisitions, financings, capital calls, leadership changes and other events that provide fraudsters with a credible pretext for outreach. Fraudsters also exploit current events and technological developments to make their communications more credible, including by posing as providers of urgent software or security updates. Having processes in place to monitor and respond to fraudulent impersonation is an important component of fraud prevention planning for sponsors and portfolio companies alike.

Debevoise & Plimpton

Trade Secrets in M&A: The Hidden IP Risk



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When stakeholders and advisors think about intellectual property risk in an M&A transaction, they tend to reach first for "traditional" types of intellectual property that are registered with the government. That instinct is reinforced by a diligence process often built around public records and government filings, with questions such as whether a target's patents, trademarks and copyrights are properly recorded with clean chain of title.

In contrast, trade secrets often receive less, if any, attention; there is no registry to search or file history to pull. However, the failure to consider the potential for trade secret risk in a transaction is a potentially dangerous and expensive omission. Trade secret litigation is becoming more common, and large trade secret verdicts and settlements arising out of M&A processes (whether failed or completed) demonstrate that trade secrets may, in appropriate circumstances, warrant the same rigor in diligence that is applied to other types of intellectual property.

This article begins by identifying recurring fact patterns that can signal trade secret risk. It then examines how a sponsor can evaluate whether a target or its officers face a credible risk of trade secret litigation, and whether the sponsor itself could inherit that exposure as a buyer. Finally, it discusses how a sponsor can structure a transaction's confidentiality agreements so that if a deal falls apart, a disappointed counterparty cannot credibly claim that the sponsor walked away with its secrets instead of its business.

Recognizing Trade Secret Risk In M&A

Trade secret litigation has grown steadily not just in the number of cases filed but also in the size of the verdicts. Federal Defend Trade Secrets Act filings rose from 609 in fiscal year 2021 to 708 in 2024 and reached a record high of 1,552 cases in 2025. Furthermore, trade secret damages in the last five years have often reached hundreds of millions of dollars.

M&A activity is a recurring trigger for these disputes, and the fact pattern repeats often enough to be recognizable. A target shares sensitive technical or commercial information with a prospective acquirer under a nondisclosure agreement (NDA) during diligence. The deal falls apart. The prospective acquirer later launches, or accelerates, a competing product or business line. The target concludes that the acquirer never intended to close and used the diligence process to obtain, free of charge, exactly the information it would have paid to acquire.

That pattern produced one of the largest trade secret verdicts in recent years. Propel Fuels, Inc. sued Phillips 66 Company after Phillips signed an NDA in September 2017 to explore acquiring Propel's renewable fuels business. After Phillips terminated negotiations in August 2018, it launched an effort to enter the renewable fuels market using the same team that had conducted due diligence on Propel. A California jury found in October 2024 that Phillips had misappropriated Propel's trade secrets, awarding $604.9 million in damages, and the court separately awarded $195 million in exemplary damages after finding the misappropriation willful and malicious. The court later denied Phillips's post-trial motions to overturn the verdict in October 2025.

The same pattern appears in strategic investments and partnerships. Zunum Aero, an electric aircraft startup that took venture capital from Boeing, sued Boeing in 2020, alleging that Boeing used Zunum's trade secrets learned during diligence to develop a competing hybrid commuter aircraft. A jury initially awarded Zunum roughly $81 million in trade secret damages. A federal judge later invalidated the verdict for insufficient identification of the trade secrets, but the Ninth Circuit reinstated the award in August 2025, finding that Zunum's evidence was specific enough to support the jury's findings.

A second pattern involves alleged trade secret misappropriation by a target, which later exposes the acquirer to liability. In *Arcturus Therapeutics, Inc. v. AbbVie Inc.*, Arcturus Therapeutics sued AbbVie Inc. and its subsidiary Capstan Therapeutics in September 2025, alleging that two individuals who had worked for Arcturus brought trade secrets relating to Arcturus's lipid nanoparticle delivery technology to Capstan before Capstan was acquired by AbbVie for $2.1 billion. Arcturus's complaint alleges that a material part of Capstan's value "consisted primarily of trade secrets its personnel had misappropriated from Arcturus." The court largely denied the defendants' motion to dismiss in March 2026, allowing the case to proceed.

Because trade secrets are not recorded on public registers, it is essential for buyers to ask the right questions during diligence.

The *Arcturus* case is instructive for sponsors for a reason that goes beyond its facts: it demonstrates that trade secret exposure most often does not stay with the seller in an acquisition. AbbVie, the buyer, now defends a lawsuit arising out of conduct that occurred before it owned Capstan, over technology that may sit at the core of the deal's value.

Diligencing Trade Secret Risk

Because trade secrets are not recorded on public registers, it is essential for buyers to ask the right questions during diligence. A few areas warrant particular attention:

Provenance of Key Trade Secrets. Where trade secrets drive the value in a transaction, diligence should trace the origins of those trade secrets. The target should be able to explain who, when and how such trade secrets were developed and whether such development drew on technology or confidential information belonging to a former employer, collaborator, licensor or other third party. A gap in that history—particularly where a key technical advance closely followed the arrival of personnel from a competitor—may warrant further investigation.

Personnel Movement Into and Out of the Target. The *Arcturus* dispute began with two individuals with longstanding ties to Arcturus—a former employee and a former consultant—moving to a competitor. Where conducting trade secret due diligence, diligence teams should ask where a target's key technical personnel came from, whether any joined from close competitors, and whether the target has documentation showing that those hires went through a clean onboarding process. If recent hires have filed patent applications, those applications should be reviewed to determine if

inventions are being claimed shortly after the new hire joined.

Consultants and Advisors Working Across Competitors. Consultants who work for multiple companies in the same technical space can create overlooked risk because they may fall outside standard onboarding and confidentiality protocols. *Arcturus* illustrates the issue: Arcturus alleges that its longtime consultant began working for Capstan while still consulting for Arcturus.

None of this diligence eliminates the risk that a seller's technology was not developed cleanly, but it builds the factual record a sponsor will want if a claim surfaces after closing: evidence that the sponsor asked the right questions and that the answers, at the time, gave no reason for concern.

Drafting for the Deal that Does Not Close

The harder problem for a sponsor is often prospective: how to structure the confidentiality and diligence protocols for a deal it is pursuing, so that if the deal fails, the sponsor is not exposed to the kind of claim Phillips 66 and Boeing faced.

The *Propel Fuels* decision is a useful roadmap of what not to do. The court found that Phillips took "no efforts to shield the team implementing its [renewable fuels] project from Propel's trade secrets," despite recognizing that it could have used a "clean team" to avoid misusing Propel's information. The court similarly emphasized Phillips's efforts to "strip[] out and delet[e] Propel information" from financial models that Phillips wanted to reuse internally. As the court put it, Phillips "should have collected and sequestered, returned, or destroyed all Propel confidential information shared during due diligence, without exception," rather than trying to parse after the fact which piece of information was a trade secret.

The harder problem for a sponsor is often prospective: how to structure the confidentiality and diligence protocols for a deal it is pursuing, so that if the deal fails, the sponsor is not exposed to the kind of claim Phillips 66 and Boeing faced.

Sponsors evaluating a strategic acquisition, minority investment or joint venture where the counterparty will share potentially competitive information should consider building the following into the transaction documents and internal process from the outset.

Negotiate the NDA with a Failed Deal in Mind. The *TAOS v. Intersil Corporation* litigation provides another data point about NDAs during negotiations: Texas Advanced Optoelectronic Solutions, Inc. (TAOS) disclosed confidential ambient-light-sensor technology to Intersil Corporation during unsuccessful 2004 merger discussions, and later alleged that Intersil used the information to develop competing products. In 2025, after years of litigation, the Federal Circuit affirmed awards, including $8.5 million in disgorgement for trade secret misappropriation, $17.1 million in exemplary damages, approximately $7.25 million in reasonable-royalty damages for breach of contract, and attorneys' fees.

Use a Clean Team for Technical Diligence. Where practicable, sponsor personnel who review a target's confidential technical information during diligence should be walled off from others in the sponsor's organization who could put that information to competitive use. This is particularly important in cases where the sponsor already holds, or is evaluating, a competing portfolio investment. The absence of a "clean team" was central to the willfulness finding in *Propel Fuels*, and its use can help rebut an inference of bad faith.

Require specificity about what is confidential. Generic NDAs that sweep in "all information disclosed" as confidential, without asking the disclosing party to identify what it considers a trade secret, create ambiguity that favors the plaintiff in later litigation. Where commercially practicable, sponsors should consider NDA provisions that require counterparties to identify trade secret material as such when it is produced.

Include an independent development clause. An acquirer's confidentiality and diligence agreements should state that the recipient remains free to develop, acquire or use similar information independently, provided it does so without reference to the counterparty's confidential disclosures.

Consider a residuals clause. A residuals clause can permit personnel who were exposed to a counterparty's confidential information to use, after the fact, general knowledge, skills and experience retained in unaided memory. These clauses are valuable to acquirers precisely because trade secret disputes over failed deals often turn on what diligence personnel remember and later apply. But a residuals clause can be drafted to exclude specific technical data, source code, formulas or documents, as courts and disclosing parties may scrutinize any residuals language that reads as an improper license to retain the substance of what was disclosed.

Conclusion

Trade secret exposure in M&A is not a theoretical risk confined to a narrow set of technology deals. It arises across industries whenever competitively sensitive information changes hands during a process that might not close, and it can attach to an acquirer years after the fact or follow an acquired business into its buyer's hands. In appropriate cases, trade secret risk should therefore be a distinct diligence item addressed by asking the right questions about people, prior negotiations and information handling, and managed prospectively through carefully drafted confidentiality agreements.

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Regulatory Risk in Cross-Border Investments: Treaty Protection for Private Capital



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Governments frequently create regulatory frameworks designed to incentivize foreign investment. But sometimes those frameworks can change after investments have been made—whether through changes to subsidy regimes, financial-sector regulations, tax treatment, or other policy shifts.

Investment treaties—agreements between two or more countries that offer protections to each other's investors under international law—offer a potentially valuable but often overlooked mechanism for addressing these risks. The most common substantive protections include guarantees against expropriation without compensation, requirements for fair and equitable treatment, prohibitions on discriminatory measures, and protections for the transfer of investment-related funds.

When a host State breaches a treaty protection, the affected investor can initiate arbitration before a neutral investment tribunal. Treaties therefore offer valuable additional protection beyond proceedings under local law in the host State's own courts.

Regulatory Risks Faced by Private Capital

Regulatory and policy risks are not confined to emerging markets or investments in physical assets. They arise wherever private capital depends on a regulatory framework, government approval or other forms of State action that the State can modify after the investment is made, as well as when the State or State entities are themselves the counterparty.

Recent examples of regulatory changes affecting private capital provide useful lessons about the protections that may be available under international investment treaties and the practical considerations investors should address when structuring cross-border investments.

Regulatory Rollbacks. The Spanish renewable energy sector provides a good example. Spain encouraged substantial private investment through long-term subsidy regimes and other regulatory incentives. Private equity funds, infrastructure investors and project finance lenders, relying on these incentives, deployed significant capital for various projects. Spain subsequently made material changes to its renewable energy regime, including retroactive modifications to the remuneration available for existing projects. These actions led to dozens of investment treaty claims. In many of these cases, arbitration tribunals found Spain in breach of its international obligations to foreign investors, resulting in awards of approximately €1.5 billion in damages.

These disputes against Spain illustrate the range of financial investments that can qualify for treaty protection when regulatory measures affect a financed project or enterprise. For example, in *Eiser v. Spain*, the protected investments made by British and Luxembourg investors included not only shareholdings but also shareholder loans and capital contributions. In *Portigon v. Spain*, a German bank brought claims in relation to project financing arrangements for renewable energy projects; the tribunal concluded that the relevant financing could qualify for treaty protection and found a treaty breach, although it ultimately awarded no damages. Pending proceedings in *Landesbank v. Spain* involve project finance lending by German banks of approximately €1.76 billion.

Spain's renewable energy sector is only one area in which investment treaty claims have been brought by investors adversely affected by regulatory or policy changes. In *OKO Pankki and others v. Estonia*, claims by Finnish and German banks arose out of Estonia's invalidation of arrangements for repayment of financing provided by the claimant banks to an Estonian joint venture. And in *British Caribbean Bank v. Belize*, a Turks and Caicos bank protected under the UK-Belize bilateral investment treaty brought claims arising from Belize's nationalization of a telecommunications enterprise to which the bank had extended financing.

Banking and Financial Sector Regulation. State interventions in the banking and finance sector—including resolution frameworks, restructuring measures and prudential regulations—have also generated claims. Treaty claims have arisen, for example, from the resolution and forced sale of Banco Popular in Spain; the resolution of Banco Espírito Santo in Portugal; the allegedly forced administration of Bahraini banks; the restructuring and privatization of the Czech banking sector; the write-down of Credit Suisse AT1 bonds in Switzerland; the court-ordered transfer of PrivatBank's Crimean assets to a trust; Estonia's revocation of a banking license; and bail-in measures affecting deposits and bonds in two Cypriot banks.

Sovereign Debt Measures. State measures affecting sovereign debt, including restructurings, have also prompted treaty claims. In *Gramercy v. Peru*, a U.S. emerging markets fund brought claims relating to Peruvian land reform bonds, ultimately prevailing on the merits. In a trio of cases against Argentina (*Abaclat*, *Ambiente Ufficio*, and *Alemanni*), over 60,000 private bondholders pursued claims arising from Argentina's sovereign debt default. In *Poštová Banka v. Greece*, a Slovak bank holding Greek government bonds challenged Greece's enactment of legislation in the context of the 2012 sovereign debt restructuring. In *Cyprus Popular Bank v. Greece*, a Cypriot bank also brought claims arising from Greece's sovereign debt restructuring, alongside separate claims concerning Greece's emergency liquidity and bank-resolution measures.

When a host State breaches a treaty protection, the affected investor can initiate arbitration before a neutral investment tribunal. Treaties therefore offer valuable additional protection beyond proceedings under local law in the host State's own courts.

Defaults on State or State-Entity Financial Obligations. Protection has also extended to financial instruments involving a State or State-owned entity as a counterparty. In *Fedax v. Venezuela*, a Dutch investor brought claims relating to Venezuela's failure to honor its promissory notes. In *Deutsche Bank v. Sri Lanka*, a hedging arrangement was found to constitute a protected investment after the State-owned oil company defaulted on its hedging obligations and the government intervened in the dispute.

Eligibility for Treaty Protection

Whether investment treaty protection is available depends on the particular treaty and the way in which the investment is structured. Even when treaty protection appears available, investors should be aware of issues that can complicate or defeat a claim. Key considerations include whether the investor qualifies for protection, whether the relevant interest constitutes a protected investment, and when treaty protection is put in place.

Protected investors. Investment treaties generally protect investors that have the nationality of the

signatory countries, and the criteria for determining nationality vary between treaties. The jurisdiction through which an investment is made can therefore affect whether treaty protection is available.

Many treaties look to the claimant's place of incorporation. Others, however, determine investor nationality by the "corporate seat" or "*siège social*"—typically the place of effective management or central administration. This approach can create some risk for holding vehicles with limited operational activity. Investors using holding structures in jurisdictions with *siège social* treaties should consider whether the vehicle has sufficient presence and decision-making activity in the jurisdiction to satisfy the applicable nationality test.

Some treaties also include "denial of benefits" clauses, which permit a host State to deny treaty protection to entities that lack substantial business activities in the host State or are controlled by nationals of third countries or of the host State itself.

question to have certain characteristics relating to contribution, risk, duration or other factors.

Arbitration tribunals have recognized treaty protection for a range of financial instruments under various treaties. Examples include long-term promissory notes issued by governments; bonds secured by mortgages; sovereign bonds, including bonds acquired on secondary markets; land reform bonds; bank bonds and deposits; loans integrated into an investment operation; interrelated arrangements comprising loans, guarantees, repayment agreements and mortgage rights; loans secured by interests in an underlying enterprise; standalone hedging arrangements; and project finance arrangements comprising long-term debt and associated interest-rate swaps.

Whether the claimant controls the specific asset in question may also be relevant under some treaties. For structures involving management agreements, fund administrators and multiple partners, tribunals may examine whether the claimant can demonstrate sufficient powers of direction and supervision over the investment, as was the case, for example, in *Gramercy v. Peru*, *Mason Capital v. Korea* and, more recently, *Contrarian Capital v. Mexico*. This analysis can involve not just the corporate ownership structure, but also factual issues relating to the corporate governance and functioning of the investment vehicles in play.

> For private capital investors, the key is to consider treaty protection at the outset—when decisions about investment structure, holding jurisdictions and ownership arrangements are still being made—rather than after a dispute has emerged.

Protected investments. Most investment treaties define covered investments with a non-exhaustive list of categories of protected assets. Whether a financial instrument qualifies for protection may also depend on its connection to the host State. Some treaties require the asset in

Timing of protection. Treaty protection should be considered alongside tax, regulatory and other commercial considerations when structuring a cross-border investment, ideally before problems arise. Tribunals may decline jurisdiction on the grounds of abuse of process where an investment has been restructured after a dispute has arisen or become reasonably foreseeable and the primary purpose of the restructuring was to gain access to treaty protection that would not otherwise exist. Legitimate tax and investment planning can be distinguished from illegitimate abuse of the treaty mechanism, but this can be a fact-intensive inquiry.

Conclusion

Investment treaties can provide an important additional layer of protection against regulatory, sovereign and other State-related risks affecting cross-border investments. For private capital investors, the key is to consider treaty protection at the outset—when decisions about investment structure, holding jurisdictions and ownership arrangements are still being made—rather than after a dispute has emerged. Careful planning at that stage can help preserve access to treaty protections if government action later impairs the investment.

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