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Weil Private Equity Sponsor Sync

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FROM THE EDITORS

We are excited to share our latest edition of Sponsor Sync, where we explore the forces shaping the private equity market today. In this issue, we highlight the surging interest in sports investing, from NFL teams to emerging leagues like pickleball, offering a deep dive into why private equity is driving the future of sports ownership. We also look at the evolving trends in digital infrastructure investment, as the race for data, connectivity, and tech transformation accelerates. We also feature our regular update in leveraged finance, and lay our predictions for antitrust regulatory enforcement in a potential Harris or Trump 2 administration. Don't miss our analysis on why structuring debt as notes might be your next best strategic move, and before you go, put your knowledge to the test in our new Sponsor Smart quiz—your firm's ranking is waiting (may the best and brightest firm win)! We hope you enjoy the read as much as we enjoyed preparing this issue.

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WEIL LOAN TRACKER

Q3'24

Average First-Lien Broadly Syndicated Spread for B Rated Borrowers:	Average First-Lien Broadly Syndicated Spread for B-Minus Rated Borrowers:	Average Spread Differential for Private Credit:	**YTD** Volume of Refinancings of U.S. Private Credit Loans into Syndicated Loan Market:	**YTD** Volume of Repricings of U.S. Leveraged Loans:
S + 374 (up 5 bps Q over Q)	**S + 424** (up 14 bps from Q2)	**~105 bps higher than BSL**	**$22 billion**	**$479 billion**

U.S. LEVERAGED FINANCE MARKET UPDATE

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SMART SUMMARY

- The momentum in the U.S. leveraged loan market seen during the first half of 2024 continued into Q3, with refinancings and repricings continuing to make up the bulk of activity.
- Post-Labor Day, we have seen an uptick in M&A and new money activity supported by favorable market conditions, which is expected to continue until the U.S. presidential election in early November.
- September was the busiest month of the year thus far for the U.S. syndicated loan market, with $69.4 billion of issuance through September 30th, of which roughly 38% represented new money LBO/M&A activity – the highest level since January 2022.

Coming off of a lively first half to 2024, opportunistic transactions continued to hold ground in the U.S. leveraged loan market into Q3'24 – especially for refinancings, repricings and amend-to-extends, albeit at a less frenzied pace than in the first two quarters of the year. Though the U.S. leveraged loan market cooled in early August amid recessionary concerns and a broader stock-market sell off, it rebounded in September with M&A activity and new money volume regaining footing, supported by favorable market and technical conditions, and a long-awaited interest rate cut announced by the Fed in mid-September.

Third Quarter Recap

As of September 20th, U.S. leveraged loan volume totaled $1.045 trillion – up 93% from the same period in 2023.[1] The second quarter boasted a record pace of leveraged loan activity totaling approximately $396 billion, due in large part to a surge in repricing amendments, which accounted for 51% of total activity.[2] The tides changed in the third quarter, during which buyouts, acquisitions, recapitalizations and other transactions overtook refinancings for the first time in almost two years.[3]

Market Revives in September following August Doldrums

While August ordinarily comes with a summer lull in new-money volume, the slowdown impacted opportunistic volume as well. The volume of leveraged loan repricings fell to the lowest reading in August since June 2023 with only $1.7 billion of repricing issuance.[4] Market data showed a similar decline in new-issue institutional volume supporting refinancings at just 24%, down from 49% and 67% in July and June, respectively, and from the year's monthly average of 60%.[5] Amend-and-extend activity slowed as well, totaling $6.3 billion in August and reaching the lowest monthly amount in more than two years.[6] Faced with these conditions, multiple deals were pulled from syndication in August.

September showed welcome signs of recovery from August's lulls. In the first week of September alone, leveraged borrowers launched $17.2 billion of repricing amendments on their term loans, such that, on a pro forma basis, a staggering 37% of all loans tracked by the Morningstar LSTA U.S. Leveraged Loan index had been repriced between January and the end of September 2024, saving borrowers an average of ~53 bps in interest expense[7]. Repricing activity is expected to continue through the end of the year with an estimated $56 billion of potential repricing targets in the U.S. still remaining.

Dividend recap transactions took off in September as well, with a total volume of $15.7 billion for the second quarter[8] giving way to $19.2 billion of volume the month of September alone (representing the highest level for any single month in the U.S. loan market since July 2021).[9] Looking at 2024 thus far, private equity sponsors have been able to extract more than $26 billion of value from dividends financed in the syndicated loan market.[10]

Revival of LBO's and M&A Financings in Q3'24

Q3'24 also saw an uptick in LBO and M&A activity. In July alone, M&A loan volume totaled $16.1 billion, compared to $21 billion in the aggregate over the entire first quarter, reflecting the largest level of M&A volume since June 2023.[11] This momentum was only further buttressed by the U.S. Federal Reserve's announcement on September 18th of an initial interest rate cut of 50 bps.

Technical conditions were also strong. Although CLO issuance tapered off somewhat in Q3, new-issue CLO volume still reached a record $129.51 billion by the beginning of September due to strong momentum in the first two quarters, marking the second highest yearly total on record and up 78% compared to the same period last year.[12]

Market observers are optimistic that the aforementioned favorable market and technical conditions, coupled with the expectation of more interest rate cuts on the horizon and record levels of available private equity dry powder, will bode well for M&A financing activity for the remainder of the year.

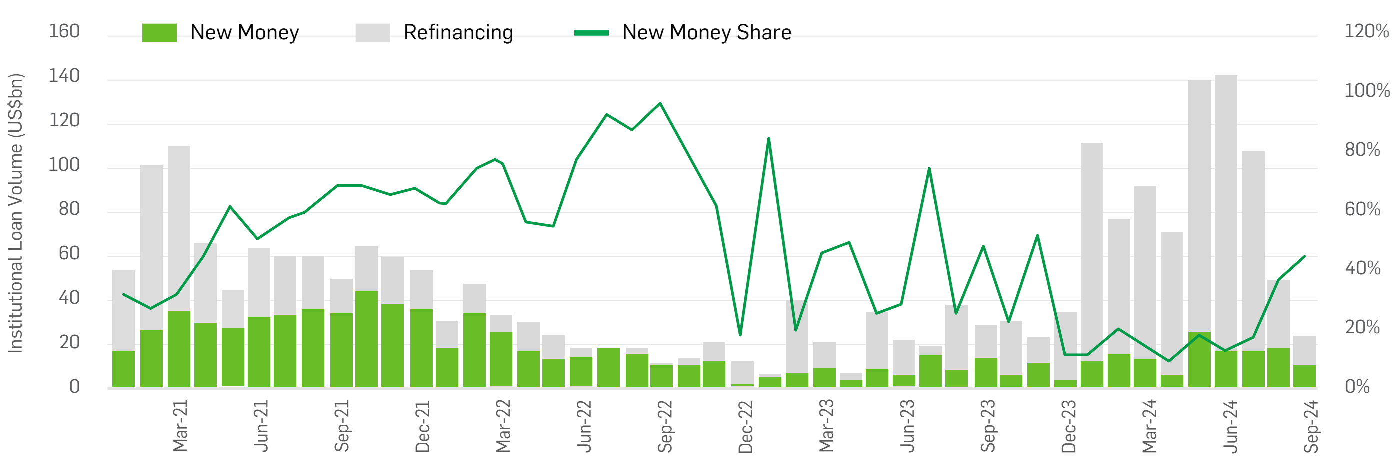
These expectations seem to have materialized in September. September was the busiest month of the year thus far for the syndicated loan market, with $69.4 billion launched through September 30.[13] About 38% of that volume represented LBO and M&A activity, marking the highest level in two and a half years.[14]

Competition Among Direct Lenders Has Benefited Borrowers

As new money volume picks up, sponsors are expected to continue to look to the ever-growing private credit market as a potential financial solution.

Over the years, competition among direct lenders for investment opportunities has resulted in more borrower-friendly terms in private credit deals, including fewer financial covenants (or, in some deals, "springing" covenants approximating the syndicated loan market), as well as tightening pricing. As of the end of Q3, average spreads on middle-market direct lending transactions had fallen to the lowest level in more than two years at ~530 bps, with 41% of sponsored new issue

New Money Institutional Volume Jumps Post-Labor Day



Source: LSEG LPC

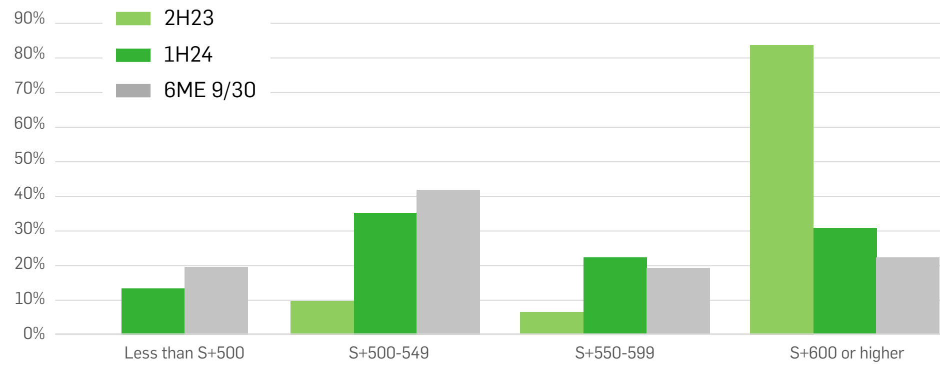
direct lending deals pricing in the S + 500-549 bps range.[15]

Private credit providers can sometimes also offer terms that are harder to clear in syndicated deals, giving them a competitive edge over the syndicated market, such as more flexible portability features, PIK interest and amortization holidays. Portability features in particular have gained traction in light of muted new deal flow, as they allow sponsors to keep their existing debt facilities in place so they can partake in M&A transactions without having to tap the market for new financing at potentially worse terms or with additional fees.

Q4 2024 OUTLOOK

As we look toward the tail end of 2024, assuming the economy remains resilient and absent major geopolitical volatility, we expect to see M&A-driven loan volume ride the September wave at least until the U.S. presidential election in early November begins to inject usual election-related uncertainty into the market. Moreover, we expect repricings to continue, though likely not at the pace seen during the spring.

Distribution of Spreads: New Issue-Sponsored Direct Lending

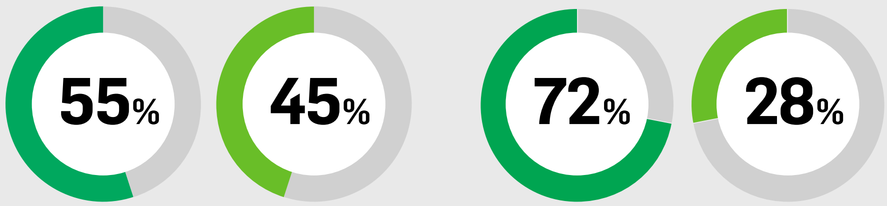


Source: Pitchbook | LCD + Data through Sept. 25, 2024
Data based on LCD News reporting; reflects spreads on senior secured loans and unitranches

SEE AROUND the CORNER with Weil PE

Our data has consistently been a leading indicator of the private equity market's trajectory, and the trends we're seeing right now are a clear signal that the deal market is heating up. In Q3, 72% of our mandates were buy-side, while proprietary processes continued to dominate, making up 55% of transactions. With the Fed's recent 50 basis point rate cut, liquidity is building in the market, and sponsors are wasting no time. While early, our Q4 data (including end of Q3) shows virtually all of our mandates are buy-side, with 65% of deals being in proprietary processes. Weil's clients are on the cutting edge, securing first-mover advantage in an increasingly competitive market. Weil has been guiding the most proactive sponsors who are capitalizing on these conditions before the broader market fully catches up. With improving valuations and more liquidity, our early data suggests the deal market is poised for a robust close to 2024. If the first weeks of Q4 is any indication, we're looking at a dynamic market ahead.

Weil Representation Q3 2024



PROPRIETARY

AUCTION OR COMPETITIVE

BUYERS

SELLERS

ANTITRUST TRENDS

WHAT TO EXPECT IN THE NEXT ADMINISTRATION


Megan Granger
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Antitrust enforcement is likely to remain vigorous regardless of the outcome of November's election.

Below we provide a brief overview of our current predictions for a Harris or Trump 2 Administration.

If Trump wins the election, there may be a period of stalemate 2-2 voting at the FTC. If Harris wins, we expect "business as usual."

FTC Chair Lina Khan's term expired at the end of September. While it is typical for a sitting commissioner to continue serving past the term of her seat until reconfirmed or replaced, Chair Khan's decision to stay on past the end of the year is likely contingent on the outcome of the election. Should Trump prevail, Khan may step down, leaving a vacancy at the FTC and the potential for a period of 2-2 stalemate voting, which could be a blessing for controversial cases that are voted on during that period (or push the agency to accept a settlement). If Harris wins, we expect the current FTC commissioner slate to continue as-is.

- Although there has been some pressure on Harris to replace Khan if she's elected, a Republican takeover of the Senate could complicate or delay the confirmation of any replacement for Khan. As a result, Khan may remain in place in order to avoid a confirmation battle, and the same could be true for Jonathan Kanter at DOJ.

While Trump 2 would likely be more pro-business, certain heightened enforcement trends that we saw in the latter half of Trump 1 resemble the Biden administration and are likely to continue.

- **Hostility toward Big Tech.** It is likely that Trump 2 continues heightened scrutiny of industries that have curried disfavor with Republicans in the past few years, particularly Big Tech. In particular, Trump may continue aggressive enforcement against companies seen as "deplatforming" conservatives as well as Jonathan Kanter's policy of bringing standalone Section 8 investigations to address board interlocks in industries seen as hostile to Republican policies

- **Lengthy Merger Investigations.** There has been little difference in the average length of in-depth investigations between Trump 1 and Biden—deals that garner regulatory scrutiny will continue to require significant periods of review.
- **Willingness to Litigate Horizontal Mergers.** Towards the end of Trump 1, the Republican-led agencies brought several litigation challenges, albeit in cases with well-defined markets, high market shares, documents showing head-to-head competition, and complaining third parties. This willingness to challenge mergers under traditional theories of harm is likely to continue in Trump 2. However, given the DOJ's loss in AT&T/TimeWarner under Trump 1, the agencies may be less likely to pursue vertical theories during Trump 2.

Harris would likely continue aggressive enforcement.

- **Staying the Course.** Generally, a Harris administration would likely stay the course on antitrust enforcement. Progressive Democrats fought hard to install Khan and Kanter as the lead antitrust officials in the Biden administration, and they will likely push to keep both appointees in their roles or replace them with like-minded enforcers.
- **Big Tech and Private Equity remain in the spotlight.** There are several significant, ongoing initiatives and agency litigations relating to private equity and Big Tech that would continue even if Harris replaces Lina Khan at the FTC and/or Jonathan Kanter at DOJ. It would be politically challenging for a Democratic appointee to lessen the scrutiny on private equity or Big Tech, so the enforcement priorities of the Biden administration are likely to continue in a Harris administration regardless of whether she replaces Khan or Kanter.
- **A wildcard in a Trump 2 administration is the influence of J.D. Vance.** Vance has been labeled a so-called "Khanservative" Republican who supports Lina Khan, especially when it comes to Big Tech, drawing attention to the "monopolistic control of information" and the need to "break Google up." Nevertheless, in joining the Trump ticket, Vance may look to distance himself more publicly from the progressive antitrust wing of the Democratic party.

CALIFORNIA'S GOVERNOR VETOS LAW TARGETING PRIVATE EQUITY BACKED HEALTH CARE TRANSACTIONS


Mei Dan
Partner
Private Equity


Emilie Cloarec
Associate
Private Equity

On September 28, 2024, Governor Newsom vetoed Assembly Bill 3129 which would have (among other things) required private equity firms to provide notice to, and obtain approval from, the California Attorney General in connection with health care related transactions involving the acquisition of a "material amount of the assets or operations" (i.e., transactions affecting 15% or more of the market value or ownership shares) or a "change of control" (i.e., transactions vesting rights significant enough to constitute a change in control). In his message to the Members of the California State Assembly, Governor Newsom stated that the Office of Health Care Affordability ("OHCA") "was created as the responsible state entity to review proposed health care transactions", and even though "OHCA itself cannot block a proposed transaction, it can coordinate with other state entities, including referring transactions for further review". Ultimately, Governor Newsom concluded that "it would be more appropriate for the OHCA to oversee consolidation [transactions]", including investments by private equity firms in health care facilities/providers. Despite the emergent trend of state-level interventions in health care transactions, California remains open for private equity backed health care transactions (at least without codified approval rights over such transactions).

TAKE NOTE: YOU MAY PREFER TO STRUCTURE DEBT IN THE FORM OF NOTES RATHER THAN LOANS


Heather Emmel
Partner
Capital Markets


Michael Hickey
Partner
Capital Markets


Merritt Johnson
Partner
Capital Markets


Greg Featherman
Partner
Tax

SMART SUMMARY

- Although typically in the form of a loan, a direct lending transaction may be effected in the form of a note (i.e., a bond that is a security) and, in fact, there are several reasons why this structure may be required or preferred by direct lenders and issuers.
- A note (vs. a loan) may facilitate the use of leverage to fund the debt investment, transferability, and equity-linked investments as well as alleviate regulatory considerations, fund considerations (e.g., limits on the aggregate amount of loans in a portfolio) and local law requirements, among other benefits.
- Notes may include all the terms and covenants often associated with loans with substantially the same documentation and diligence process.

Overview

Much has been reported on the increased popularity of direct lending and its many advantages to borrowers over traditional syndicated loan and high yield debt financings, particularly in the context of sponsor LBOs. See, e.g., "The Rise of Private Credit & Its Impact on Acquisition Dynamics" here. For more information on this topic, see our long-form article here.

Although direct lending typically takes the form of a loan with a credit agreement, a direct lending transaction may be effected in the form of a note, which may have advantages over a loan for both direct lenders and issuers alike:

- **Convertible Structure:** If the debt is convertible into equity, the debt may be considered a security and, therefore, the transaction generally should be documented in the form of a note purchase agreement rather than a credit agreement.
- **Investor Back Leverage:** Investors may seek financing for their investments, and that financing may require the investor to pledge the investments as security for the financing. In these back leverage financings, investors may receive more credit for pledging notes as opposed to loans (in part, due to the typically better liquidity of notes).

	Notes	Loans
Investor Back-Leverage	✔	
Transferability	✔	
Regulatory Considerations	✔	
Local Law Requirements	✔	
Limitations in Existing Debt Agreements	✔	
Securities Law Protection	✔	

"Although direct lending typically takes the form of a loan with a credit agreement, a direct lending transaction may be effected in the form of a note, which may have advantages over a loan for both direct lenders and issuers alike"

- **Transferability:** Unless the parties agree otherwise, notes are typically easier to transfer than loans, particularly if issued in global form through The Depository Trust Company ("DTC"). Trades in the bond market tend to settle more quickly than traditional loan assignments, which usually require borrower consent, and the market for notes placed in direct lending transactions will typically provide more liquidity for investors than the loan market.
- **Regulatory Considerations:** Direct lenders that are subject to leveraged lending guidelines (e.g., commercial banks) may be limited in the types or amount of leveraged loans that they can fund, and, as a result, they may prefer to structure the investment as a note that is a security.
- **Fund Considerations:** An investor's governing documents, such as its limited partnership agreement, may contain limitations on the aggregate amount of funds that can be invested in the form of loans versus a note that is a security.
- **Local Law Requirements:** Non-U.S. jurisdictions may require the debt obligation to take the form of a note in order for the debtor to grant security to the creditors or to incur the debt in the first place. In addition, creditors may avoid certain licensing requirements as well as potential foreign tax consequences if the debt is provided as note rather than loan.
- **Limitations in Existing Debt Agreements:** A company's existing credit facility may contain most-favored nation ("MFN") pricing adjustments that would increase the applicable interest rate upon the incurrence of certain additional indebtedness at a higher rate within certain timeframes. Typical MFN provisions in loan agreements often only apply to incremental indebtedness incurred in the form of a loan and not "incremental equivalent debt" issued in the form of a security (i.e., notes).
- **Securities Law Protection:** An investor acquiring notes is afforded the protection of the U.S. securities laws, which although may be limited in the context of a note sold to sophisticated investors, do not apply to an investment in the form of a loan.
- **Tax Considerations:** Although the distinction between a debt obligation in the form of a note versus in the form of a loan does not have any independent significance for tax purposes, the distinction might be evidence of, or otherwise indirectly impact, the specific tax treatment of the debt obligation. In particular, a foreign lender is more likely to reduce its risk of paying U.S. taxes by investing in the note of a U.S. issuer than by entering into a loan with a U.S. borrower.
- **League Table Credit:** Last, but certainly not least, if the investor is a bank or has a broker-dealer affiliate, the investor may prefer to structure the debt in the form of notes to obtain league table credit.

Investors and issuers should consider the following when electing to fund a direct lending transaction in the form of notes instead of loans:

- **Economics and Covenants.** In direct lending transactions, regardless of form, investors and companies are free to include traditional term loan features (such as financial maintenance covenants, a floating interest rate and the ability to prepay the debt at any time) or high-yield bond features (such as incurrence-based covenants, a fixed interest rate and more extensive call protection). As a result, the substantive business arrangement on the economics, covenants and other terms of the investment often will not dictate whether the investment takes the form of loans or notes.

- **Offering Document and Related Documentation.** Offering Document and Related Documentation. In traditional syndicated bond transactions and acquisition financing, the issuer and target are often required to prepare extensive disclosure, audited and reviewed financial statements, pro forma financial statements and a comfort letter from independent auditors and, in some instances, the auditors will need to re-audit or re-review historical periods. None of this is typically required in a direct lending transaction in the form of a note, as investors do their own due diligence and benefit directly from the representations and warranties in the purchase agreement. As a result, the documentation is no more onerous than a loan transaction.
- **Diligence.** As noted above, investors typically conduct their own diligence in direct notes transactions; however, the issuer will be required to make representations regarding its business, financial statements and compliance with laws in the definitive documentation with respect to the transaction, with any exceptions noted in disclosure schedules. In addition, investors will be asked to provide representations as to their sophistication, their ability to do due diligence on the issuer and their understanding that they may lose all or substantially of their investment—so called "big boy" representations.
- **Transfer Restrictions.** An advantage for a creditor of holding a debt obligation in the form of notes versus a loan is the ability of the creditor to easily transfer the obligation to a third party, subject only to compliance with the U.S. securities laws (which do not meaningfully restrict non-public transfers among sophisticated parties). Debtors and creditors may, however, contractually agree to limit the transferability of a direct note through a side letter, in the note purchase agreement (or indenture) or in the note itself. Issuers often bargain for limits on transferability primarily as a means to maintain control over, and knowledge of, their creditor base, to facilitate amendments and waivers as well as to avoid the notes trading into the hands of aggressive "vulture" hedge funds, competitors or other hostile parties. W

CREDIT WHERE CREDIT IS DUE: SYNDICATED LOANS VS. PRIVATE CREDIT MARKET CONDITIONS


Justin Lee
Partner
Banking & Finance


Justina Chen
Partner
Banking & Finance

Competition is Fierce

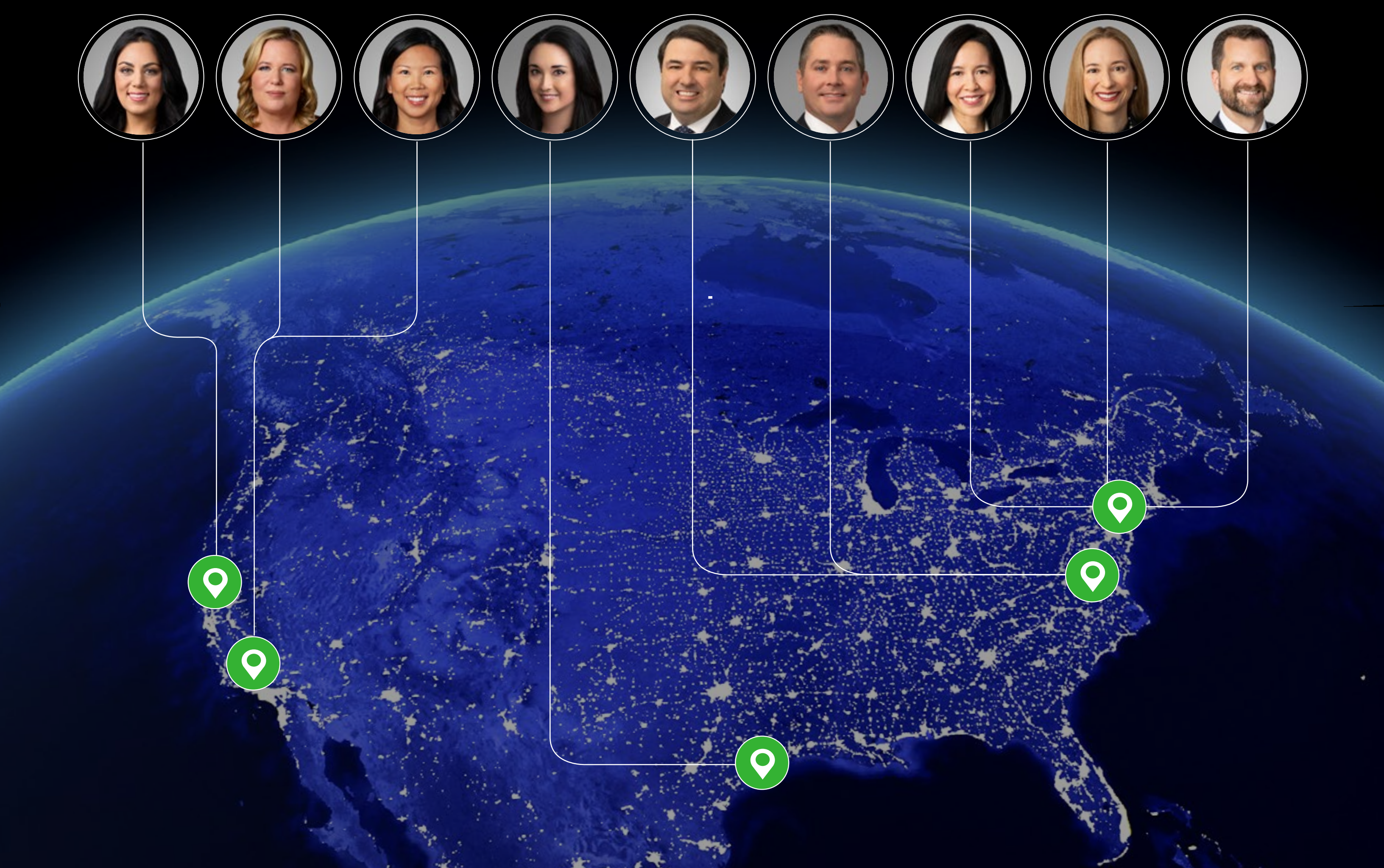
We continue to see an increase in financing processes that "dual track" syndicated and private credit solutions, as banks continue to compete against private credit providers to regain market share. We see this competition play out across the full field of the leveraged finance market, from small to large financings, for new acquisition financings, refinancings and repricings, and for borrowers of varying creditworthiness. One benefit that private credit providers offer is their ability to move quickly to closing, without the need to engage in a syndication process that can require additional time, borrower resources and, in some cases, changes to terms in a manner adverse to the borrower. This benefit is particularly attractive for borrowers that are focused on market uncertainty. Syndicated and private credit players are perhaps more evenly matched in repricings, which are not necessarily event-driven or subject to the same time pressure.

If the Federal Reserve continues to lower interest rates, as is widely predicted by market participants, we expect to see more opportunities for competition between syndicated lenders and private credit providers on repricing activity. As a result of this competition, we believe we are likely to continue to see a loosening of terms in borrowers' favor in the near term, as private credit providers that have historically demanded tighter terms compete against syndicated banks looking to regain market share. On the other hand, we are starting to see some credit providers avoid the competition altogether through joint syndicated/private credit solutions—as evidenced, for example, by the recently reported exclusive partnership between Citigroup Inc. and Apollo Global Management Inc. to work together on $25 billion of non-investment grade financings for corporate and private equity clients over the next five years.

One outcome of the recent prevalence of private credit deals (especially those that closed during a low-interest rate environment with borrower-friendly terms) is the occurrence of liability management exercises ("LMEs") where the lender group is comprised of only a few lenders. It may be the case that the small size of the lender group incentivizes private credit providers to work together on a solution (see, e.g., Pluralsight's debt for equity exchange with its private creditors), rather than against one another. Our inclination is that such LMEs with private credit / club deals is also likely to be more "behind the scenes" vis-à-vis some of the headline grabbing LME transactions in the market.

Weil's 2024 Private Equity Expansion

Weil has been one of the fastest-growing premier private equity legal advisors in 2024, with the addition of well-known and highly-experienced partners across each of our key, and new, offices. The Editors asked our newest partners about what drew them to Weil's platform.



Weil, Gotshal & Manges LLP

San Francisco

Nav Rekhi

What makes Weil the best place for your clients?

While there are a lot of great firms out there, clients will feel the difference when they have an incredible legal team who's working in a collaborative culture.

What attracted you to join Weil's private equity practice?

I was impressed by the team and the focus on growth. A lot of firms had talked a big game about wanting to grow Bay Area private equity but Weil came across as very thoughtful and coordinated across the firm.

Los Angeles

Tana Ryan

What attracted you to join Weil's private equity practice?

Weil's PE practice is the perfect mix of what my clients need most – a deep and well developed private equity team that is nonetheless focused on growing and evolving as private equity clients continue to develop new investment strategies and expand their market presence. Weil Private Equity is a rare find and was an opportunity I just couldn't say no to!

What are your immediate and long-term goals as you step into your role at Weil?

I am so honored to get to lead Weil's expansion into the Los Angeles and San Francisco markets! We'll be working with Weil's existing west coast resources and deep private equity bench in New York and other offices to establish our presence quickly and decisively, with the long term goal of being THE premier private equity practice on the West Coast. We're off to an exciting start with new additions on the hiring and client front already, with so much more to come!

Alice Yuan

What are your immediate and long-term goals as you step into your role at Weil?

My immediate goals are to introduce clients that I've really enjoyed working with to the Weil team. Longer term, I want to help build a strong, cohesive team of attorneys in LA and SF, and build long-lasting partnerships with key clients.

How do you envision your role contributing to the growth and evolution of Weil's private equity practice?

I can help enhance Weil's PE practice with my knowledge and experience with executing on middle-market deals and growing a local Private Equity practice from scratch (both of which I did at my prior firm).

Weil, Gotshal & Manges LLP

Houston

Jacqui Bogucki

What attracted you to join Weil's private equity practice?

I grew up at Weil as a summer associate in 2013 and started in the Dallas office in 2014, so rejoining the Private Equity practice was a return home in many ways.

What makes Weil the best place for your clients?

Weil has a fantastic global Private Equity platform with a deep and growing bench of the top deal makers in the infrastructure and energy sectors.

Washington, D.C.

Chris Mulligan

What makes Weil the best place for your clients?

While I was looking at a range of law firms when leaving the SEC, what stood out for me was how the culture at Weil was unified and collegial. It truly is a law firm that is solely focused on providing exceptional client service. All clients are Weil clients. That translates to exceptional client service because everyone wants to provide the best possible service instead of worrying about who receives credit for something.

What attracted you to join Weil's private equity practice?

I knew early in the process that Weil was an obvious choice for me. Coming from the SEC, I knew I needed a premiere private equity fund formation practice so I could apply everything I learned during my dozen years at the Commission to a large and sophisticated client base. Weil has a unified, world-class fund formation practice. I knew early in the process that Weil was an obvious choice for me.

Chris Scully

What was the most significant factor that prompted your move?

Weil's entrepreneurial spirit and "can do" attitude was a major contributing factor to my choice to join the Firm. Weil's Private Equity and Private Funds groups have a clear vision for the future of both our client base and the broader practice. It was evident from every meeting that Weil's client-first culture was a Firm-defining characteristic.

How do you hope to evolve your practice in the next few years?

It is my goal to continue supplementing and expanding the capabilities of our private funds regulatory practice, making it a destination solution for all things "regulatory." We are already seeing a tremendous interest on this front with many new clients coming to us on "regulatory only" mandates. Whether it is working with our private fund formation colleagues on primary and secondary fundraises, or working with clients in connection with our SEC Investment Adviser Examinations practice, we have the experience and capability to be a trusted advisor to our private fund and other regulatory clients.

Weil, Gotshal & Manges LLP

New York

Karen Chao

What are your immediate and long-term goals as you step into your role at Weil?

My immediate goals include integrating into the Private Equity practice, getting to know my colleagues as well as introducing my clients to the Weil platform. Long term goals at Weil include expanding existing client relationships, developing new client relationships, participating and having meaningful roles on firm committees.

What excites you most about your future at Weil?

The opportunity to work with sophisticated and thoughtful colleagues to grow the private funds practice.

Kristine Koren

What was the most significant factor that prompted your move?

My new colleagues in the private funds and private equity groups. Having worked across the table from Weil for almost twenty years, it's a tremendous privilege to join the most sophisticated and collegial dealmakers I know!

What excites you most about your future at Weil?

In a world where private equity has become the driver for innovation in so many major industries, I believe that private equity sponsors and investors will be laying the foundations for our future (and not only in the infra space) … It would be an honor to have any role in our client's important work and hopefully to provide sage counsel that stands the test of time.

Luke Laumann

What attracted you to join Weil's private equity practice?

Weil's strong brand with clients, elite talent combined with the rare combination of a hungry group with a cohesive, positive culture.

How do you envision your role contributing to the growth and evolution of Weil's private equity practice?

The key to this career is forming long term relationship with both clients and colleagues and investing in their success. This is my focus.

Weil, Gotshal & Manges LLP

GET IN THE GAME: INVESTING IN SPORTS


Kyle Krpata
Partner
Private Equity


Dennis Adams
Partner
Technology & IP Transactions


Zach Schreiber[16]
Associate
Complex Commercial Litigation

The Evolution of the Sports Investment Landscape

For the past few years, the sports industry has been riding a wave of developments that are revolutionizing both the sports business world and the investing landscape, driven primarily by a combination of regulatory changes, an increased focus on improving the "consumer experience" and emerging sports technologies. From the legalization of sports betting and boom in women's sports, to the fragmentation of media rights and monetization of collegiate NIL, and skyrocketing of player salaries and team valuations - sports business is booming.

At the forefront of this revolution has been the increasing growth of institutional capital being invested in sports. Private equity investment in sports began in earnest in 2006, when a private equity consortium acquired French soccer club Paris Saint-Germain for €41M and CVC Capital acquired Formula One for an estimated $1.7B. However, it took until 2019 for North American sports to catch up, when Major League Baseball became the first of the "Big 4" North American sports leagues to allow private equity and institutional investment. The NBA and NHL followed suit in 2020 and 2021, respectively, and as a result, private equity firms currently back over 20+ MLB, NBA, and NHL teams with varying levels of investment (meaning over 20% of the teams in those leagues have some amount of institutional investment).[17]

In August 2024, the NFL and its owners voted to allow private equity investment in NFL franchises, albeit with strict parameters around the amount of investments individual sponsors could hold in a particular team, and a cap on the total private equity investment permitted for any particular team. Even more notably, the NFL will initially permit only select investors – Arctos, Ares, Sixth Street and a consortium group (including Blackstone, the Carlyle Group, CVC Capital, Dynasty Equity and Ludis) – to make investments in NFL franchises. NFL teams are now permitted to sell up to 10% of their ownership to these investors, with a minimum 3% investment by any individual investor, and a six year minimum hold period. In addition, the individual funds (Arctos, Ares, and Sixth Street) are permitted to invest in no more than six teams, while the consortium group are permitted to acquire stakes in up to 12 teams.

Why Now is the Right Time

Historically, investment in professional sports teams meant having to compete for extremely limited and infrequent investment opportunities with wealthy individuals willing to pay a premium for the right to own a piece of a franchise. That, coupled with league-imposed hurdles designed to limit exit sales and limited ability to receive a return on the investment, has made sports investments both an impractical and unattractive investment for private equity sponsors. However, a wave of developments in recent years has changed the manner in which both the leagues/ownership and private equity sponsors view these opportunities. Notably, team owners are increasingly seeking liquidity in light of skyrocketing player salaries, stadium development projects, and efforts to enhance consumer experiences. At the same time, private equity firms are looking for innovative growth strategies and diversity for their portfolios.

The rapidly-increasing valuations of teams has also led to fewer individuals having the ability to invest in (and certainly to wholly-acquire) teams and leagues. As a result, these individuals have turned to institutional investors for cash. The Ross-Arctos Sports Franchise Index (RAFSI) shows that the values of North American sports franchises have compounded at 13.0% per annum over the past 60 years, with a 17.8% rate over the past three years.[18] In particular, domestic media rights have driven the rise in valuations, most notably the NFL's 11-year media rights agreement estimated to be valued at over $110B. But these rising media rights valuations are not limited to the "Big 4" sports leagues, as evidenced by NASCAR's seven-year media rights deal with Nexstar estimated to be worth around $800M, and the WNBA's recent announcement of a $200M media rights deal. In total, US television distributors will pay an estimated $32.9B for sports media rights in 2025, up from $3.4B in 2000.[19]

Additionally, North American sports leagues are focused on cultivating a global audience, as shown by the NFL's and MLB's games in Asia, Europe, and South and Central America.

Each of the "Big 4" has their own rules and restrictions around private equity investment, which are outlined in the chart shown.

Big 4 Valuations and Revenue

League	Total Transaction Value (2024)	Team	2014 Valuation	2024 Valuation	Cumulative Growth (%)	Estimated 2024 Revenue
NFL[20]	$190 Billion	Dallas Cowboys	$3.2 Billion	$10.32 Billion	223%	$1.2 Billion
		St. Louis/ Los Angeles Rams	$930 Million	$7.79 Billion	738%	$825 Million
NBA[21]	$74.4 Billion	Golden State Warriors	$750 Million	$8.28 Billion	1004%	$850 Million
		New York Knicks	$1.4 Billion	$7.43 Billion	431%	$504 Million
MLB[22]	$79 Billion	New York Yankees	$2.5 Billion	$7.55 Billion	202%	$679 Million
		Los Angeles Dodgers	$2.0 Billion	$5.45 Billion	173%	$549 Million
NHL[23]	$41.9 Billion	New York Rangers	$1.1 Billion	$2.65 Billion	141%	$265 Million
		Toronto Maple Leafs	$1.3 Billion	$2.8 Billion	115%	$281 Million

**2023 Valuations*

Big 4 PE Investment Rules & Restrictions

	NFL	NBA	MLB	NHL
Maximum Equity a Team Can Sell to Funds	10%	30%	30%	30%
Maximum Equity a Single Fund Can Own in One Team	10%	20%	15%	20%
Maximum Number of Teams a Fund Can Own	6	5	Unlimited	5
Minimum Investment	3% of a team's equity	Unknown	Unknown	$20 Million
Average Franchise Vale	$5.93 Billion	$3.85 Billion	$2.4 Billion	$1.33 Billion

Source: Sportico

Women's and Emerging Sports

As the attitudes and attention towards women's sports have changed, private equity has begun to invest heavily in the space. This has provided significant upside because the valuations are rising far more rapidly than the legacy "Big 4" sports. The NWSL has been at the forefront in welcoming private equity investment into women's soccer. In 2023, Sixth Street purchased the rights to the expansion team Bay FC. In doing so, Sixth Street became the first institutional investor to own a majority stake in a US professional team. Others have followed: in June 2024, the Carlye Group partnered with an MLS team, Seattle Sounders FC, to purchase the NWSL's Seattle Reign. And private equity investment in women's sports has not been limited to soccer. In 2023, CVC Capital invested $150 million into the Women's Tennis Association and received a 20% stake in a new commercial subsidiary, WTA Ventures. CVC Capital will become a commercial partner of the WTA, focusing on growing revenue through sponsorship sales, broadcasting, and data rights. Additionally, the LPGA is soliciting investors and recently partnered with Fenway Sports Management to expand the tour's marketing opportunities.

Due to the increasing valuations of the "Big 4" franchises and the leagues' restrictions on private equity ownership, some private equity firms have also looked to other emerging sports as a prime area for growth. For example, pickleball is the fastest growing sport in America and accordingly has attracted substantial private equity investment. In February 2024, the two largest professional pickleball leagues, Major League Pickleball and the Professional Pickleball Association merged. At the time, Major League Pickleball was the top team-based professional league and the Professional Pickleball Association was the leading individual league. The merger was accompanied by a $75 million investment from a group that includes private equity firm SC Holdings. The newly formed United Pickleball Association will focus on growing the association's footprint by offering an enhanced fan experience and a streamlined schedule.

There has also been a rise in Multi Club Ownership (MCO), where investors purchase stakes in multiple teams to achieve synergies and scale their investments. MCO provides soccer teams many of the same benefits seen in similar, non-sport-related investments, including increased bargaining power in commercial agreements, pooling of resources and expertise, and increased brand awareness. With the demand for investment in sports growing, this is a trend that appears poised to continue.

"Team owners are increasingly seeking liquidity in light of skyrocketing player salaries, stadium development projects, and efforts to enhance consumer experiences. At the same time, private equity firms are looking for innovative growth strategies and diversity for

Private Equity's Interest in Soccer

Starting in the late 2000s, private equity investment has become ubiquitous with European Soccer (or Football), with many of the world's largest clubs being owned in-part by private equity firms, including AC Milan, Liverpool, Chelsea and Juventus. Firms took hold of the clubs and used their expertise to expand the commercial operations of the teams through increased broadcast and sponsorship revenue. Additionally, during the COVID-19 pandemic many teams began to struggle financially and turned to private equity firms for cash. This period saw a dramatic increase in the private equity investment into clubs and leagues.

Other Investment Opportunities in Sports

In addition to direct team ownership, private equity firms have found a myriad of ways to get involved with sports. For example, in 2020, Shamrock Capital invested into Excel Sports Management, a management and marketing agency with a roster including Tiger Woods, Derek Jeter, Caitlin Clark, Nikola Jokic, Russell Westbrook, Justin Herbert, Jared Goff, and Garett Wilson.

And in recent years, with student-athletes now able to earn compensation while participating in college athletics, intuitional investors have been eager to venture into the collegiate sports market, with billions of dollars being channeled toward collegiate and NIL-related investments. Some notable transactions include:

- Clearlake Capital and other investors' investment in Learfield Communications Inc., a collegiate sports marketing company.
- RedBird Capital and Weatherford Capital's formation of Collegiate Athletic Solutions (CAS), a consulting firm aimed at providing universities and colleges with new funding sources. CAS is currently in talks with a number of universities to provide funding.
- Legends' 10-year expansion of its relationship with Florida State University. Legends is a Sixth Street-backed venue operations and experience company that currently operates FSU's stadium, among many others. The expansion gives Legends the right to collaborate with FSU in the exploitation of FSU's multimedia rights.

Other notable sports-related investments include:

- Providence Equity's investment in Topgolf, and Callaway's acquisition of Topgolf for $2.66B.
- Redbird Capital's joint venture with the MLBPA and NFLPA in 2019 to form OneTeam Partners, which specializes in commercializing professional athlete group likeness rights. In September 2022, Redbird Capital sold its 40% interest in the venture, when OneTeam Partners was valued at $1.9B.
- KKR's investment in PlayOn! Sports, a high school sports media and technology company.
- Charterhouse's $315M investment in Two Circles, a marketing firm focused on processing fan data and boosting engagement.

Get in the Game

While even as recently as a decade ago the thought of private equity investment in sports seemed at odds with the traditional investment strategy of these funds, the rising valuations of sports franchises, coupled with the rapid growth of women's and emerging sports, have precipitated an ideal opportunity for private equity firms to invest. While investment opportunities in the traditional "Big 4" leagues remain limited and highly competitive, the leagues and team owners appear to be open for business when it comes to institutional investment, as evidenced by their increased willingness to loosen decades-old restrictions against these investors. With a blend of stable cash flows, high asset appreciation potential, and myriad investment opportunities, the sports sector is primed to be an increasingly attractive target for private equity firms.

POWERING UP DIGITAL INFRASTRUCTURE INVESTMENT: WHAT WE ARE TRACKING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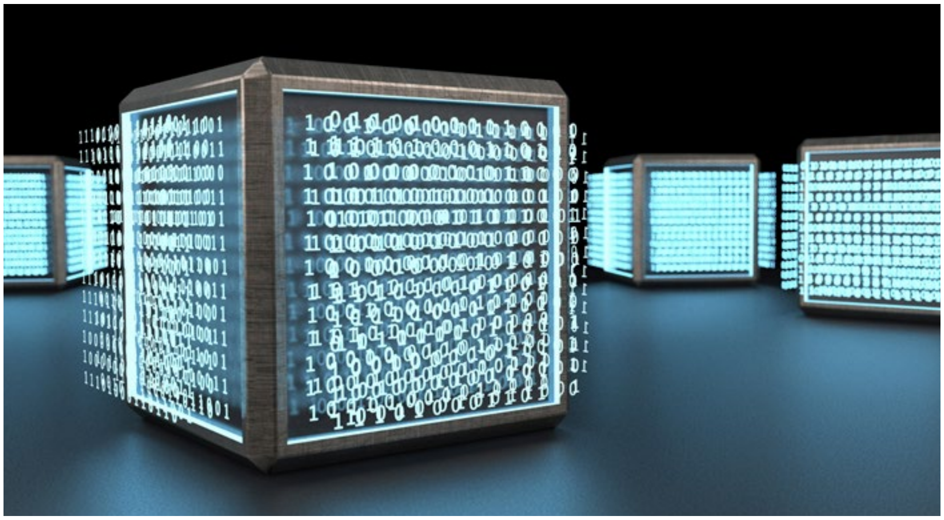

Data centers, AI and power are the buzzwords dominating discussions around digital infrastructure. Our team highlights some of the key trends we are seeing and expect for the year ahead in the digital infrastructure sector:

1 Insatiable Demand for Capital

The hundreds of billions of dollars in demand for new capital in the digital infrastructure space has created a tremendous opportunity for market participants. We expect that there will be a large and growing need for private equity dollars to fill the gap for traditional funding, though given the sheer quantum of demand, we will increasingly see every type of investor (including buyout firms, real estate investors, growth equity and the public markets) in the space. These dollars will run the gamut from traditional debt and equity investments to minority and structured investments to ABS and CMBS structures to corporate partnerships and joint ventures. While a vast majority of such dollars will be focused on data centers (driven by AI), there will continue to be opportunities across all verticals in the digital infrastructure space.

2 Great Consolidation Wave Expected to Continue in 2025

A consolidation wave began in mid-2024 in the digital infrastructure asset class (other than in data centers), which will likely continue in 2025 and through the end of the decade. For example, we are witnessing the reversal of the split up of the “Bell System” as residential broadband and mobile communication converge as evidenced by **Verizon**’s announced $20 billion acquisition of **Frontier Communications**, **KKR** and **T-Mobile**’s joint venture to acquire **Metronet** and **EQT** and **T-Mobile**’s joint venture to acquire **Lumos**. We expect to see an up-tick in corporate partnership and joint ventures between sponsors and businesses across all of the digital infrastructure asset classes. Such arrangements can provide the parties a better allocation of risk and an optimal balance sheet. Additional scaling and consolidation in the middle market is also expected.

3 Debt Markets Warming Up

Even before the Federal Reserve’s recent rate cut, the infrastructure debt markets were seeing an increase in activity, especially in the project finance space for multi-billion, multi-year construction projects such as **QTS**’s $3.5 billion project financing and **EdgeConneX**’s $2.3 billion Atlanta project financing. While factors such as the quality of a company’s underlying customer agreements may impact interest rate and other financing terms, debt financing has been accessible in the current market and we expect its availability to increase as rates ease. In the data center space specifically, customer demand for rack space is high and vacancies are at an all-time low, allowing data center operators to position themselves for optimal contractual leverage. The upcoming year could also be the year that IPOs return, particularly in the data center space.

4 Increasing LP Demand

Insatiable appetites of sponsors' limited partners (LPs) in the digital infrastructure space continue to lead to increased demand for direct investment into sponsors' portfolio companies. This demand is driven from both the portfolio companies needing capital and LPs being eager to invest in the assets. This scenario continues to evolve in real time, as investors are subject to the push to deploy more capital in the sector and the pull in LPs gaining comfort that the digital infrastructure space is a stable, long-term asset class.

5 Data Centers Remain Hot

The theme in data center investing is scaling up – over the past 24-36 months, the size of data center financing deals has grown massively due to the capital demands required to build out data centers, especially with the proliferation of AI. A recent example of this is **Vantage Data Center**'s $9.2 billion financing that closed this summer. More recently, **Equinix**, **GIC** and **CPPIB** teamed up in the beginning of October on a new $15 billion North American data center JV. These are only two of many large transactions over the past few months. Though private equity and venture capital will continue to play their role in this build up, alternative sources of capital like private ABS, CMBS and life insurance companies will increasingly supply the dollars needed (at a lower cost of capital) to satiate data centers' capital demands. While demand for colocation data centers has been choppier, demand for hyperscalers has been insatiable. With the Tier 1 markets saturated, hyperscalers have increasingly moved to – and are selling out in – Tier 2 markets, which may have increased power availability and customers that are becoming increasingly larger. The varying uses of data centers is also driving specialization in the market as, for example, the high demands with respect to latency and uptime percentage may be less rigorous for AI learning models than cloud computing, but AI learning models may require a greater concentration of computing power in one location than cloud computing demands.

“Data center operators are increasingly focused on sustainability initiatives and metrics, from tracking concrete and steel emissions, to use of water and other cooling technology and of course in respect of power consumption. Such focus is in part due to the focus of their customers (namely, large technology companies) and investors and could accelerate some of the energy transition build out”

6 Massive Opportunity in AI

Conservative estimates expect that AI will be at least a $2 trillion industry by the end of the decade – less than 5 years from now. The AI revolution is expected to rocket growth across the digital infrastructure space, from increased wireless demand due to increased traffic, to increased data center demand to process such data. Private equity capital is largely expected to fund much of the tail winds around AI, with the recently announced **Global AI Infrastructure Investment Partnership (GAIIP)** among **BlackRock**, **Global Infrastructure Partners**, **Microsoft** and **MGX**, which will create a $100 billion platform to provide longer-dated capital to AI infrastructure and the energy infrastructure to enable it, being at the forefront of such investment. Operators are also harnessing the power of AI to improve their technologies and optimize their operations, including by using AI to analyze site locations, customers and lease templates. As AI proliferates in the space, investors should carefully consider technology and obsolescence risk in their targets, as well as the sourcing and security of the power necessary to service AI demands.

7 Power Sourcing, Storage and Security are Critical

The availability of power and the security of such power are increasingly becoming key considerations investors and operators in the data center space. Data centers presently account for approximately 1-2% of global power consumption, but this is expected to rise to 3-4% by the end of the decade, with the spike chiefly driven by AI which some experts expect will represent approximately 20% of data center power demand by such time. On average, a ChatGPT query requires almost 10x as much power to process as a standard Google search. Power availability and security (including a fresh and heightened focus on power storage) has now become a threshold question for underwriting a company's current operations and anticipated future expansions.

8 Focus on Sustainability

The conflict between society increasingly demanding that companies utilize green resources and clean technology, and its appetite for power to sustain and support AI is another key consideration for which market participants are still wrestling with a solution. Data center power demand is expected to markedly increase in the next five years, which will inevitably lead to an increase in data center emissions. Data center operators are increasingly focused on sustainability initiatives and metrics, from tracking concrete and steel emissions, to use of water and other cooling technology and of course in respect of power consumption. Such focus is in part due to the focus of their customers (namely, large technology companies) and investors and could accelerate some of the energy transition build out of more non-carbon power sources which, in addition to being "green", could also help solve power availability and security constraints. The struggle of hyperscalers to meet their green energy goals due to increasing data center demand is also spilling over into carbon offset and energy storage projects, linking those two markets and intensifying use of green energy. Sponsors with demonstrated expertise in both the digital and power spaces are well-positioned to capitalize on this convergence between digital and power.

9 Valuations Expected to Remain Steady

As a whole, digital infrastructure assets largely appear to be fully priced and we expect valuations to remain steady (and high), other than in the data center space where investors should expect to see even higher valuations. One reason valuations currently remain high is that only the best assets are currently trading. With the recent rate cut, we expect M&A activity to increase, with a broader spectrum of assets being sold.

10 Minimal Election Noise Expected

In an election year, no discussion is complete without discussing the potential impacts of the upcoming U.S. Presidential election on the industry. As digital infrastructure assets are by nature long-lived and historically subject to low governmental regulation we anticipate the election outcome to likely be immaterial to investors in the sector, so long as they fully understand the impact of governmental supported programs in underwriting the company. While election outcomes can cause major policy shifts that affect M&A activity generally (e.g., increased antitrust scrutiny), we are cautiously optimistic that the outcome will not create headwinds for deal making in the space.

Our authors recently were invited to join other dealmakers at the forefront of the digital infrastructure space to moderate two panels at the TMT M&A Forum USA 2024 conference in New York City, on September 25-26, 2024: "*Data Center Leaders Panel: Financing Structures, Valuations, M&A and Navigating the Future of AI*" moderated by **Weil partner Brian Gingold**; and "*Access to Capital – Examining Demand, Recycling and Evolving LP Strategies*" moderated by **Weil partner Luke Laumann**.

THE LIABILITY MANAGEMENT OVERTON WINDOW HAS EXPANDED TO ALL PLAYERS AND ALL CORNERS; PREPARE ACCORDINGLY


Jeffrey Saferstein
Partner
Restructuring


Alex Welch
Partner
Restructuring

SMART SUMMARY

- Liability Management (LM) was, once upon a time, viewed as extremely aggressive and as a last ditch effort to save a business before declaring bankruptcy.
- Today, LM transactions are being used far more often and by firms that would have never considered them in the past.
- Even the most aggressive LM transactions, like up-tiers and other similar transactions, pitting creditors against creditors, are causing fewer ripples in the market today than ever before given their prevalence, but challenges persist in court and it is to be seen what effect, if any, rulings will have on the future prevalence of LM.

Liability management takes many forms, ranging from ordinary course refinancings to very aggressive transactions that pit creditors against each other (often referred to as "creditor-on-creditor violence") in what can effectively become a zero-sum battle over their credits.

In the last several years, these transactions have become extremely popular as private equity firms use them to extend runway to get through a downturn in the market or recapitalize portfolio companies without resorting to chapter 11. Weil has been at the leading edge of many of the transactions and has seen numerous turnarounds in the face of LM transactions.

More complex LM transactions include:

- **"drop downs"**: where assets are dropped down into an unrestricted subsidiary and then loans are made against those assets;
- **"up-tiers"**: where certain existing creditors exchange a lower tranche of debt into a higher tranche, typically at a discount and to the detriment of other lenders who lent under the same instrument and are left behind;
- **"double dips"**: where new loans are made to a subsidiary and then the lender gets two claims against the borrower entities through intercompany claims thus enhancing their recoveries in a chapter 11 scenario.

LM transactions have become as creative as the lawyers and bankers who are executing them; the only restraints being what the relevant documents expressly prohibit, rather than what they expressly permit. This approach has led to many LM transactions being extremely aggressive.

Take for instance an up-tier transaction where fifty-one percent of the lenders become senior to the other forty-nine percent. If the company were to go into bankruptcy, the minority lenders would be subordinated to the majority and only receive a recovery after the now new super senior lenders are paid in full. Re-sorting lien or payment priority amongst previously pari lenders through amendments and exchanges with the support of a slim majority is obviously not something that anyone who lent money to the company would have ever imagined in years gone by, but with (or without) the right language in loan documents it may be permissible, and it is now common.

Initially, LM transactions were the preserve of the most aggressive funds and sponsors; however, over time and through repeated market use, LM transactions are more widely accepted, effectively shifting the Overton Window. Private equity firms that were concerned about reputational risk or angering lenders they routinely looked to for funding are now more closely looking at LM transactions as among the options they must at least consider as fiduciaries. But LM transactions are not without risk.

There has been a lot in press recently about some of these transactions, many of which are playing out in bankruptcy courts around the country. Some Judges have found that the transactions are perfectly permissible under the company's debt documents while others have found that they violated the terms or the process was not appropriate. Many are still being litigated.

There are several lessons learned from these cases:

- **First**, if you are going to look at a potential LM transaction, do it early. Do not wait until the company is running out of money and is then forced to get something done. Terms will be better if done early and there will be less scrutiny put on the transaction.
- **Second**, explore all options. Look at several different ways to improve the balance sheet. The record is important that all options were considered.
- **Third**, be extremely diligent in analyzing the company's debt and other relevant documents to make sure what you want to do is permissible and then follow the appropriate steps to get it right. Be exacting on this front. While this seems obvious, following the documents precisely is critical.
- **And last**, run a process with irrefutable integrity. If it is a related party transaction where the private equity firm may own debt in the company or, where there might otherwise be a conflict, set up a special committee of independent directors to review and approve the transaction. This easy step may save the transaction.

"Private equity firms that were concerned about reputational risk or angering lenders they routinely looked to for funding are now more closely looking at LM transactions as among the options they must at least consider as fiduciaries."

In sum, the prevalence of LM transactions is likely to increase in the foreseeable future. As they have become more common and sophisticated, so too have the challenges to them. Accordingly, process is critical to the success of any LM transaction and firms should seek the advice of experts to make sure it is done right and does not invite years of costly litigation seeking to unwind the LM transaction.

MINING FOR GOLD IN CONTRACTUAL BOILERPLATE

Glenn D. West
Retired Partner
Private Equity

I have often spoken about the importance of so-called "boilerplate" – the part of the written agreement that is generally treated as standard fare and unimportant, the bit at the end after all the real stuff. But, for the most part, I illustrate the importance of boilerplate by noting cases where the unconsidered "bit at the end" actually undermined the heavily negotiated "real stuff;" *i.e.*, I focus on boilerplate as potential "landmines." This morning I want to reverse course and tell a story (recognizing that some embellishment has probably occurred over the years) about how careful review of boilerplate actually saved the day for a client – *i.e.*, I want to focus on boilerplate as a potential "gold mine." I may start this as a regular feature on my musings and ask others to contribute stories.[24]

Many years ago, I was called in for a second opinion by a private equity owner of a company with public debt. During an audit, the company's accountants had determined that the company was in default of its public debt based on a transaction that the company had engaged in during the previous year. Part of the offending transaction had involved the granting of a "lien," which the accountants believed was prohibited by the terms of the public debt indenture. The Board had been advised that this could well result in the issuance of a going concern qualification to the company's audited financial statements. The Board sought the opinion of its law firm (a large Chicago-based firm of some renown) as to whether this was a valid issue and whether they could assure the accountants that it was not. The law firm said it was a valid concern and apparently suggested that the company begin to prepare for a possible bankruptcy (obtaining a consent from the bondholders was considered impossible). Hence the call to us by the private equity owner's appointed board member.

"Lien" was a broadly defined term, and what happened in the prior transaction appeared to clearly qualify as a "lien." But as is common, there were quite a few exceptions to the broad prohibition. The one I focused on was the last one – the indenture permitted the granting of any "liens" that were permitted by the "Credit Agreement." Credit Agreement was defined as a credit agreement that had been entered as of a specific date with an named agent bank. A review of the original credit agreement revealed no exceptions that would have permitted the lien granted pursuant to the prior transaction. However, it turned out that a bank amendment permitting the lien granted in the prior transaction had been obtained (why no one had apparently focused on the indenture at that time is not clear, but apparently the CFO was very focused on the credit agreement and worked with the banks throughout the prior transaction, without involving the company's regular Chicago firm I believe).

Reviewing the definition of Credit Agreement more carefully, it turned

“Interpretive or rules of construction clauses can be landmines as well as goldmines depending on which side of the issue you find yourself”

out that the term was not limited to just the originally executed credit agreement but to the credit agreement “as amended from time to time.” A boilerplate provision that is common in many agreements (and sometimes in indentures but not always) is a provision that is entitled “interpretations” or “rules of construction.” Occasionally, there may be included in an “interpretations” or “rules of construction” provision a clause that reads as follows:

> ***Any agreement***, instrument, law, rule or statute ***defined or referred to in this [Indenture] means***, unless otherwise indicated, ***such agreement***, instrument, law, rule or statute ***as from time to time amended, modified or supplemented***.

For our purposes, and given the limits of memory, let’s assume that was what this one said in this indenture.[25] Because there was nothing that otherwise indicated an intention to limit the defined term to its original, unamended version, I advised that there was no default, all was well, and we were prepared to convince the accounting firm that they had misread the indenture.

The Chicago firm stuck to their guns and remained fully committed to their opinion that the company was in default of the indenture. While it was clear that the Chicago firm had originally missed the interpretive provision treating amendments as part of the original referenced credit agreement, their position was that utilizing that interpretive provision to permit the granted lien was simply “too cute.” Our position was that it was nothing of the kind. We ended up taking over and successfully lead company through the crisis. As a post script, the company did eventually file for bankruptcy, but for other reasons, and we handled it.

Interpretive or rules of construction clauses can be landmines as well as goldmines depending on which side of the issue you find yourself (and I would probably not want to unthinkingly include an “as amended” interpretation for references to agreements that might unwittingly have the effect of expanding scheduled exceptions to reps so that they included subsequently executed, and undisclosed, amendments). But here (from 13 Fletcher Corp. Forms § 61:91 (5th ed.)) is an example of a broad interpretive or rules of construction provision for your review and contemplation, so that you spot it when you see it and modify it appropriately for your deal (clause (h) is the applicable one for our discussion):

> **Construction.** In this Agreement, unless otherwise stated, the following uses apply: (a) references to a statute will refer to the statute and any amendments and any successor statutes, and to all regulations promulgated under or implementing the statute, as amended, or its successors, as in effect at the relevant time; (b) in computing periods from a specified date to a later specified date, the words “from” and “commencing on” (and the like) mean “from and including,” and the words “to,” “until” and “ending on” (and the like) mean “to, but excluding”; (c) references to a governmental or quasi-governmental agency, authority or instrumentality will also refer to a regulatory body that succeeds to the functions of the agency, authority or instrumentality; (d) indications of time of day will be based upon the time applicable to the location of the principal headquarters of the Company; (e) the words “include,” “includes” and “including” means “include, without limitation,” “includes, without limitation” and “including, without limitation,” respectively; (f) all references to preambles, recitals, sections, and

exhibits are to preambles, recitals, sections, and exhibits in or to this Agreement, unless otherwise specified; (g) the words "hereof," "herein," "hereto," "hereby," "hereunder," and other words of similar import refer to this Agreement as a whole (including exhibits); (h) any reference to a document or set of documents, and the rights and obligations of the parties under any such documents, means such document or documents as amended from time to time, and any and all modifications, extensions, renewals, substitutions, or replacements thereof; (i) all words used will be construed to be of such gender or number as the circumstances and context require; (j) the captions and headings of preambles, recitals, sections, and exhibits appearing in or attached to this Agreement have been inserted solely for convenience of reference, and will not be considered a part of this Agreement, nor will any of them affect the meaning or interpretation of this Agreement or any of its provisions; and (k) all accounting terms not specifically defined herein will be construed in accordance with GAAP.

Sorry, but you really do have to read (and think about) this stuff.

Sponsor SMART

Show off your Sponsor Smarts! Send the editor team your answers at sponsor.sync@weil.com to the five quiz questions below and check our next issue for the correct answers. Firms with the most correct answers will earn a spot on next issue's Sponsor Smart Leaderboard. Ready, set, GO!

1 A "tipping basket" is:

A. a bucket of water

B. a deductible that once met tips into indemnity obligations above the deductible

C. a deductible that one met requires coverage from dollar-one

2 Continuation vehicles are used as a way to:

A. offer management a right to invest in a company

B. complete add-ons

C. roll ownership to another fund of the same sponsor

3 True or False:

Reverse break-fees are paid by sellers to buyers for failing to close after signing a purchase agreement.

4 When seller reps survive closing:

A. the buyer can bring claims for breaches of a rep after closing even if there is no separate indemnity

B. the buyer can bring claims for breaches of a rep after closing but only if there is a separate indemnity

C. they send the seller a bill and hope to work together again on the next sell-side

5 What percentage of Weil deals involve representation and warranty insurance?

A. 20% **B.** 50% **C.** 75%

Bonus Question:

What was the "Private Equity Deal of the Year" at the 2024 IFLR Americas Awards?

You may also submit your response by scanning the QR code

ENDNOTES

U.S. LEVERAGED FINANCE MARKET UPDATE

1 Gold Sheets, LSEG LPC, September 30, 2024.

2 Marina Lukatsky, Q2 US Leveraged Loan Market Wrap: Demand surges, leading to record activity, PitchBook (June 26, 2024).

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GET IN THE GAME: INVESTING IN SPORTS

16 The authors would like to thank associates Brendan McNerney and Shane Kuse for their assistance in preparing this article.

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MINING FOR GOLD IN CONTRACTUAL BOILERPLATE

24 I have used illustrations from Weil war stories in past postings, but I didn't tell the readers it was a story involving us. See e.g., Glenn West, Be Wary of Someone Offering a "Fulsome" Set of Reps, Weil's Global Private Equity Watch, July 28, 2016, https://goo.gl/pu8NMB (the post was about the dangers of using the term "fulsome"— legend has it that the litigator was a Weil litigator arguing a case in federal court in the Midwest)

25 I actually can't now remember whether this was evident from the actual defined term, or only by reference to the boilerplate "interpretations" or "rules of construction" provision, but the story works better to treat is has having only been evident by reference to the boilerplate.

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Weil Private Equity is proud of our broad representations and the successes of our clients. Below is a small sampling of our recent work:

- Weil advised Astorg Partners in its approximately $282 million take-private acquisition of Hamilton Thorne and simultaneous acquisition of the Assisted Reproductive Technologies (ART) product portfolio of Cook Medical
- Weil advised Avista Healthcare Partners and its portfolio company WellSpring Consumer Healthcare in its acquisition of vH essentials
- Weil advised Blue Star Innovation Partners LP in its acquisition of Ledger Run, Inc.
- Weil advised Citation Capital in its acquisition of a majority stake in Aptive Environmental
- Weil advised Goldman Sachs Alternatives in its $440 million investment in BrightNight
- Weil advised GrowthCurve Capital, in its majority investment in PureFacts Financial Solutions Inc.
- Weil advised InfraRed InfraRed Capital Partners in the sale of its minority stake in LiveOak Fiber, LLC
- Weil advised Lee Equity Partners in sale of its majority stake in Simplicity Group Holdings, Inc.
- Weil advised Providence Equity Partners in the sale of its portfolio company Tait LLC
- Weil advised Stripes and its portfolio company Siete Foods in its $1.2 billion sale to PepsiCo, Inc.
- Weil advised TCV in its sale of Evisort Inc.

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