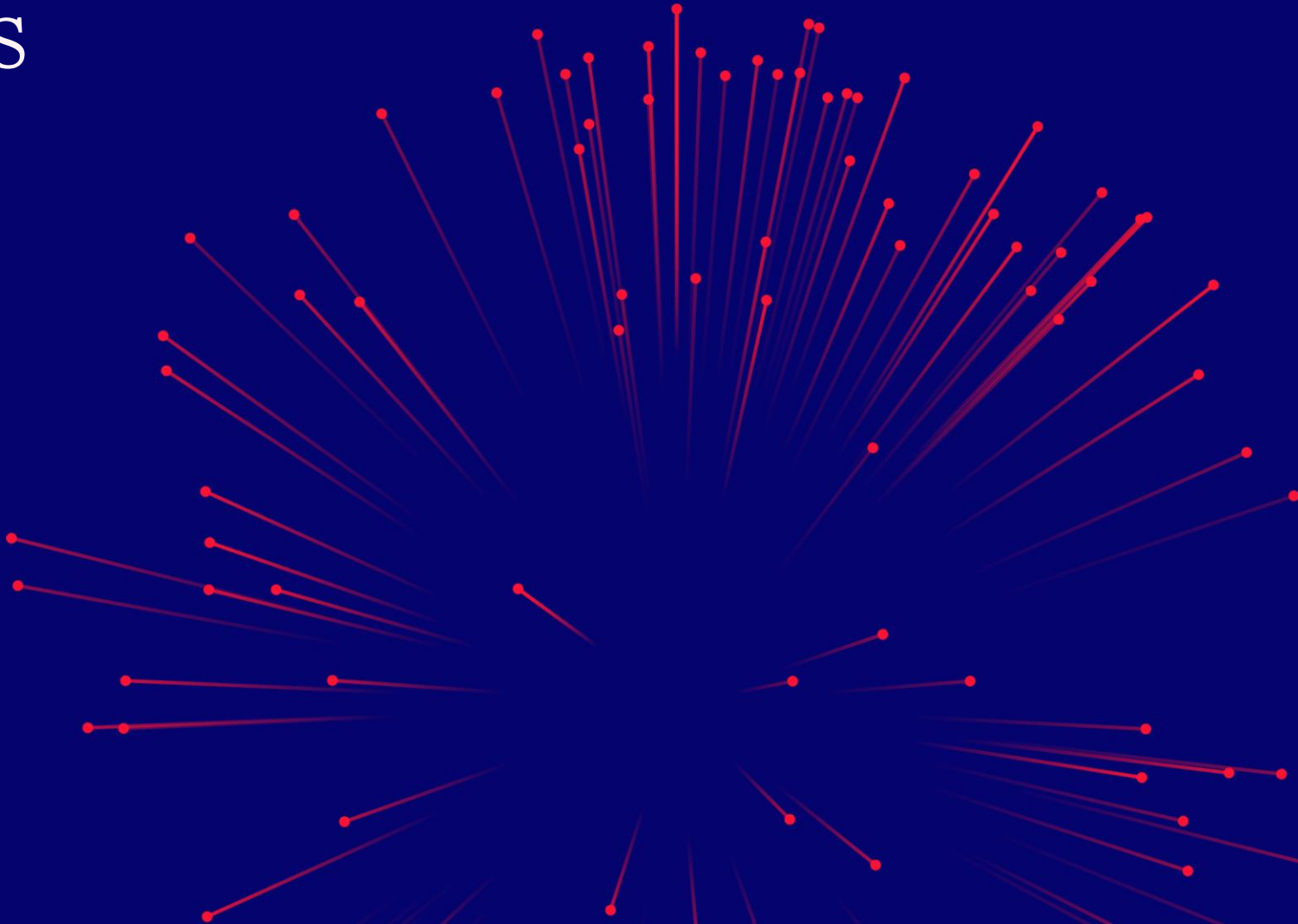


Key M&A Trends and Legal Developments

Legal Insights: A CLE webinar series



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Trends in joint ventures

AGENDA

Today's Speakers



Erin Kirchner
Partner, Chicago



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Dual track exits



What does pursuing a “dual-track process” mean?

Pursuing a dual-track process involves:

- preparing for a strategic private M&A sale – often through an auction process

while at the same time

- preparing to go public via:
 - an IPO
 - a direct listing
 - a business combination with a publicly listed special purpose acquisition company (a “de-SPAC” transaction), and/or
 - an acquisition of a public company with a de minimis market valuation (a “reverse merger” transaction)

Advantages and challenges to dual-track process

Pursuing a dual-track process

Advantages

- Greater transaction certainty
- Less susceptible to lack of buyer interest
- Less risk of buyer disruption
- Sets valuation expectations
- Maximize price because of increased competition and market interest – IPO sets reserve price
- Less dependent on one market route and market volatility
- Flexibility to switch options
- Flexibility to use hybrid solution
- Synergies between various workstream tasks reduce cost and disruption

Challenges

- Greater complexity and resource heavier (from advisers and management)
- Risk of contamination from one stream to next
- Added preparation required and additional time and cost impact on business
- Banks have “skin in the game” (need to incentivize equally for M&A and public options)
- Perceived lack of strategy
- More expensive (but not double)
- Flexibility to switch between routes may in practice be reduced in later stages due to short window for current financial information (IPO) and/or need for regulatory approvals

High-level timeline

Process, timing and workstreams

- 1 Selection of legal, financial and accounting advisors and the underwriting syndicate managing the IPO process

- 2 Due diligence preparation—collect, centralize and categorize

- 3 Coordination across banking and legal teams in diligence, pacing, messaging and ear to the ground

- 4 S-1 preparation will often precede the auction sale process given significant lead time required to file with the SEC

- 5 Auction process customarily kicks off with initial filing of registration statement but filing may be delayed depending on target company's assessment of which is the more promising path

- 6 Target company compares relative valuations offered by an IPO versus an M&A exit and chooses ultimate track

Key workstreams

Process, timing and workstreams

- **Due diligence:** The importance of the due diligence process must not be underestimated. Investing time in preparing a thorough and well-organized database of sites will facilitate an efficient transaction and maximize value. Typical to prepare sell-side diligence reports, and 10b5 deference level diligence may be onerous, but necessary. Important to ensure that there is no disconnect between legal due diligence and financial due diligence.
- **Presentation of KPIs:** Adjustments need to be robust and capable of verification.
- **Financial forecasting:** Working capital analysis should be aligned between the multi-tracks.
- **Antitrust / CFIUS / other related regulatory review:** Determining what approvals and the timing will hold weight in determining the right path
- **Management equity:** Potential buyers will want a good understanding of current equity incentive packages to understand what incentives it will be need to provide post-closing. Management are likely to focus on liquidity, tax and how and when the management equity will be valued.
- **Optionality may come at a price of cost effectiveness (or not):** From a buyer's perspective there may be a concern that a significant amount of time and money is spent pursuing a parallel track. An early-stage discussion on break fees or costs may be sought, depending on the competitive nature of the transaction process. The buyer may try and pass on as much of the work and costs of due diligence to the seller in the case of a multi-track process.

Key process considerations

Process, timing and workstreams

- Some considerations and steps are the same or very similar for each of the processes. Well managed, these can serve for both and help drive the dual-track process efficiently:
- The key to minimizing duplication of effort lies in *planning the process carefully in advance*. Early preparation will inevitably pay back when implementing the project.
- Synergies between various workstream tasks allow reduction of cost and disruption (IM/prospectus, registration statement, VDD/10b-5 documentary due diligence, disclosure letter). *Alignment and ongoing communications between the teams* working on the multiple tracks are required to maximize the benefits of such track processes.
- Flexibility to switch between tracks may in practice be reduced in later stages due to the short execution window. It is therefore key to *identify main timing roadblocks well in advance* to be able to react quickly, if necessary.
- Key is to *achieve maximum valuation visibility prior to decision* on which track to take. Flow of information and process needs to be managed carefully to ensure that final binding offers are received prior to a potential “intention to float” announcement. Maintenance of confidentiality will play a key role in maintaining and managing a multi-track process.

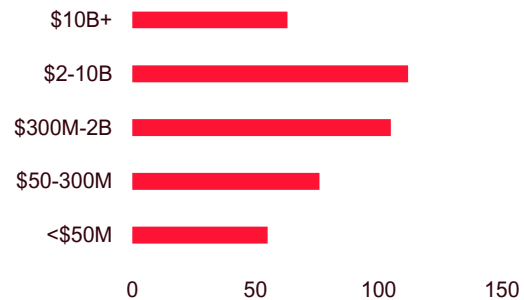
Shareholder activism in 2025 and 2026



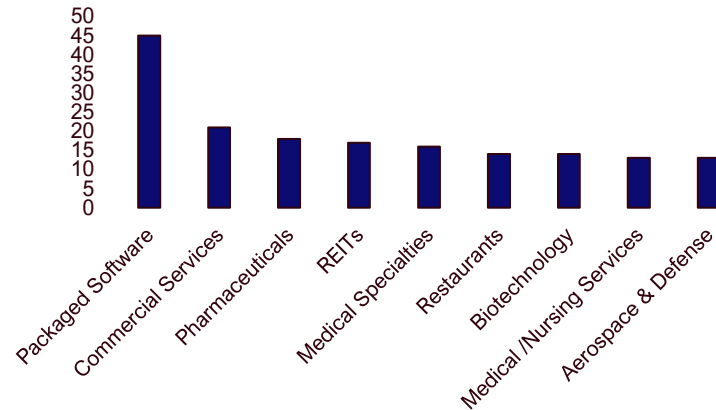
2025 Activism Retrospective



2025 US-Based Campaigns by Market Cap



2025 Most Targeted Industries for US-Based Companies



Activism in 2025

Select Observations and Trends

- 2025 was marked by numerous high-profile “withhold” campaigns, including at Forward Air (Ancora), Harley-Davidson (H Partners), WEX (Impactive), and Cracker Barrel (Biglari)
 - While failure to be reelected was rare, directors suffered significant dissent and, in some cases, agreed to step down (Forward Air, Harley-Davidson)
- Strictly private engagements, including private placeholder nominations, intensified, as companies and activists grappled with market uncertainty
- Change in SEC guidance relating to “active-passive” shareholder engagement resulted in certain stewardship teams at institutional investors taking a more cautious approach during issuer engagements, leading to less voting insight and pre-meeting visibility
- Companies realized critical litigation victories in cases challenging (i) rejected nomination notices and (ii) validity of advance notice bylaws

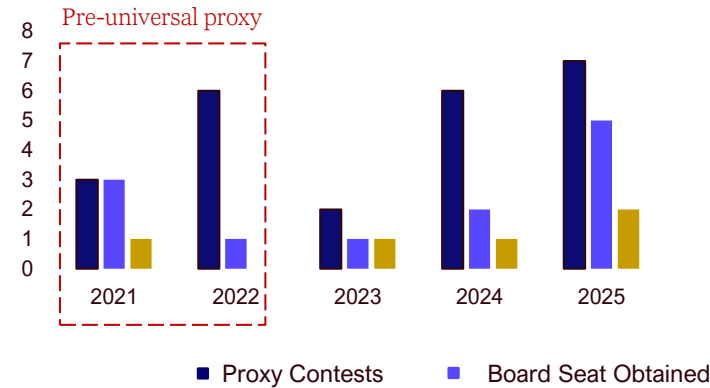
Source: FactSet
 Note: Data (i) only includes “high impact” campaigns and (ii) excludes activism against funds

Proxy Contests

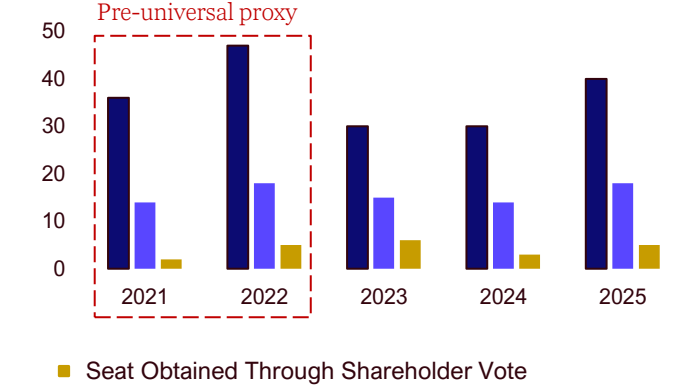
Proxy Contest Perspectives

- In September 2022, the universal proxy rules took effect, introducing a mechanical change to the manner in which proxy contests are adjudicated by shareholders
 - Eliminated the binary voting regime that previously applied to US proxy contests
 - Shareholders now permitted to “mix-and-match” when voting on director candidates proposed by companies and activists, mirroring in-person voting framework
- Global proxy contest activity remained steady, with 229 contests launched in 2025, compared to 239, 226, and 224 in 2024, 2023, and 2022, respectively
 - 72 proxy contests at US-based companies in 2025, compared to 67, 72, and 82 in 2024, 2023, and 2022, respectively
- 31% of the announced proxy fights at S&P 500 and Russell 3000 companies went to a shareholder vote since the universal proxy rules became effective
 - Settlements, both formal and informal, remain the most common vehicle for board representation

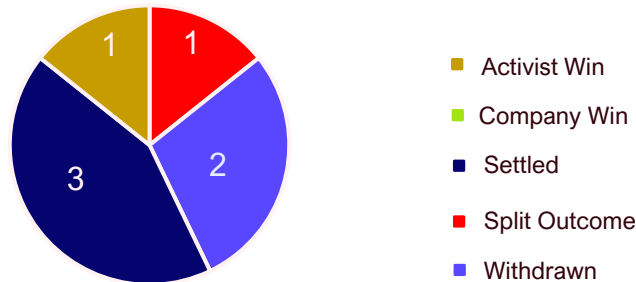
2025 Board-Related Proxy Contests at S&P 500 Companies (by meeting date)



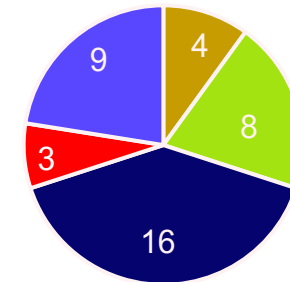
2025 Board-Related Proxy Contests at Russell 3000 Companies (by meeting date)



2025 S&P 500 All Contest Outcomes (by meeting date)



2025 Russell 3000 All Contest Outcomes (by meeting date)



Note: Data excludes activism against funds and universal proxy rules were in effect for one quarter of 2022

Proxy Advisor Influence Post-Universal Proxy

- Since the universal proxy rules took effect on September 1, 2022, ISS has issued 85 voting recommendations in connection with proxy contests at US companies
 - Of the 85 voting recommendations, 52 were in favor of the company, 28 were in favor of the activist, and 5 were split
- During the same period, Glass Lewis has issued 79 such voting recommendations
 - Of the 79 voting recommendations, 46 were in favor of the company, 29 were in favor of the activist, and 4 were split
- ISS and Glass Lewis have been the subject of scrutiny at both the state and federal levels, resulting in an evolving proxy advisory landscape
 - ISS and Glass Lewis have both announced changes to their benchmark policies and proxy voting recommendation frameworks
 - ISS adopted a full case-by-base approach to shareholder proposals concerning E&S matters
 - In 2027, Glass Lewis will cease its standard benchmark offering and transition clients to differentiated frameworks tied to specific investment philosophies and stewardship preferences
 - The Trump Administration issued an executive order entitled “Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors,” stating that proxy advisors “prioritize” DEI and ESG matters “even though investor returns should be the only priority”
 - SEC Commissioner Mark Uyeda also publicly questioned whether shareholders may form a Section 13 “group” if they automatically vote based on proxy advisor recommendations—an undesirable outcome for investors, if enforced
- Companies and investors should carefully monitor further developments with respect to the regulation of proxy advisors, including with respect to shifts in the significance of their voting recommendations in the context of proxy fights



12%

Percentage of proxy contests where ISS recommended *in favor of the company*, but the activist was at least partially successful, including through a settlement

50%

Percentage of proxy contests where ISS recommended *in favor of the activist* and the activist was at least partially successful, including through a settlement

40%

Percentage of proxy contests where ISS made a *split recommendation* and the activist was at least partially successful, including through a settlement



15%

Percentage of proxy contests where GL recommended *in favor of the company*, but the activist was at least partially successful, including through a settlement

52%

Percentage of proxy contests where GL recommended *in favor of the activist* and the activist was at least partially successful, including through a settlement

25%

Percentage of proxy contests where GL made a *split recommendation* and the activist was at least partially successful, including through a settlement



14%

Percentage of proxy contests where ISS and GL recommended *in favor of the company*, but the activist was at least partially successful, including through a settlement

63%

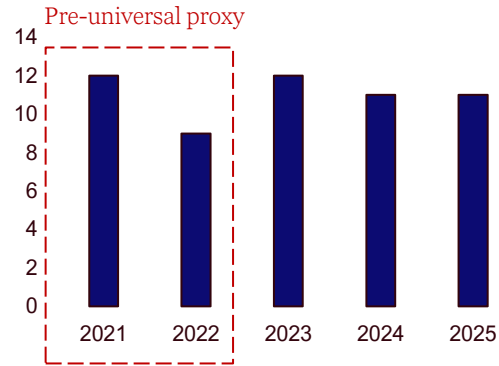
Percentage of proxy contests where ISS and GL recommended *in favor of the activist* and the activist was at least partially successful, including through a settlement

1

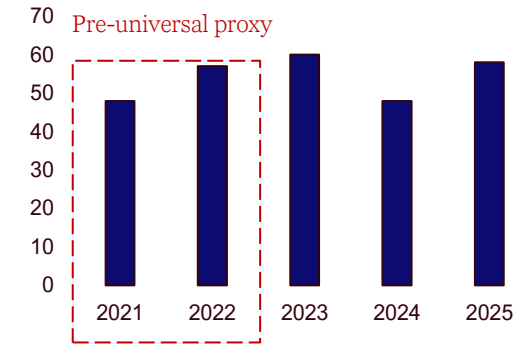
Since September 1, 2022, there has been 1 proxy contest where both ISS and GL made a *split recommendation*—the activist was partially successful

Board Representation

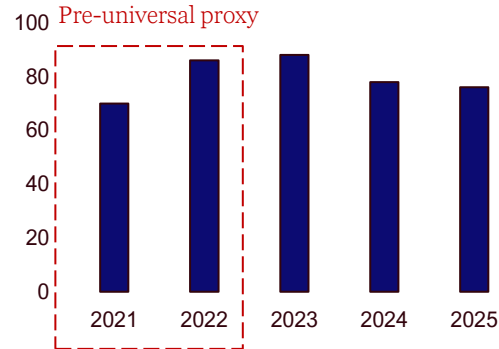
Campaigns at S&P 500 Companies Resulting in a Board Seat (by announcement date)



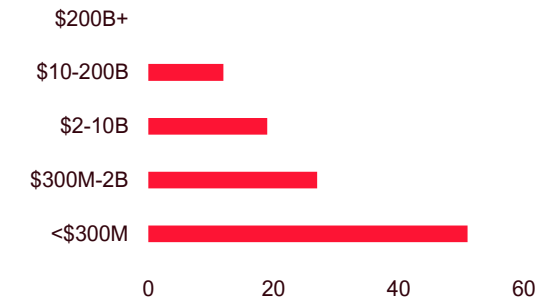
Campaigns at Russell 3000 Companies Resulting in a Board Seat (by announcement date)



Campaigns at US-Based Companies Resulting in a Board Seat (by announcement date)



2025 Campaigns Resulting in a Board Seat (by announcement date and market cap)



Board Representation by the Numbers

- Universal proxy rules have been accompanied by a slight year-over-year increase in campaigns resulting in board seats at Russell 3000 companies, but have not fundamentally shifted the activism landscape as it relates to board representation
- Small- and mid-cap companies have continued their historical trend of seeing a higher volume of board-level change in connection with activism
- Globally, 116 campaigns resulted in board seats during 2025, compared to 148, 144, and 140 in 2024, 2023, and 2022, respectively

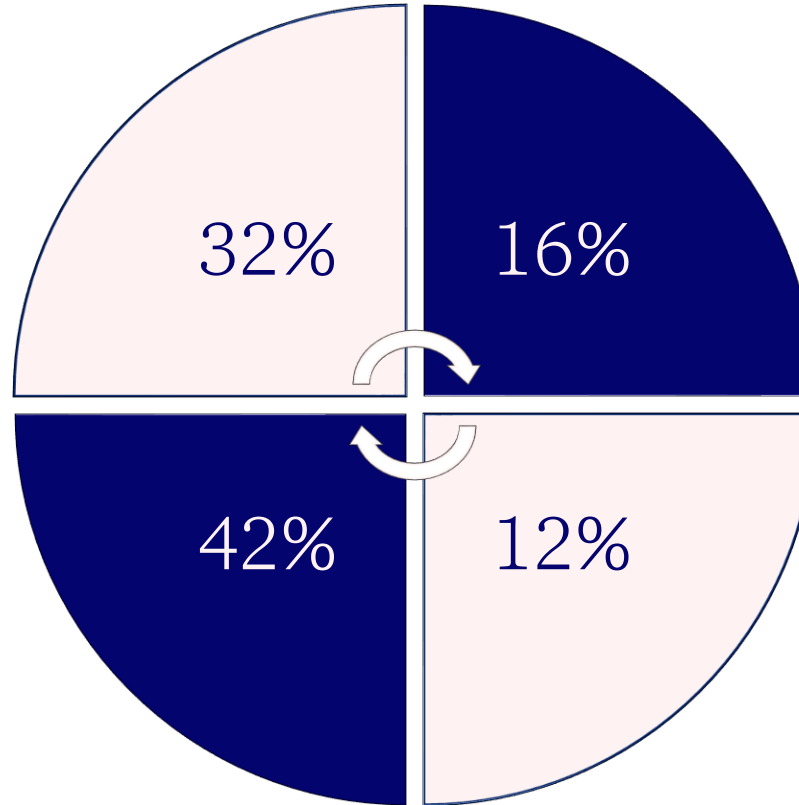
Campaign Demands in 2025

Governance Demands

- Addition of new directors
- Adopt governance best practices
- Remove director(s)
- Remove takeover defenses
- E&S demands

Strategic Demands

- Sale of company
- Breakup
- Improve deal terms and/or block deal from proceeding
- Pursue acquisition
- Review strategic alternatives
- Liquidation of company
- Hostile M&A



(by percentage of campaigns)

Operational Demands

- Change management team
- Improve underperformance
- Implement operational changes
- Rationalize cost structure
- Institute compensation reforms

Capital Allocation Demands

- Return cash via dividends or buybacks
- Increase leverage
- Debt repayment

Activism Trends to Monitor in 2026



Engagement Uncertainty

- Continuing shifts in the regulatory landscape will likely retain the recent shadow cast over engagements between companies and their shareholders
- The so-called “retreat” of proxy advisors, SEC commentary on eligibility to file as a passive investor, and the reformulation of stewardship teams at BlackRock, Vanguard, and State Street together yield more-than-typical quantities of uncertainty, particularly in the proxy fight context
- Companies, activists, and their respective advisors will need to spend more time understanding where voters truly stand in the lead-up to a contested shareholder meeting



M&A Activism

- 2025’s M&A rebound has been welcomed by activists looking to realize a near-term premium on their investment
- Going into 2026, we anticipate that engaged shareholders will increase the frequency with which they make M&A-related demands
- In addition to “sell the company” campaigns, we expect that shareholders will continue to push for breakups, as they have done successfully in recent years
- Companies that have been spun-out or made newly public through a breakup will continue to be an M&A focus for activists looking to target underperformers



Alternative Activism

- Expect continued intensification of private engagement strategies, including letter writing campaigns coupled with the specter of publication and media leaks
- Activists will seek to leverage private placeholder nominations, applying pressure to issuers and signaling the seriousness of their demands
- Informal settlements will continue to be popular campaign outcomes
- “Withhold” campaigns proved to be a low cost, high efficacy tool for activists in 2025—look for that strategy to persist in 2026, especially where activists surface near or after the closing of a nomination window

Acquihire trends and considerations



Intro to acquihires

Types of Acquire Structures

An “acquire” generally refers to any M&A transaction where the primary “asset” being acquired is the talent (employees) of the target company.

Acquihires vary in size and form, but typically fall into one of the following three structures:

1. Full Company Purchase

- Stock sale or merger to acquire the entire company
- Buyer typically requires key employees to remain employed as of closing
- Sometimes includes a requirement that key employees “re-vest” a meaningful portion of their transaction consideration

2. Asset Purchase

- Typically a distressed sale where buyer wants to hire employees and acquire title to certain assets (e.g. IP) of target but does not want to assume target’s liabilities

3. Waiver and Release (plus License)

- Typically a very fast-paced transaction where buyer wants to hire certain employees and use certain assets (IP) of target but does not need title to the target’s assets and does not want to assume target’s liabilities
- Streamlined set of transaction documents that can be quickly and efficiently implemented

Waiver & release deals – the “reverse acquihire”

Waiver & release/license deals (referred to as “reverse acquihires”) separate the people from the corporate shell.

Instead of merging with or purchasing the target or its assets, the acquirer:

- hires the founders and key staff directly; and
- pays the target (and often, indirectly, its investors) under a waiver-and-release agreement, frequently paired with a non-exclusive, perpetual IP license that allows the acquirer to use the target’s technology without owning it.

This “**reverse acquihire**” has emerged most visibly in AI, where regulators increasingly scrutinize Big Tech’s startup acquisitions, and where the know-how sits disproportionately with a few researchers and engineers of the company.

- The structure gives acquirers speed and practical control over the workforce and know-how, while attempting to sidestep pre-closing merger notifications.
- It also raises questions about antitrust “substance over form,” the treatment of employees left behind at “RemainCo” and the long-term effects on competition.

Types of acquihire structures

Benefits and key tradeoffs

Structure	Pros	Cons
1. Full purchase (may include equity re-vest)	<ul style="list-style-type: none">• Clear title to assets• Enforceable deal non-competes in many jurisdictions• Fewer contract assignment issues• Often better tax treatment for target stockholders	<ul style="list-style-type: none">• All liabilities of target company are inherited by buyer (can negotiate indemnities)• Broader diligence and integration effort• HSR/merger control risk at scale• Often slower/more expensive• 280G
2. Asset purchase of IP + transfer of employees	<ul style="list-style-type: none">• Title to those assets that are properly assigned• Targeted risk assumption (avoids many liabilities)• Buyer benefits from step-up in basis of target's assets	<ul style="list-style-type: none">• Assignments required (consents to assign may be challenging)• Still can trigger merger control in some jurisdictions• Potential double taxation for target shareholders• Can be complex in foreign jurisdictions• Employees are terminated by target (or resign) and must be hired by buyer (may result in possible severance and/or WARN issues)• Target company wind down may distract key employees• May trigger 280G• More likely to result in transfer taxes
3. Waiver-and-release + non-exclusive license ("reverse acquihire")	<ul style="list-style-type: none">• Fast, simple documents (typically less expensive on front-end)• Limited successor liability• May avoid pre-closing notifications• Aligns with talent-first rationale	<ul style="list-style-type: none">• Regulatory gray zone (post-closing antitrust risk)• License is non-exclusive• Potential double taxation for target shareholders• Employees are terminated by target (or resign) and must be hired by buyer (may result in possible severance and/or WARN issues)• Target company wind down may distract key employees

Types of acquihire structures

Strategic considerations

Perspective	Full purchase (may include re-vest)	Asset purchase + team transfer	Reverse acquihire (waiver + license)
<i>IP certainty</i>	Highest; buyer owns IP	High if assignments clean	Lowest; license is non-exclusive; rebuild often required
<i>Liability profile</i>	Broad; buyers typically address with indemnity and escrows	Targeted; some risks remain	Narrowest; potential successor-liability exposure
<i>Speed to close</i>	May be slowest; full process (including diligence, regulatory considerations)	Moderate; targeted consents and diligence	Fastest; risk of post-closing review
<i>Employee retention</i>	Can be achieved with new offers/packages for key employees, employee conditions, re-vest; structure results in all employees being retained, unless employees leave or as otherwise specified	Can be achieved with new offers/packages, employee conditions; only those employees provided with buyer offers are transferred	Can be achieved with new offers/packages for hires; weak for “RemainCo” employees
<i>Tax efficiency</i>	More tax efficient than other structures	Deal-dependent; may involve two layers of taxation for target shareholders	Deal-dependent; may involve two layers of taxation for target shareholders
<i>Regulatory risk</i>	Highest at scale; HSR/merger control	Medium; some risk exists	Potential post-closing scrutiny; substance-over-form lens
<i>Optics and governance</i>	Clear fiduciary process and disclosures	Manageable with proper process	Heightened optics risk; investor/employer lawsuits can name buyer

Execution realities for a reverse acquihire

Antitrust: Expect potential antitrust scrutiny of reverse acquihires. U.S. agencies have signaled willingness to “look through” formalities and to probe whether a mass transfer of staff and licenses is an acquisition in substance. European authorities have explicitly explored reportability of similar packages. Companies should assume post-closing review is a real possibility, build clean narratives, and avoid exclusivity where it is not essential.

Tax & Accounting: Treat tax and accounting early and seriously. Large “license” checks to the shell company can be economically inefficient compared to a stock sale or reorganizations, particularly where net operating losses are limited or constrained. Model outcomes up front; the “fastest” structure can be the costliest after tax.

Employee issues: Mind the people left behind. Reverse acquihires can fracture teams and morale. Buyers that ignore rank-and-file outcomes risk reputational blowback in a small labor market, litigation risk for aiding and abetting fiduciary breaches, and higher attrition among the very hires they prioritized.

IP: Button up IP hygiene. Defensive licenses are not a luxury. Absent a clear license and covenant not to sue, the buyer’s new hires can be exposed to trade-secret or copyright claims by “RemainCo” or a rival that later buys the shell’s assets.

Fiduciary duties: Boards must be thoughtful about their fiduciary duties. Even where the transaction is nominally a “release and license,” directors should document alternatives considered, mitigate conflicts, and—where feasible—seek stockholder approval. That record is the best defense against later fiduciary duty claims.

Trends in joint ventures



Business rationale & preliminary considerations

Be sure to determine the following at the outset as guiding principles

- **What is the business rationale?** Are there significant resources that can be contributed by each party to accomplish this business objective?
- **What is the expected final outcome?** Will the partners have greater success if they consolidated all of their resources and integrated or should the two entities remain distinct from one another? How long should the joint venture last for?
- **What are the outcomes that must be avoided?** Are all participants in alignment as to the outcomes that must be avoided? What are the risks of the time horizon and operation of the joint venture and what mitigation measures can be included in the joint venture structure?
- **What is the expected value or revenue of the joint venture?** Is this joint venture worth pursuing from a financial standpoint? What is the likelihood of obtaining such value or revenue, and are all parties in alignment as to the potential risks inherent with the joint venture entity outweighed by the potential value to be realized?
- **What is the time horizon of the joint venture?** Do the joint venture participants have resources during this time period or does additional funding need to be re raised?
- **What is the exit strategy?** Are the exit strategies and procedures carefully drafted in the joint venture agreement? Are any participants of the joint venture to be bought out upon exit or will the entire joint venture liquidate upon one party's exit? How should proceeds or assets be distributed upon exit?

Considerations

Negotiating a JV

Joint ventures can be more complex to negotiate than typical M&A transactions, due to the ongoing nature of the relationship.

When negotiating the terms upfront, parties must keep in mind what may happen down the road if there is disagreement, need for additional contributions or a party wants to sell or liquidate its investment due to unforeseen circumstances.

Procedures all the way from formation to disputes and termination need to be negotiated 'on a clear day' to avoid (or at least minimize the potential for) later disputes.

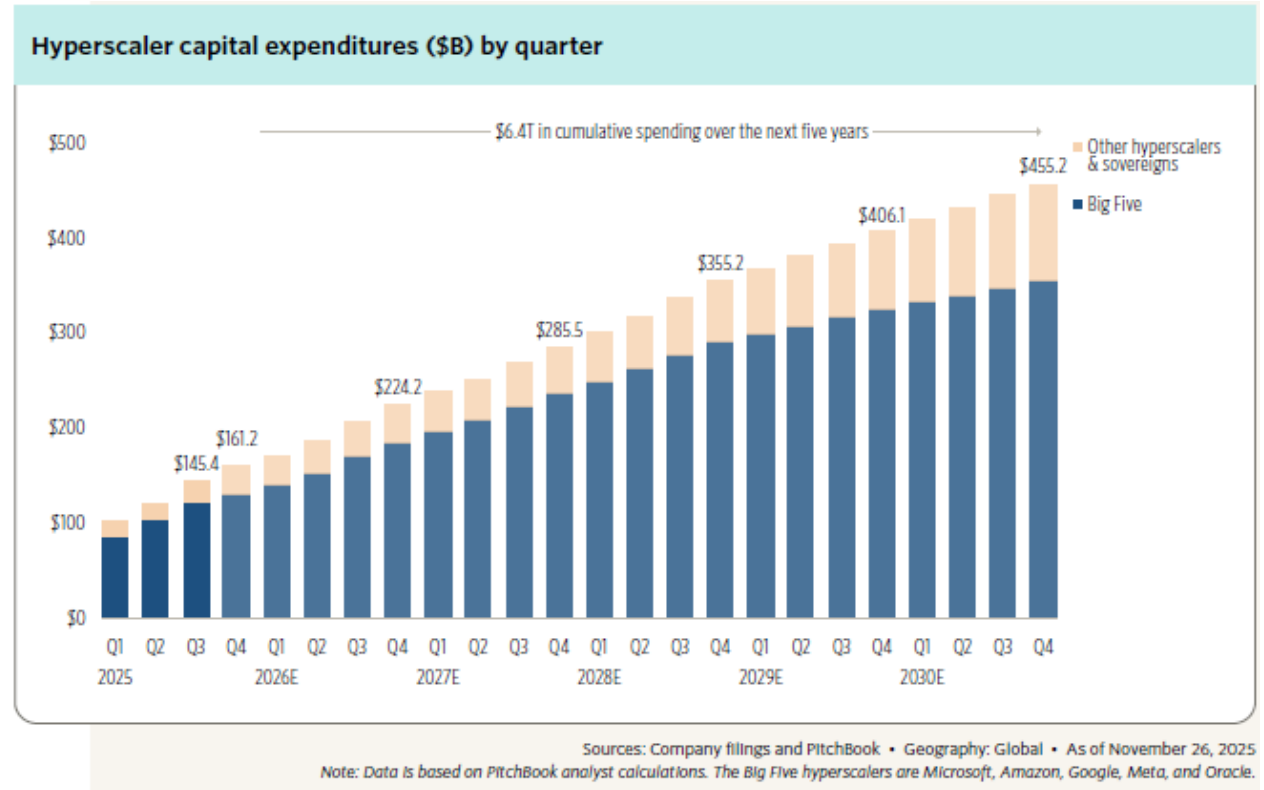
- Formation:
 - Structure and control
 - Governing law
 - Contributions (cash and assets; IP-specific considerations)
 - Required approvals
- Governance and operations:
 - Administration
 - Employees
 - IP development and ownership
 - Deadlock
 - Disputes
- Economics:
 - Distributions / profits
 - Capital calls
 - Taxes
- Exit / dissolution:
 - Transfer of equity interests (buyout rights, put / call options, etc.)
 - Who owns the IP?
 - Termination

Joints ventures in AI infrastructure development

Joint venture and strategic alliance trends

AI as an M&A driver in digital infrastructure

- Data centers have evolved from niche infrastructure into one of the most sought-after institutional investment classes. The sector recorded more than \$70 billion in M&A transactions in 2024, signaling institutional appetite for digital infrastructure.
- McKinsey projects companies will need to invest **\$5.2 trillion globally in data center infrastructure by 2030 to meet AI demand**, with the US requiring \$1 trillion in capital expenditures over the next five years.
- AI data center development is increasingly reliant on joint ventures (JVs) and strategic alliances to finance the massive capital and power requirements.



Joins ventures in AI infrastructure development

Key structures and examples

Hyperscaler & Financial Investor JV: Tech companies like Meta, Microsoft, and OpenAI partner with asset managers to share development risks, leverage specialist operating capabilities, and access substantial capital.

- **Meta & Blue Owl Capital:** Funds managed by Blue Owl Capital formed a JV with Meta to develop the multibillion-dollar Hyperion data center campus in Louisiana. Meta retains operational control and a 20% equity stake, while Blue Owl provides the majority of the funding (~80% ownership).
- **BlackRock, Global Infrastructure Partners (GIP), Microsoft, & MGX:** This partnership, the Global AI Infrastructure Investment Partnership (GAIIP), aims to invest in new and expanded data centers and supporting power infrastructure globally.
- **OpenAI, Oracle, & SoftBank:** This group is behind the "Stargate Project," an initiative planning to invest over \$100 billion to build multiple large AI data centers across the US.

Developer & Capital Investor JV: Traditional data center developers partner with institutional capital (like the Digital Realty–Blackstone partnership) to manage project planning, construction permits, and ongoing operations while sharing profits over the long term.

Utility Provider & Developer JV: Partnerships involving energy companies, such as Eni and Khazna Data Centers, focus on integrating data center development with sustainable and reliable power sources to meet the high-density power demands of AI workloads.

Tech Companies and Municipalities: Tech companies partner with municipalities that provide land and incentives, as well as commitments to ongoing energy needs.

- **Garbe DC & Guldborgsund Municipality, Denmark:** The municipality partnered with Garbe DC to establish a 35-hectare AI Data Center Campus. This project is expected to bring up to 20 billion Danish kroner in investment and 350 megawatts of capacity, marking it as one of Europe's largest data centers.
- **Atlas Agro & Richland, Washington:** The city of Richland is partnering with Atlas Agro to develop a data center campus in conjunction with a green fertilizer plant, focusing on climate leadership and job growth.

Joins ventures in AI infrastructure development

Structural elements and financing

The long time horizons needed to build AI data centers and the immense capital requirements (a single facility can cost billions) necessitate innovative financing structures.

- **Special Purpose Vehicles (SPVs):** JVs often utilize SPVs to form a bankruptcy-remote entity that shields project risks and liabilities from the corporate balance sheets of the parent companies.
- **Debt Financing:** Lenders, including commercial banks and insurance companies, typically underwrite a significant portion (60-75%) of the project costs, with bespoke debt structures to bridge construction and permanent financing phases.
- **Equity Allocation:** The tech partner (e.g., Meta) contributes expertise and operational control, while the financial partner (e.g., Blue Owl) contributes the bulk of the cash, leading to different equity ownership percentages.
- **GPU Financing:** In some emerging models, the AI computing hardware itself (GPUs) can serve as collateral for funding.

These structures enable faster deployment of mission-critical infrastructure, spread financial risk among partners and help meet the accelerating demand for AI compute capacity.

Cooley

Thank you!

