

Coolley

2024 Private Equity Year in Review

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Note from our co-chairs

As we reflect on 2024, we are excited to share highlights from what was an eventful year for Cooley's private equity (PE) practice, as well as the broader markets, and offer key insights into what we think is on the horizon for 2025. While the deal environment has faced its share of challenges over the past several years, we observed a meaningful rebound in PE activity last year, including with respect to new platforms, add-on acquisitions, fundraising and exits, and we believe this will continue to gain momentum in the year ahead.

In 2024, Cooley PE supported transactions spanning industries – including technology, software, aerospace and defense, industrial and manufacturing, business services, telecommunications, infrastructure and healthcare, among others. Standout moments for our team included launching our inaugural private equity conference, the Cooley Private Equity Forward Forum, expanding our support for initiatives championing women in private equity, and continuing to grow our bench strength and elevate our offerings (discussed more below). In this 2024 Year in Review, we also provide our outlook on deal activity for the year ahead and some of the more significant impacts we are expecting from the new presidential administration in the United States.

Thank you for your continued engagement with Cooley's private equity practice – we are excited for what lies ahead and look forward to continuing to collaborate with our clients in 2025!

– Al Browne and Sonny Allison

Cooley PE in Focus: Breaking New Ground

Cooley's inaugural PE Forward Forum

Cooley's inaugural Private Equity Forward Forum, held on September 25, 2024, in New York City, was a resounding success, bringing together investors and other industry leaders for an engaging day of insights and networking. This flagship event is a cornerstone of Cooley's commitment to developing an annual premier platform for the private equity industry.

The feedback we heard from participants underscored the value of the event's format and the practical takeaways shared throughout the day. The forum featured a dynamic agenda covering a wide range of timely topics – including strategies for value creation, leveraging artificial intelligence for a competitive edge and maximizing returns. [View the full agenda.](#)

We are already looking ahead to this year's program, scheduled for September 2025.

Thank you to all who attended and contributed to the success of Cooley's 2024 Private Equity Forward Forum. We look forward to seeing you again soon!

Cooley leads the way in advancing women in private equity

In 2024, Cooley deepened its commitment to advancing women in PE through meaningful initiatives and community engagement. With women representing more than half of our PE group, we are committed to leading by example in fostering diversity, and we strive to set a higher standard for inclusivity in the industry.

Key highlights from last year included participating in the 2024 With Intelligence Women's Private Equity Summit in Phoenix, hosting a networking reception at the 2024 Kayo Women's M&A Summit in Boston, and debuting a "Women in Private Equity Investing" reception in Denver.

Looking ahead to 2025, Cooley is excited to add to our slate of events – including hosting a new intimate dinner at the With Intelligence Women's Private Equity Summit and building on the success of our Denver reception by expanding our footprint to Boston. Stay tuned for more details soon.

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2024 PE Wrapped

M&A showed signs of recovery, particularly beginning in the second half of 2024, [with deal volume for private equity up 17% year over year as of the end of the third quarter](#), and even greater buyout activity witnessed in the fourth quarter, despite a relatively slow start to the year. Deal volume continued to remain lower than pandemic levels, during which time activity was driven largely by all-time low interest rates and economic stimulus. We expect dealmaking to continue regaining momentum in 2025, due to expected changes in the regulatory environment under the second Trump administration in the US, and the fact that many limited partners (LPs) are focused on funds providing liquidity and returning capital. Private equity funds have amassed large quantities of dry powder over the past several years – as of March 2024, [global funds had more than \\$500 billion of dry powder](#). While some of this capital was deployed in the latter half of 2024, buyout activity has not yet increased enough to deploy most of this capital. Finally, for funds that raised capital in 2020, the standard five-year investment period will be coming to an end this year. Those fund managers will be seeking to deploy any remaining capital, which may contribute to increased buyout activity and reinforce optimism surrounding upcoming exit opportunities.

Deals of all shapes and sizes

Despite dealmaking stabilizing to around pre-pandemic levels, we are seeing a different composition of deal types and sizes. Smaller exits were seen in early 2024 compared to 2023, while year-over-year volume stepped up significantly in Q3 and Q4. This upward trend coincided with the Federal Reserve and European Central Bank decreasing interest rates in the second half of the year, and, with the potential for further, though potentially slowing, rate decreases, we expect increased activity throughout 2025.

We noted several meaningful trends in the composition of deal types completed throughout 2024, including:

- **Tech deals dominated:** The technology sector had another particularly strong year, with technology companies' earnings holding strong in the public markets and building on the historical strength of tech sector-focused PE funds.¹ Dealmaking in the sector increased significantly compared to 2023, with software and cybersecurity deals specifically driving growth (for example, Thoma Bravo's acquisition of Darktrace, valued at \$5.3 billion).² The PE industry has now backed more technology companies over the past five years than companies from any other sector, cementing tech dealmaking as the most popular PE

¹ PitchBook, "Q3 2024 US PE Breakdown," p. 13.

² *Id.*

investment.³ Among deals that Cooley advised on in 2024, a majority of target companies were in the tech sector, reflective of our market-leading capabilities advising on legal issues in this space.

- **Incentives to invest in infrastructure:** Deal activity in the infrastructure sector also picked up in 2024 (for example, Brookfield's \$3.8 billion investment in French renewable energy developer Neoen), with the bipartisan US Infrastructure Investment and Jobs Act providing for \$1.2 trillion in federal spending over the next five years. This [legislation will provide significant incentives for PE firms to invest in certain areas](#), from clean energy to broadband. This reflects a combination of the long-standing trend in private equity investments targeting sectors with steady cash flows and long-term growth potential and the recent increase in demand for renewable energy sources driving investments in climate tech.
- **Platform LBOs returned:** Platform leveraged buyout (LBO) activity began to rebound, after slumping significantly in 2023, trending back toward pre-pandemic levels.⁴ The appetite for add-on strategies also remained high, as discussed below.
- **Continuation funds prevailed:** Increasing continuation fund activity was prevalent in 2024, as LPs sought attractive opportunities among funds needing liquidity in an otherwise sluggish fundraising environment but wanting to maintain exposure to strong assets. For example, Cooley client Rubicon Technology Partners formed a \$500 million single-asset continuation fund to extend its partnership with Cin7, a global leader in cloud-based inventory management software.
- **Growth equity remained popular:** In the US market, in particular, growth equity and minority deals increased again in 2024 by around 33% on a value basis by the end of the third quarter, gaining further momentum after a similar increase in 2023.⁵

Policy Shifts

One of the biggest unknown factors at the end of 2024 and beginning of 2025 is the impact of the new US presidential administration and Congress on investment activity and regulations. Before the November 2024 election, PE experienced a few public policy headwinds, some of which may carry over into 2025. In Congress, legislation was introduced, and hearings were held, on the impacts PE had on healthcare, and nearly a dozen states adopted regulations or passed legislation requiring closer scrutiny of PE's role in healthcare markets.

Further, the Federal Trade Commission (FTC) adopted a controversial noncompete rule that, had it not been blocked by a federal court, would have negatively impacted the way PE funds retain top talent and protect their investments. The 2024 elections ushered in policymakers that are certainly less hostile to private equity, but we note that, in some instances, like healthcare, there is bipartisan skepticism of the benefits of PE investment. This could result in examination by Congress and attenuated reviews by the FTC. Our predictions and key insights in light of the changing governmental regime are discussed below under "New Leadership, New Rules?"

US dollars drive European deals

The 2024 Brookfield/Neoen and Thoma Bravo/Darktrace deals noted above under "Deals of all shapes and sizes" and below under "Insights From Across the Pond" exemplify the growing trend of significant US investments in European companies. This shift is largely driven by the strength of the US dollar against local European currencies, creating a favorable environment for US investors to acquire European firms at attractive valuations. Such cross-border transactions reflect a broader strategic move, where US firms leverage currency fluctuations to access high-growth opportunities in the European market.

Buying and building into the future

Building on the momentum of prior years, private equity firms in 2024 also frequently leveraged the "buy and build" approach (also known as "add-on" investments) to fortify their positions and enhance the performance of existing portfolio companies. This method has proven invaluable in adapting to market uncertainties, enabling firms to scale operations, diversify revenue streams and maintain competitiveness in a challenging environment.

The past year underscored the importance of adaptability and diversification, and add-on acquisitions will remain a critical tool for navigating economic uncertainties in 2025 and beyond, with PE funds poised to double-down in this space. By focusing on smaller, strategic deals, firms can mitigate risks while maximizing returns. This approach may continue to offer a pathway for expanding market share, achieving scale and driving sustainable growth, though such route remains subject to uncertainty regarding antitrust scrutiny, as discussed further below under "Antitrust Regulators Turned Up the Heat in 2024." The pursuit of tech-enabled

³ Preqin Ltd.

⁴ PitchBook, "Q3 2024 US PE Middle Market Report."

⁵ PitchBook, "Q3 2024 US PE Breakdown," p. 8.

solutions and innovative business models will dominate add-on strategies, as seen in 2024, in attempts to future-proof portfolios.

Combined equity commitment letters and limited guarantees

In LBO deals, the practice of combining equity commitment letters (ECLs) and limited guarantees (LGs), two distinct documents into one – a change in prevailing market practice – became popular in 2024. This streamlined approach reflects the desire of law firms and clients to enhance efficiency, reduce complexity and mitigate potential risks associated with these transactions. Notably, the combined form is used for both the equity commitment and guarantee features, but the seller in the transaction does not have direct privity of contract for either component. Although this lack of direct privity could pose concerns for a seller, Delaware case law on third-party beneficiary rights is well-developed and clear, and, with careful and intentional drafting, the combined form is highly unlikely to shift risk to the seller.⁶ As such, we expect use of a combined form to continue to gain popularity in 2025.

New Leadership, New Rules?

The second Trump administration, which came into power on January 20, 2025, has signaled that it will pursue a light-touch regulatory stance, which we expect may result in less stringent M&A reviews, the rollback of certain regulations, and the issuance of executive orders, most of which should have positive results for PE activity. However, this Trump administration is still in its very early stages, with key cabinet and agency heads yet to be confirmed by the Senate, so exact policies that could impact PE and the timing of their implementation remain to be determined. That said, the second Trump administration has indicated that its policies seek to increase investments in legacy sectors (e.g., healthcare, energy and housing), possibly at the expense of “green energy” and the broader sustainability sector.

With respect to healthcare, the Biden administration, as one of its final acts, [released this report](#), authored by the Department of Health and Human Services (HHS), in consultation with the FTC and Department of Justice (DOJ), raising significant concerns over consolidation in the healthcare market, including rising costs, and noting the influx of PE as a contributor. While expressed by the Biden administration, these concerns are shared by the Trump administration, and it bears monitoring to see what – if any – regulatory action that its version of the HHS, FTC and DOJ will take.

Of course, agency rulemaking, and the decision to refrain from rulemaking, must be examined through the lens of *Loper Bright Enterprises v. Raimondo*, which held that decisions must adhere to statutory mandates (with less reliance on the broad discretion once afforded). In addition, despite recent overtures between the Trump administration and CEOs of large technology companies, there remains skepticism in parts of the administration regarding the benefits of combinations that result in big tech companies. Thus, this administration is likely to continue scrutiny over transactions involving “Big Tech,” which, as noted above, has become a key sector in PE dealmaking. Finally, there remain several questions about the scope and authority of the Department of Government Efficiency (DoGE) and how it could translate to a better regulatory environment. The precise content and timing of actions in the Trump administration remain very difficult to predict, as does the overall impact.

Geopolitical issues, such as the imposition of tariffs and export controls, are also important macro public policy issues that could impact cross-border transactions in the PE space.

Following the confirmation of Pam Bondi as attorney general, key players to watch through the nomination process include Gail Slater for assistant attorney general for antitrust, Paul Atkins for chair of the Securities and Exchange Commission, and Andrew Ferguson for chair of the FTC, as well as appointees for the United States Trade Representative and Department of Commerce Bureau of Industry and Security.

119th Congress and PE

In the 119th Congress, the House and Senate are controlled by Republicans for the first time since 2017. This may be a net positive for PE – for example, much like the incoming administration, congressional Republicans have stated that they are focused on cutting regulatory “red tape” and empowering DoGE. To that end, the main committees of jurisdiction for PE – House Financial Services and Senate Banking (as well as their government oversight counterparts) – while not discussing PE directly, have mentioned that they will focus on reviewing existing rules that negatively impact the financial sector.

One tool that is likely to be used by Congress to roll back rules is the Congressional Review Act (CRA), under which Congress can, by a simple majority vote, overturn final rules “as though such rule had never taken

⁶ Cooley analysis of: a) *Crispo v. Musk*, 304 A. 3d 567 (Del. Ch. 2023); b) *Bako Pathology LP v. Bakotic*, No. 382, 2021, op. at *27 Del. (November 28, 2022); c) *United Health Alliance LLC v. United Medical LLC*, C.A. 7710-VCP (November 20, 2014); and d) *Madison Realty P's 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).

effect,”⁷ and, importantly, these rules “may not be reissued in substantially the same form.”⁸ One important element of the CRA is the “lookback period,” which determines which rules are subject to disapproval. While the exact date of the lookback period is established by the Senate and House Parliamentarians, the current thinking is that rules issued on or after August 1, 2024, may be subject to the CRA. While Democrats do not control a majority in the House or Senate, it is important to monitor their press statements and proposed legislation regarding PE. For example, it is quite likely Sen. Elizabeth Warren (D-MA), who will become the ranking member of the Senate Banking Committee, will continue her pursuit of increasing regulation of PE in the healthcare and housing sectors.

Another main agenda item for the 119th Congress is the expiring tax provisions of 2017’s tax reform initiatives, known as the Tax Cuts and Jobs Act (TCJA). The process to identify which provisions to extend or exclude, and to craft the legislation to do so, is likely to take up much of 2025 (the provisions expire in December of this year). TCJA did not target PE specifically, but provisions to monitor include corporate and individual tax rate reductions, expensing for capital investments, carried interest, and research and development expensing. Another key element of the TCJA is the mechanism used to offset its expected cost, which may include increased tariffs on imported goods, especially those from China, while budget reconciliation will be used to pass any TCJA extensions. The most important known element of such reconciliation is that it only requires majority votes in the House and Senate. It is difficult at this point to predict what impact extending the tax cuts from TCJA will have on the economy generally (and PE specifically), but we can be sure that some elements will survive the process, as the TCJA is a signature issue for the new administration and Congress.

The key policymakers who will shape the legislative and regulatory landscape for PE in 2025 are the chairmen of the congressional committees of jurisdiction and the heads of agencies that have the greatest impact over mergers, investment and competition issues – including House Financial Services Committee Chairman French Hill (R-AR); Senate Banking Committee Chairman Tim Scott (R-SC); House Ways and Means Chairman Jason Smith (R-MO); Senate Finance Chairman Mike Crapo (R-ID); and House Budget Committee Chairman Jody Arrington (R-TX). In addition, House and Senate leadership – e.g., House Speaker Mike Johnson (R-LA) and Senate Majority Leader John Thune (R-SD) – are expected to play significant roles.

Antitrust Regulators Turned Up the Heat in 2024

Under the Biden administration, PE transactions came under heightened antitrust scrutiny. Both the FTC and the DOJ’s Antitrust Division signaled their intent to closely monitor PE firms’ deals and board appointments – a commitment they continued to fulfill last year.

The agencies maintained their strong focus on private equity “stealth roll-ups” and serial acquisitions, as evidenced by the FTC’s January 2025 administrative complaint and proposed settlement with Welsh, Carson, Anderson & Stowe (Welsh Carson) over allegations of an unlawful roll-up strategy. The FTC initially filed suit against Welsh Carson and its portfolio company, US Anesthesia Partners (USAP), in federal court in Texas, claiming that USAP’s acquisitions created a monopoly on anesthesia services in parts of Texas, driving up prices, and that Welsh Carson had orchestrated the strategy. While the court allowed the case against USAP to proceed, it dismissed the claims against Welsh Carson in May 2024, citing the firm’s minority stake in USAP and limited board representation. Nevertheless, the FTC continued its pursuit of Welsh Carson through an administrative process within the FTC. The proposed settlement, though not imposing monetary penalties, requires the firm to reduce its involvement with USAP and obtain FTC approval before making any future investments in anesthesia services across the US.

The FTC’s focus on PE also was demonstrated with its launch of two public inquiries:

- **In March 2024**, it initiated a probe into PE acquisitions in the healthcare sector, followed in May by a joint FTC-DOJ inquiry into serial acquisitions and roll-up strategies across industries.
- **In October 2024**, the agencies issued significant changes to the Hart-Scott-Rodino (HSR) Act premerger notification program, taking effect in 2025. The new rules require parties to disclose competitive overlaps, supply relationships, and detailed information on minority ownership and partial acquisitions – a particular concern for PE firms – the implications of which we discussed in detail in this [Cooley client alert](#).

Meanwhile, in January 2025, the DOJ filed a complaint against PE firm KKR for alleged violations of the HSR Act, seeking massive civil penalties, potentially totaling more than \$650 million. The DOJ alleges that KKR failed to submit complete and accurate premerger filings, as required by the HSR Act, on at least 16 occasions between 2021 and 2022, and that such actions reflect a “culture of noncompliance” with violations being “systemic.” KKR filed a countersuit, seeking a declaratory judgment that it did not violate the HSR Act, and asserting that the DOJ’s interpretations of the HSR Act are unconstitutionally vague, and the proposed fines

⁷ Congressional Review Act, 5 USC § 801(f).

⁸ Congressional Review Act, 5 USC § 801(b)(2).

are excessive and unconstitutional.

While enforcement priorities may shift under the new Trump administration and return to a more traditional antitrust framework, scrutiny of PE transactions is unlikely to disappear completely. PE involvement in reported deals has grown from 10% in 2001 to nearly 40% today, resulting in more PE deals that potentially raise antitrust concerns. Further, the new HSR rules will require additional information, providing antitrust agencies with improved tools to evaluate and determine if certain PE transactions may raise potential competitive issues. Even under traditional antitrust frameworks, this increased visibility and the rising prevalence of PE deals suggest there will be continued oversight of this sector.

Smarter Deals: The Rise of AI and Generative AI in PE

With rapid developments in technology, use of generative artificial intelligence (gen AI) technologies has become a strategic priority for PE firms over the past several years. Gen AI is leveraged by firms in evaluating opportunities and allocating capital to investment targets – including developers of gen AI technologies and companies in adjacent industries, such as hardware manufacturers, gen AI scaling providers (e.g., cloud service providers deploying proprietary or third-party gen AI models), and businesses that provide resources to scale the application of gen AI (e.g., energy and materials).

PE sponsors also are playing an increased role in managing existing portfolio companies' use of AI (artificial intelligence) and gen AI technologies. This layer of scrutiny has become crucial, given the nuanced confidentiality and compliance risks posed by these technologies, as well as considerations relating to bias, hallucinations and intellectual property ownership, among others. Such oversight may take the form of general guidance or a more prescriptive approach, such as mandating policies relating to the use of these technologies – e.g., What use cases are acceptable? What types of information can be submitted as prompts? How is output reviewed?

Internally, PE firms are utilizing gen AI to enhance decision-making, streamline operations and gain competitive advantages in deal sourcing, due diligence and portfolio management. One application is the use of AI-powered tools to identify potential acquisition targets by analyzing potential target data – such as financial performance, market conditions and competitive dynamics. Gen AI also is used heavily in business due diligence, as traditional due diligence processes are time-consuming and labor-intensive. AI systems can quickly analyze large amounts of unstructured data – such as financial information, customer reviews, social media sentiment and operational metrics – to assess a target company's performance, risks and growth potential. As gen AI tools are deployed in due diligence, it is important for PE firms to ensure they have adequate rights (pursuant to a nondisclosure agreement or otherwise) to submit potential target information into AI models. Gen AI also is being used by sponsors in portfolio management, with PE firms utilizing machine learning algorithms to monitor and improve performance of their investments. Such tools track key performance indicators, predict potential challenges and recommend strategies to optimize operations.

Despite the many advantages noted, use of gen AI by PE firms is not without risk, including certain industry-specific risks. One concern is the quality and reliability of the data used in AI models, as poor data quality or biased algorithms can lead to inaccurate predictions, potentially resulting in flawed investment decisions. Investment decisions also rely on qualitative factors (e.g., personnel decisions, company culture, market dynamics, etc.) that are less conducive to the application of gen AI. Additionally, the rapid adoption of gen AI introduces cybersecurity risks, as sensitive financial and operational data becomes more exposed to potential breaches. These risks are exacerbated by an increasingly complex AI regulatory landscape, which saw significant changes in 2024 and is expected to continue to evolve rapidly to address future concerns. Finally, the widespread use of AI-driven tools could lead to a homogenization of investment strategies. If many investors rely on similar systems, this could diminish diversity in funding and potentially result in firms missing out on unconventional opportunities. In all cases, PE firms must consider how to communicate the use of such tools to partners and engage in thoughtful implementation to take advantage of the many benefits of gen AI, while mitigating potential risks.

How Borrowers Are Turning Challenges Into Opportunities

Despite high interest rates, refinancing and repricing activity was relatively high in 2024. The [first half of the year witnessed more than \\$500 billion in institutional loan activity](#) – more than five times higher than the same period in each of 2022 and 2023. As dealmaking activity rose, borrowers leveraged relationships with lenders and used competitive processes to extract better terms, as witnessed both in pricing and covenant flexibility. Term Secured Overnight Financing Rate (SOFR) floors have shifted downwards: While 1.00% was the market standard reference rate floor in the days of the London Interbank Offered Rate (LIBOR), we are now seeing

more loans with SOFR floors as low as 0.00% in the larger cap market⁹ (although, in our experience, this is still trending at 1.00% in the lower middle market). Term SOFR credit spread adjustments have all but gone by the wayside in new sponsor-backed credits – they are largely a feature of the first couple years following the LIBOR transition. With respect to covenant capacity, many larger sponsor-backed companies have day-one first lien debt capacity of up to 200% of closing date earnings before interest, taxes, depreciation and amortization (EBITDA),¹⁰ while lower middle-market companies tend to have capacity at about 50 – 85% of closing date EBITDA.

Another pressure point is the builder basket: While most sponsor-backed loans require that access to the builder basket be accompanied by a leverage test, whether that test is set at closing leverage (or below) remains a point of negotiation and varies across the market. Interestingly, several of our middle-market clients closed the year with loans that required that access to builder baskets have only default blockers (and not leverage tests). In addition, over the course of 2024, an increasing number of sponsor-backed credit agreements permitted retained asset sale proceeds to be added to the builder basket.¹¹ Finally, we have seen sponsors push lenders on basket reallocation, or the ability to shift unused basket capacity to another covenant. In many credit agreements, investment capacity can be increased by any unused restricted payment or restricted debt payment capacity. In addition, the ability to “pick your poison,” or reclassify unused restricted payment capacity into secured debt capacity, which was rarely seen in the US prior to 2023, gained significant traction in the third quarter of 2024, [with 53% of sponsor-backed loans containing such provisions](#).

[Factors driving the return toward borrower-friendly drafting](#) included federal rate cuts and economic growth, whetting lender appetite for more volume. In addition, [credit spreads](#) tightened, ending the year ended at the lowest levels since the early 2000s (234.321 basis points on December 26, 2024, for the speculative grade market, compared to 253.510 basis points on June 11, 2007, and 250.623 basis points on March 9, 2005), driving borrowers’ enthusiasm for refinancings and repricings.

Like in prior years, [PE firms also turned to private credit to finance acquisitions and support portfolio companies in 2024](#): Approximately 63% of PE firms reported using private credit for acquisition financing, and nearly half utilized it for general corporate borrowing at the portfolio level. This trend provided greater flexibility and alternative funding sources amid fluctuating interest rates. In addition, bank-led loans increased significantly as a proportion of deal lending in 2024.¹² Banks’ willingness to deploy capital toward LBOs indicates that sponsors will be able to find competitive offerings from banks in the year ahead. However, the use of bank financing overall remained depressed compared to historical averages.

As discussed above, PE acquisition activity is expected to rise in 2025. As for existing investments, many companies will be facing maturity walls in 2025 and 2026. For those that refinanced with extremely low rates in 2020 and 2021, those facilities will be maturing this year or next. Despite three rate cuts in 2024, we remain in a much higher interest rate environment, [and it is anticipated that interest rates will persist higher than pre-COVID levels](#). The [Federal Reserve has indicated that it will be “cautious” about rate cuts this year](#), hoping to avoid undoing any progress in bringing inflation down, and announced on February 11, 2025, that they will not be reducing rates at this time, with officials suggesting [they will maintain that wait-and-see posture at least through their next meeting in one month](#). The increase in cost of capital may result in more defaults and, in some cases, distress and/or insolvency. In particular, borrowers of annualized recurring revenue (ARR) loans, which are generally provided to subscription-based businesses, or those businesses with insufficient EBITDA to support a traditional cash-flow based loan, have struggled in this high interest rate and high inflationary environment and are prone to covenant violations. Since borrowers of ARR loans often do not generate meaningful free cash flow, they may be unable to support higher interest rate expense. However, if 2025 is anything like 2024, many borrowers will be supported by their sponsors with larger equity checks, and [their lenders will provide covenant forgiveness in exchange for higher interest rates and injections of junior capital](#).

A Tale of Two Uptiers: Why Serta and Mitel Came Out Differently

Distressed companies and their lenders have increasingly relied upon uptier transactions as a liability management exercise (LME), whereby a select group of lenders prime nonparticipating lenders of the same priority in exchange for an influx of new, first-priority capital. The reasons for an uptier are straightforward: The company receives liquidity and potentially a deleveraged balance sheet, and the participating lenders (often, the very PE firms backing the company) receive enhanced priority. On the other hand, the collateral of excluded lenders, including other PE firms, can significantly deteriorate as they find themselves subordinated to the other lenders in the borrower’s capital structure.

⁹ Xtract Research, “State of the US Loan Market – 3Q2024.”

¹⁰ *Id.*

¹¹ Cooley analysis of Xtract Research, “State of the US Loan Market – 4Q2024.”

¹² PitchBook, “Q3 2024 US PE Breakdown,” p. 8.

Two recent cases shed light on the permissibility of uptier transactions. In *Serta* and *Mitel*, each issued on New Year's Eve 2024, two different appellate courts evaluated whether uptiers that were challenged by excluded lenders violated the underlying credit agreements. At issue in both cases was whether the uptier violated the credit agreement's requirement that any borrower repayment or repurchase of a loan must be done pro rata among all lenders, with certain limited exceptions. In *Serta*, the US Court of Appeals for the Fifth Circuit found that *Serta's* uptier transaction violated the pro rata requirement, because the term "open market purchase" referred to the specific "secondary market for syndicated loans," and not merely "an acquisition of something for value in competition among private parties."¹³ Thus, the transaction, which had purported to take advantage of the "open market exception," was impermissible, as it had not taken place on such an open market.

In contrast, the First Department Appellate Division (in New York state court) reversed the trial court's denial of *Mitel's* motion to dismiss the excluded lenders' challenge to the *Mitel* uptier, finding that the transaction did not violate the *Mitel* credit agreement's pro rata provision. Although reaching the opposite result as *Serta*, the *Mitel* decision is not inconsistent in its reasoning: The key distinction was the text of the agreement. Unlike *Serta's* agreement, *Mitel's* agreement did not contain an "open market purchase" exception. Rather, the analogous "sacred right" provision provided that no agreement could "decrease or forgive the principal amount of ... any Loan ... without the prior written consent of each Lender directly adversely affected thereby." Notably, that consent was the only consent required, and the First Department held that other lenders selling their loans to *Mitel* (and then executing the uptier) resulted in an "indirect" effect on the excluded lender's loans.¹⁴

The lesson here is that the details matter, and courts will continue to strictly enforce contractual terms. It appears that any uptier transaction that relies exclusively on the "open market purchase" exception to pro rata treatment is vulnerable to challenge. While not binding on other jurisdictions, the Fifth Circuit's *Serta* decision is likely to be persuasive in the absence of other circuit-level decisions. Coupled with lower courts in New York consistently expressing skepticism of uptiers in cases like *Trimark* and *Boardriders*, we expect parties to avoid relying exclusively on the "open market purchase" exception when structuring LMEs in the future.

Growing Popularity, Rising Premiums and Shifting Trends in RWI

Transactions by PE sponsors involving representation and warranty insurance (RWI) have increased both by number of policies bound and by deal value in 2024 versus 2023.^{15,16,17} The use of RWI has become increasingly mainstream, particularly in private equity transactions, where it is estimated that 75% of PE acquirers use RWI.¹⁸ RWI has become a requirement for many transactions where PE buyers and sellers are involved because PE firms want to maintain strong relationships with management post-closing and close a fund and/or mitigate claw-back risk.¹⁹ In addition, bidders can gain a competitive edge in auction processes by offering to obtain RWI (instead of asking for an escrow) and RWI streamlines purchase agreement negotiations, as its use tends to provide buyers with a more robust set of representations.

As deal size and volume increases, the price of policies has started to increase from what premiums were in 2023 (although they are still historically low).^{20,21} This appears to be, at least partially, in response to an increase in material claims being made with respect to policies (see below).

As stated in [this June 2024 Cooley client alert](#), the standard retention (deductible applied before claims can be recovered) under RWI policies has historically been 1% of enterprise value. However, in the last year, underwriters have increasingly provided for initial retentions below 1%, and as low as 0.5%-0.25% of enterprise value for smaller deals. In addition, carriers have adjusted how they approach policy limits, and it is now easier to get terms for limits as low as \$3 million, allowing lower middle-market transactions to utilize RWI instead of more standard indemnity structures.²²

PE sponsors looking to obtain an RWI policy in 2025 can expect to see some standard coverage exclusions on virtually every policy. Such standard exclusions include certain environmental matters, useability of net operating losses and tax credits, wage and hour matters, forward-looking representations and underfunding of pension plans. However, while these exclusions are still prevalent, insurers are taking a slightly more insured-

¹³ *Serta*, 2024 WL 5250365, at *12, 14.

¹⁴ *Ocean Trails*, 2024 WL 5248898, at *1.

¹⁵ Pete Witte, *Private Equity Pulse: Key takeaways from Q3 2024*, EY, October 24, 2024.

¹⁶ Euclid Transactional, [R&W/W&I Insurance June 2024 Update](#).

¹⁷ Euclid Transactional, [R&W/W&I Insurance August 2024 Update](#).

¹⁸ Woodruff-Sawyer, [Guide to Representations & Warranties Insurance, 2024 Edition](#).

¹⁹ *Id.*

²⁰ Euclid Transactional, [R&W/W&I Insurance August 2024 Update](#).

²¹ Euclid Transactional, [R&W/W&I Insurance December 2024 Update](#).

²² Woodruff-Sawyer, [Private Equity: Looking Ahead to 2025](#).

favorable approach to some of these matters. For example, underwriters will highlight and “deem excluded” specific forward-looking representations, rather than using broad language in the policy to exclude all such potential representations.²³ Brokers are reporting seeing very few deal-specific exclusions at the submission stage, and underwriters are willing to take on risks that they historically would not assume to make their quotes more competitive.²⁴

While there has been only a mild increase in the frequency of RWI claims, the severity of these claims has grown. Although smaller to mid-sized claims still make up most payments, there has been a notable increase in very large claims.²⁵ According to Euclid, 50% of its paid-out claims involved payments of 75% or more of the policy’s limit of liability in 2024.²⁶

The distribution of claims by breach type has remained relatively stable over the past few years, with financial statement breaches continuing to be most common under RWI policies and the driver of the most severe losses,²⁷ followed by breaches concerning compliance with laws and material contracts. Notably, breaches involving material customer or material contract representations declined this year.²⁸

We have observed that some underwriters are becoming more resistant to legitimate claims compared to previous years, while others maintain a more commercially pragmatic approach. This is significant, given that there are currently 28 underwriters in the US market vying to underwrite deals, and the decision often comes down to certain intangibles, like previous claims handling experiences.²⁹

As noted above, given the uptick in deal activity at the end of 2024, along with cooling inflation, lower interest rates, and a new presidential administration, many expect deal flow to continue to increase. If this is the case, an increased demand for RWI could lead to a shift in policy coverage and exclusion terms, potentially becoming less favorable to policyholders.³⁰ The increase in large claims may challenge insurers’ capacity to absorb those losses and lead to exits by certain insurers. The uptick in such claims also may result in enhanced due diligence conducted by underwriters and less policyholder-friendly terms.³¹ Additionally, the secondary market is expected to experience sustained growth in 2025, with RWI playing an increasingly significant role.³²

Fundraising in 2024: Caution Prevails, but Bright Spots Emerge for 2025

The 2024 private equity fundraising environment was characterized by caution, with activity remaining somewhat subdued, following in the footsteps of 2023. On the general partner (GP) side, this manifested itself in a desire to de-risk the fundraising process (e.g., through conservative raise targets), while on the LP side, this caution was exhibited in reduced or delayed commitments, often due to a lack of distributions to paid-in capital (DPI), extended diligence and negotiations, and a flight to brand-name fund managers.

However, there several bright spots, and the private equity market kept itself busy with a number of fundraises and transactions – with secondary transactions, spinouts and GP stakes transactions, in particular, continuing to be areas of high activity, along with robust mid-market fundraising. The market also saw a sustained volume of continuation vehicles, as traditional exit routes remained less accessible than normal.

There are good reasons to believe that 2025 will be a strong year for both capital raising and deployment. Most importantly, we have entered a cycle of looser monetary policy, which may create a friendlier environment for exits and distributions. Other factors are in play as well, including the uncertainty of the US presidential election being now behind us, and, with that, general expectations for a deregulatory agenda to follow in Washington, DC, as discussed above under “New Leadership, New Rules?”

²³ Woodruff-Sawyer, [Guide to Representations & Warranties Insurance, 2024 Edition](#).

²⁴ Woodruff-Sawyer, [Private Equity: Looking Ahead to 2025](#).

²⁵ Lockton, [Commercial Insurance Market Remains in Balance: Lockton Market Update, December 2024](#).

²⁶ Euclid Transactional, [R&W/W&I Insurance December 2024 Update](#).

²⁷ *Id.*

²⁸ Lockton, [Commercial Insurance Market Remains in Balance: Lockton Market Update, December 2024](#).

²⁹ Woodruff-Sawyer, [Guide to Representations & Warranties Insurance, 2024 Edition](#).

³⁰ Lockton, [Commercial Insurance Market Remains in Balance: Lockton Market Update, December 2024](#).

³¹ Marsh, [Global Transactional Risk Insurance Claims Report 2024](#).

³² Woodruff-Sawyer, [Guide to Representations & Warranties Insurance, 2024 Edition](#).

Insights From Across the Pond

The environment for PE dealmaking in the UK and Europe was similarly affected by broader economic challenges in 2024, including high inflation and higher interest rates, which have weighed upon overall M&A activity across the continent. PE firms have nonetheless contributed significantly to transaction activity by, among other approaches, utilizing consortium deals (such as CVC, Nordic Capital and ADIA coming together in August to take-private UK investment platform Hargreave Lansdown) and secondary sales (such as BC Partners selling to Goldman Sachs Asset Management its interest in Dutch pharmaceutical company Synthon in Q4).

The multibillion-dollar acquisitions by Thoma Bravo of UK company Darktrace and by Brookfield of a majority interest in French company Neoen, each noted above under "2024 PE Wrapped," are [among other transactions that have fuelled a strong year for larger-value](#), PE-backed deals in Europe. While dealmaking more generally (including for lower-value and mid-market assets) was somewhat more volatile, Europe has remained attractive for many PE investors given the comparative strength of the US dollar and comparatively lower valuation of public and private companies.

In the UK (and to an extent, Europe more broadly), the use of seller-led auctions to support price competition and deal execution remains commonplace. Warranty and indemnity insurance (W&I insurance, the UK/European equivalent of RWI) is frequently used by parties to PE transactions, and it is apparent that some sellers are increasingly inclined to act early to develop, and even include, the W&I policy as part of the deal package offered for negotiation with buyers. Where W&I policies are used, seller liability can be capped as low as one pound – this can be a helpful solution to avoid adversarial negotiations regarding the liability package where management will roll over. These features also facilitate a cleaner break for sellers, alongside use of the "locked-box" completion mechanism, which provides for greater pricing certainty (including comparability of bids) by fixing the price at the locked-box date and limiting the scope of post-closing accounting adjustments.

Nonetheless, increased regulatory scrutiny has presented challenges for executing and closing deals in recent years, and deal timelines have generally suffered more delays and fluctuations. For periods of the year, and particularly for mid- or lower-value deals, the path to a committed deal seemed more unpredictable against the backdrop of ongoing war in Ukraine and a changing political landscape – not least, the parliamentary elections in the UK and France, and the upcoming elections in Germany and the European Union.

In the UK, the Labour government used its first budget since assuming power in July 2024 to deliver a number of tax-related commitments from its manifesto. For the PE sector, a key announcement – which was long trailed and debated over the election period – was reform of the treatment of carried interest for fund managers. As discussed in [this October 2024 Cooley blog post](#), as an interim change, the current 28% capital gains tax rate applying to carried interest will be increased to 32%, effective April 2025. All carried interest will be brought fully within the scope of income tax from April 2026 onwards. However, with the aim of "safeguarding the strength of the UK as a fund management hub," the rate of income tax applicable to "qualifying" carried interest will be adjusted, applying a multiplier to the headline 45% rate, to reduce the effective rate to just over 32%. There will be a consultation on what counts as "qualifying" carried interest, which is expected to consider conditions, such as co-investment (including whether managers' own capital is "at work" and "on risk") and the possible application of a holding period.

The signs of growing market confidence³³ for PE dealmaking globally in 2025 are as relevant to the UK and Europe as they are to the US. The UK and many European countries are seeking renewed economic growth following the challenges of the pandemic and more recent years. There also is significant interest in growing local tech unicorns³⁴ and reinvigorating the capital markets³⁵ and the pathways for growth to initial public offering, including through private capital. The trends and challenges discussed below under "Looking Ahead in 2025" also are likely to be seen in PE dealmaking in the UK and Europe.

Looking Ahead in 2025

Overall, the key macroeconomic factors, including changing political and regulatory landscapes, point toward increased dealmaking activity in 2025. Going forward, we also are tracking several important trends in the industry, including the anticipated increase in the number of club deals, the importance of add-on acquisitions amid the uptick in leveraged buyout transactions, and the frequency of management rollovers in deal structuring.

³³ Pete Witte, [Private Equity Pulse: Key takeaways from Q3 2024](#), EY, October 24, 2024.

³⁴ UK government press release, ["Government backs next generation of tech scale ups"](#), 14 November 2024; European Innovation Council, ["First 48 companies join the European Innovation Council Scaling Club"](#), 9 April 2024.

³⁵ UK government speech, ["Mansion House 2024 speech"](#), 14 November 2024.

2025 promises to be a year where adaptability, innovation and strategic vision will determine the winners in the private equity landscape. We anticipate the following for the year ahead:

- **Increased pressure to deploy capital:** With substantial “dry powder” accumulated, PE firms may face pressure to deploy capital efficiently, potentially leading to a surge in deal activity.³⁶
- **LP demand for liquidity:** LPs will be increasingly focused on liquidity, creating a strong demand for private equity firms to deliver exits and realize returns. This demand to sell will be a key driver in deal activity for 2025, as LPs look for opportunities to free up capital.
- **Resurgence of IPO activity:** LPs’ demands for liquidity may lead to increased initial public offering activity in 2025, with the potential for PE firms to consider going public as a possible viable path for liquidity amid expectations that the Trump administration could roll back some listing requirements.
- **Adaptation to economic and geopolitical dynamics:** PE firms will need to navigate ongoing economic uncertainties and geopolitical developments, adjusting strategies to mitigate risks and capitalizing on emerging opportunities.

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36 Laura Kreutzer, “Private Equity’s 2025 ‘Dry Powder’ Countdown,” The Wall Street Journal, January 3, 2025.