PRIVATE EQUITY & VENTURE CAPITAL COMMITTEE

# PREFERRED RETURNS

SPRING 2025

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## Data Centers, AI, and Strain on the Grid: A Case for Private Equity and Energy Collaboration

**BRAY DOHRWARDT**
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News feeds are filled with stories about the rapid rise of data centers across the United States. Fueled by the surge in internet-connected devices in homes and the swift implementation of AI across industries, the demand for high-performance computing and data processing has increased significantly. Energy-intensive data centers are being constructed at an unprecedented pace. However, this growth is approaching a hard limit: the U.S. electric grid was not designed to handle this sudden demand. The speed of current data center deployment exceeds the capacity of traditional energy planning and interconnection systems to keep pace. Regulatory delays and outdated planning models clash with the tech-driven urgency and investment. The result? A potential bottleneck that threatens to stall the very technologies reshaping the economy. For private equity, data center investments present enormous opportunities, with one large investor recently projecting that "the U.S. will see over $1 trillion invested in data centers over the next five years...". However, realizing meaningful returns requires investors to understand energy challenges better and work to foster improved collaboration amongst all stakeholders, or they risk seeing their investments dissolve into nothing.

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**Spring Meeting 2025 Highlights:**


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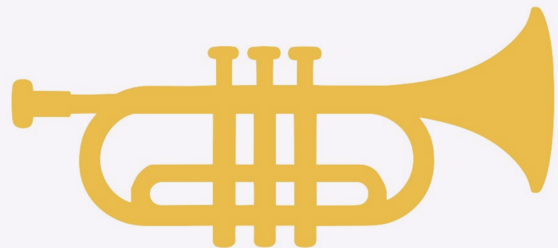

**PRIVATE EQUITY & VENTURE CAPITAL COMMITTEE LEADERSHIP**

**Brett Stewart**
*Committee Chair*

**Matthew Kittay & Brian Huber**
*Committee Co-Vice Chairs*

**Anat Alon-Beck**
*Chair, Academic Subcommittee*

**Tim Poydenis**
*Chair, Angel Venture Capital Subcommittee*

**Sandi Knox**
*Chair, Corporate Venture Capital Subcommittee*

**Benedict Kwon & Gary Ross**
*Co-Chairs, Funds Subcommittee*

**Katrien Vorlat & Elliot Greenstone,**
*Co-Chairs, International Venture Capital & Private Equity Subcommittee*

**Lisa Stark & Helen Reeves**, *Co-Chairs*
**Alyssa Ronan**, *Vice-Chair*
*Jurisprudence Subcommittee*

**David Albin**, *Chair*
**Samantha Horn**, *Vice Chair*
*Private Equity M&A Joint Subcommittee*

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*Co-Chairs, Venture Capital Financing Subcommittee*

**David Alderstein**, *Chair*
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*Financial Services Technology Joint Subcommittee*

**Jon Gworek**
*Chair, Programs Subcommittee*

**Ernest Holtzheimer**
*Membership & Technology Director*

**Steve Wilson**
*Immediate Past Co-Chair of this Committee*

**Joshua Geffon**
*Immediate Past Co-Chair of this Committee*

**Sarah K. Anischik & Lawrence Dempsey**
*Co-Editors, Preferred Returns*

**Evy Marques**
*Diversity Director*

# Message from the Chair

**What do John Fogerty, Gladys Knight, Dave Matthews and Lil Wayne have in common?** They will all be in New Orleans, LA this weekend, and the ABA Business Law Section will be there too! The Private Equity and Venture Capital Committee has a wonderful meeting in store for our members and we look forward to seeing you there!

We hope you can join us just at 9:00 am on Thursday April 24th, just before our meetings get started, in the Armstrong Ballroom (8th Floor) for our **Member and New Member Breakfast**. It's a great opportunity to meet the PEVC Committee's leadership and learn more about what's going on in the Committee.

The Private Equity and Venture Capital main Committee meeting immediately follows the breakfast, and takes place in the Armstrong Ballroom from 9:30 – 11:00 am. Our friends **Houlihan Lokey** will be kicking off the meeting with their always anticipated PEVC market update, following which we are in for a special treat as **SEC Commissioner Peirce will be joining us for a virtual fireside chat**. The Commissioner will be discussing her perspectives and priorities, including among other things, on crypto and the PEVC industry. It promised to be an engaging discussion and a meeting you won't want to miss. Due to the special nature of our guest, our main PEVC Committee meeting will be available via live streaming for registered virtual attendees of the Spring Meeting.

The topical content continues with our subcommittees, each of which has fabulous content planned, a full schedule of which can be found on page 3 of this edition of *Preferred Returns.* Given current economic uncertainties, changing markets, and AI, among other factors, we have no doubt there will be some interesting discussions to be had.

Between the exceptional content and taking in a little bit of Jazz Fest, we hope you'll also find some time to take part in the meaningful networking opportunities that the Business Law Section Spring Meeting has to offer. In particular, the **PEVC Committee Dinner will be held at The Court of Two Sisters** on Thursday evening. It promises to be a special evening of delicious food and good company. A special thank you to our sponsors Kroll and Houlihan Lokey whose support makes the event possible. Only a few tickets remain so if you want to join us be sure to secure yours today before they're sold out.

Looking forward to seeing you in New Orleans!

Brett Stewart, Chair

Brett Stewart, McMillan LLP
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## SCHEDULE OF PEVC COMMITTEE EVENTS
## BUSINESS LAW SECTION SPRING MEETING | APRIL 2025

### THURSDAY — April 24, 2025

| Event | Location | Time |
|---|---|---|
| PEVC Member & New Member Breakfast | ARMSTRONG BALLROOM<br>8th Floor | 9:00AM - 9:30AM |
| PEVC Committee Meeting | ARMSTRONG BALLROOM<br>8th Floor | 9:30AM - 11:00AM |
| International PEVC Subcommittee Meeting | ARMSTRONG BALLROOM<br>8th Floor | 11:00AM - 12:00PM |
| Financial Services Technology Joint Subcommittee Meeting | GRAND BALLROOM D<br>5th Floor | 1:30PM - 2:30PM |
| PEVC Angel Venture Capital Subcommittee Meeting | GRAND BALLROOM D<br>5th Floor | 2:30PM - 3:30PM |
| PEVC Jurisprudence Subcommittee Meeting | GRAND BALLROOM D<br>5th Floor | 3:30PM - 4:30PM |
| PEVC Financing Subcommittee Meeting | GRAND BALLROOM D<br>5th Floor | 4:30PM - 5:30PM |

### PEVC COMMITTEE DINNER

***Ticketed Event***

**The Court of Two Sisters**
613 Royal St, New Orleans, LA

7:30PM - 9:30PM

### FRIDAY — April 25, 2025

| Event | Location | Time |
|---|---|---|
| Program: Top Legal Developments from 2024 Impacting Venture Capital and Emerging Companies: Beyond DE Jurisprudence | GRAND BALLROOM B<br>5th Floor | 8:00AM - 9:00AM |
| PEVC Leadership Meeting **CLOSED MEETING** | BORGNE<br>3rd Floor | 10:00AM - 11:00AM |
| Private Equity M&A Joint Subcommittee Meeting | ARMSTRONG BALLROOM<br>8th Floor | 10:45AM - 12:00PM |
| PEVC Funds Subcommittee Meeting | BORGNE<br>3rd Floor | 11:00AM - 12:00PM |

**ALL TIMES LISTED IN CENTRAL TIME**

**FOR THE MOST UP-TO-DATE SCHEDULE, PLEASE VISIT THE MEETING WEBSITE:**
https://events.americanbar.org/event/94deea68-0146-4a46-839d-8b170b6045d9/agenda

Check out Page 4 for
CLE Programs we're co-sponsoring

# CLE HIGHLIGHTS

**Our Committee is proud to be presenting:**

**Top Legal Developments from 2024 Impacting Venture Capital and Emerging Companies: Beyond DE Jurisprudence**

Friday | **8:00 AM to 9:00 AM |** Grand Ballroom B, 5th Floor

**In addition, we're co-sponsoring the following CLE programs**

### A Primer on Fund Financing Secondary Solutions

- **Presented By: Commercial Finance**
- Co-sponsoring Committees: Banking Law; Private Equity and Venture Capital; Securitization and Structured Finance

Thursday

**4:00 PM to 5:00 PM**

Rhythms III
2nd Floor

### When Will the Real Estate Insolvency Tsunami Arrive, Or Is It Already Here? Restructuring and Insolvency in Today's Commercial Real Estate

- **Presented By: Business Bankruptcy**
- Co-sponsoring Committees: Commercial Finance; Private Equity and Venture Capital; Trust Indentures and Indenture Trustees

Friday

**8:00 AM to 9:30 AM**

Rhythms I
2nd Floor

### Demystifying the Legal Opinion: What It Is and Why It Matters

- **Presented By: Legal Opinions**
- Co-sponsoring Committees: Banking Law; Business Bankruptcy; Business Law Education; Commercial Finance; Corporate Governance; Corporate Laws; Corporate Sustainability Law; Federal Regulation of Securities; Law and Accounting; LLCs, Partnerships and Unincorporated Entities; Mergers and Acquisitions; Middle Market and Small Business; Private Equity and Venture Capital; Professional Responsibility

Friday

**2:00 PM to 3:30 PM**

Grand Ballroom C
5th Floor

### Leveraging Qualified Small Business Stock (QSBS) in Mergers, Acquisitions, and Private Equity Transactions

- **Presented By: Taxation**
- Co-sponsoring Committees: Middle Market and Small Business; Private Equity and Venture Capital

Friday

**4:00 PM to 5:30 PM**

Rhythms II
2nd Floor


HOULIHAN LOKEY

In today's dynamic financial environment, having a thorough understanding of the market and its myriad components is not only useful but essential. With this need in mind, Houlihan Lokey, a proud sponsor of the American Bar Association (ABA) events, regularly produces a series of insightful content aimed at providing an integrated financial and legal perspective.

Our series of updates and studies cover a wide range of topics that hold significance for legal professionals engaged with corporate finance. Here's a snapshot of our recent work:

- M&A and Capital Markets Update
- Termination Fee Study
- Transaction Consideration Study
- Going Private Transaction Study
- Spin-Off Study

Houlihan Lokey

Houlihan Lokey's association with the ABA extends beyond sponsorship - we value the enriching conversations and the exchange of ideas we have with ABA members. As we continue to navigate the complexities of the market together, we remain committed to producing insightful content that can aid the M&A community. If these resources pique your interest, we invite you to reach out and start a conversation and you can also be added to our distribution list for future content.

# Target Acquired: Promises and Pitfalls for Private Equity in an Era of Regulatory Scrutiny

Tyler P. Young, Matthew C. Zorn & Alexander R. Ades

The foundational principle of limited liability forms the bedrock of the American capital system. For decades it has shielded private equity firms from tenuous claims of vicarious liability, enabling them to acquire and develop portfolio companies with aims of growing the economy through new ideas, new services, and new jobs. But increasingly regulators and private litigants have been testing the limits of these protections, trying to hold private equity firms liable even when they do little more than hold an ownership interest and provide oversight and support typical of investors.

This article examines a recent case involving private equity firm Welsh, Carson, Anderson & Stowe and U.S. Anesthesia Partners (USAP), a Welsh Carson investment. The FTC and private plaintiffs brought antitrust claims against Welsh Carson based on an allegedly anticompetitive roll-up acquisition strategy. The claims against Welsh Carson were dismissed, however, because the firm retained only a minority stake and did not independently engage in anticompetitive conduct. This case study offers important insights into how courts will evaluate the degree of ownership and control sufficient to hold parent companies liable for portfolio company conduct, the risks of overlapping board membership, and the regulatory outlook for private equity.

**Case Study: Welsh Carson & U.S. Anesthesia Partners**

In 2023, the FTC, followed soon after by a putative class of employee benefit plans sued private equity firm Welsh Carson and its portfolio company USAP based on a series of acquisitions of hospital-only anesthesia practices dating back to USAP's founding over a decade earlier.[1] The suits allege that the companies engaged in an anticompetitive scheme to consolidate anesthesiology practices in Texas to drive up prices by leveraging increased market share.

Welsh Carson invested in USAP at the outset, with one of its funds providing start-up capital and acquiring a 50.2% interest. Welsh Carson then exercised control and oversight typical of private equity in the early stages of an investment: recruiting officers, advising on strategy, and assisting with due diligence on prospective acquisitions. Welsh Carson also received dividends from USAP. In the five years after USAP's formation in 2012, Welsh Carson's majority interest was diluted to just under 45%. In 2017, the initial investing fund sold its equity, and another Welsh Carson fund acquired a 23% interest. USAP acquired over a dozen practices during this time.

Based on Welsh Carson's early actions in support of a portfolio company, as well as Welsh Carson's majority-turned-minority ownership interest, the FTC and plaintiffs sought to hold Welsh Carson funds and other entities liable for USAP's conduct. They did so despite Welsh Carson and USAP having separate corporate statuses.

But as the trial court concluded in dismissing the class claims against Welsh Carson (ten months after they were filed), this liability theory ran counter to established principles of corporate law and separateness.[2] Plaintiffs had only cited actions by the portfolio company and Welsh Carson conduct incidental to its investment. They therefore could not allege any independent anticompetitive conduct by Welsh Carson within the limitations period, and the claims were dismissed.[3]

Because Welsh Carson held only a minority ownership interest during the limitations period, plaintiffs faced an uphill battle. They struggled to show actionable USAP conduct that could be attributed to Welsh Carson consistent with the presumption that distinct corporate entities are truly separate. To that end, plaintiffs alleged that a Welsh Carson partner, while serving as a USAP director, made statements in furtherance of the supposed conspiracy.

But that effort also fell short, as the court reaffirmed that even a director serving simultaneously on the parent's and subsidiary's boards is insufficient to impose liability on the parent. The Supreme Court established that principle in *United States v. Bestfoods*, explaining that directors often "change hats" and are nevertheless presumed to act on behalf of the company on whose board they sit when involved in that company's business. To defeat that presumption and hold a parent company liable, a plaintiff must show that such a dual-hatted director "depart[ed] so far from the norms of parental influence exercised through dual officeholding as to serve the parent."[4] Plaintiffs were unable to make that showing.

***Article Continued on Page 10***

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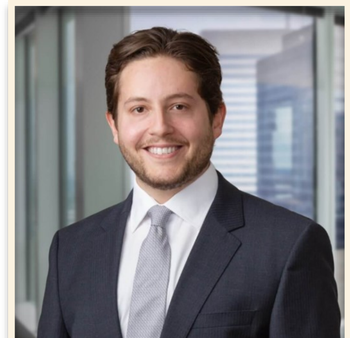

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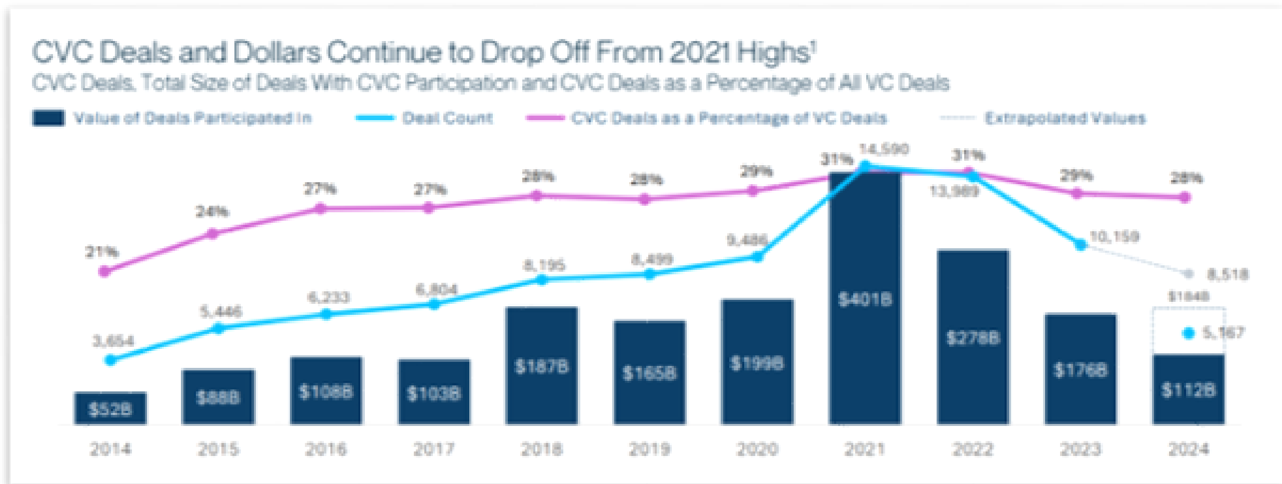
# Traditional Venture Capital vs. Corporate Venture Capital: An Overview

*Christopher C. McKinnon, Jim Ryan, Shiri Shenhav, Thomas Hopkins and MacKenzie LeMunyan – all of Morrison Foerster*

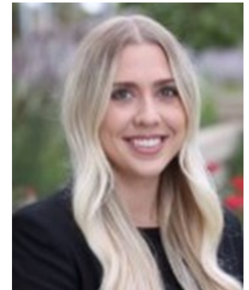
Early-stage investors can materially influence the strategic direction of startup companies they invest in. Because of that, investors and founders alike should be aware of the unique incentives and goals of different types of investors and take those into account when considering fundraising options.

There are many sources of capital available to fast-growing startups. Two main investor groups are traditional venture capital firms ("VCs") and the venture capital arms of established companies, known as corporate venture capital funds ("CVCs"). In general, VCs and CVCs are similar in many respects – in that they seek to invest in promising startups – but they also can have fundamentally different incentives and expectations. Generally speaking, VCs prioritize financial returns, while most CVCs prioritize strategic or commercial objectives. This article provides an overview of the trends, structures and incentives of these two investor groups and outlines certain relationship dynamics to consider during the fundraising process.

Although startup financing activity has slowed compared to its peak in 2021, corporate venture capital continues to play an outsized role in the US fundraising market, where 48% of startup financings involved CVC participation in 2023 (compared to 34% in 2013).[1] On a worldwide basis, despite the decrease in CVC deal volume in the past three years (shown in the graph below), global CVC investment participation rates remain high (28% percent of all VC deals).




See The State of Corporate Venture Capital 2024 Report-Silicon Valley Bank, Q4 FY2024, accessible at: https://www.svb.com/trends-insights/reports/state-of-cvc/.



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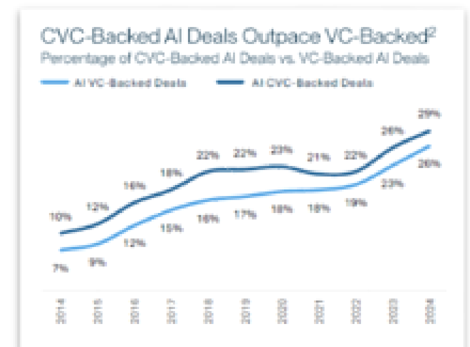
**MacKenzie LeMunyan**
**Associate | Morrison Foerster**
**Palo Alto, CA**

Moreover, in today's fundraising environment, with technology and AI companies in particular garnering substantial interest from investors across geographies, sectors and stages, CVCs are investing in AI companies more often than VCs.

**Corporate Venture Capital**

CVCs are investment arms of established companies. Many CVCs are focused principally on strategic and commercial considerations—while financial returns tend to still be important to CVCs, they are often secondary to broader strategic and commercial objectives.[2] A typical CVC strives to gain a competitive advantage by identifying promising new technologies to complement or enhance the business of its parent company through establishing commercial arrangements, forming partnerships and/or acquiring startups. Investments can allow a CVC to, among other things, obtain deeper insight into new technologies, gain exposure to new talent, enter new markets, enhance the parent company's business and identify potential acquisition targets.

*Article Continued on Page 8*




See The State of Corporate Venture Capital 2024 Report-Silicon Valley Bank, Q4 FY2024, accessible at: https://www.svb.com/trends-insights/reports/state-of-cvc/.

## Private Equity M&A Joint Subcommittee

The Private Equity M&A Joint Subcommittee last met on Saturday morning, February 1, 2025 at 9:00 a.m. Pacific Time at the Montage, Laguna Beach, California, as part of the M&A Committee's standalone meeting. We had three presentations. First, I was joined by two investment bankers – Warren H. Fedor of Carl Marks Advisors, New York, New York and Andrew Capitman of Kroll, in San Francisco and New York – and two attorneys – Joanna Lin of McDermott, Will & Emery in Dallas, Texas and Katherine Krauss of Simpson, Thacher & Bartlett, New York, New York – for a discussion on how investment bankers and private equity deal lawyers can best work together to advance the objectives of their shared clients. Then, our long time contributor Lisa Stark of Delaware Corporate Counsel spoke to us about Firefighters' Pension System of Kansas City Trust v. Found. Bldg. Materials, Inc. (Del. Ch. May 31, 2024), a case involving a private equity fund defending claims of breaching their fiduciary duty. Finally, our Vice Chair, Samantha Horn, was joined by Aly Love of Debevoise & Plimpton, New York, New York and Brittany Ann Sakowitz, Kirkland & Ellis, LLP, Houston, Texas for a panel discussion on rollovers and share consideration received by sellers in PE M&A transactions. The panel discussed the reasons why rollovers are common and some of the issues and topics for negotiation that arise when rollovers are part of the transaction proceeds as well as a comparison to a strategic buyer. The panel discussion included a mock negotiation between a buyer counsel and seller counsel on certain of the issues common in these transactions and some of the potential negotiations or solutions.

Our upcoming meeting will take place on Friday morning, April 25, at the Sheraton New Orleans Hotel, at 10:45 a.m. local time. We have planned three presentations for the meeting. First, Youmna Salameh and Helen Cheng of Houlihan Lokey will make their annual presentation on the state of the private equity markets. Then, Scott Whitaker of Stone Pigman in New Orleans will join me for a discussion on an issue that I don't recall ever being discussed within the M&A Committee – whether private equity deal lawyers representing sellers need to counsel their clients on risks with hiring employees during a sale process. Finally, Ian Nelson of Hotshot and George Taylor of Burr and Forman in Birmingham, Alabama will discuss some developments from Hotshot in the area of training private equity lawyers.

My Vice Chair, Samantha Horn of Stikeman Elliott in Toronto, Ontario, Canada (still our friend no matter what our government says!!!) and I continue to seek **YOUR** feedback as to the meetings and the Joint Subcommittee. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. We are also looking to make the meetings themselves more interactive, so please do not hesitate to put your hand up and ask appropriate questions. We would love for you to weigh in during the meeting with questions and thoughts. Also, as we've said before, if you haven't met us and you attend the meeting, please feel free to introduce yourself in person or shoot one or both of us an email afterwards and introduce yourself.

*- David I. Albin, Chair*

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## THINGS TO DO IN NEW ORLEANS

### SIGHTS

**OGDEN MUSEUM OF SOUTHERN ART**

Located in the Warehouse Arts District of downtown New Orleans, the Ogden Museum of Southern Art holds the largest and most comprehensive collection of Southern art.

**925 Camp St, New Orleans, LA 70130**

https://ogdenmuseum.org

**MARDI GRAS WORLD**

View artists building Mardi Gras floats, year round.

**1380 Port of New Orleans Pl, New Orleans, LA 70130**

https://www.mardigrasworld.com

**SAZERAC HOUSE**

A museum and bar with tours explaining how the Sazerac is part of the customs, traditions and culture of New Orleans.

**101 Magazine St, New Orleans, LA 70130**

https://www.sazerachouse.com

### BITES

**BRENNAN'S RESTAURANT**

417 Royal Street

New Orleans, LA 70130

504-525-9711

https://www.brennansneworleans.com/

**CAFÉ DU MONDE**

800 Decatur Street

New Orleans, LA 70116

504-587-0833

shop.cafedumonde.com

**LA PETITE GROCERY**

4238 Magazine St, New Orleans, LA 70115

504-891-3377

https://www.lapetitegrocery.com/

***Traditional Venture Capital vs. Corporate Venture Capital: An Overview*** ***(Continued from Page 6)***

Capital for CVC investments typically comes from the balance sheet of its parent company, so CVCs are not accountable to third-party limited partners and generally do not have strictly defined investment periods. This allows CVCs to consider a potentially broader set of investment opportunities over a potentially longer investment timeline and remain active in economic downturns when VCs may be slower to deploy capital. However, it also means that a CVC's investment focus or pace of capital deployment may shift over time as the strategic priorities or financial fortunes of its parent company change. CVC investors tend to invest in companies that are in the same (or a closely related) industry as the CVC's parent company and the parent company may even be an existing or potential customer or supplier to target portfolio companies.

**Traditional Venture Capital**

A traditional venture capital firm raises money from third parties (limited partners), pools it together in one or more investment funds, and seeks financial returns over a defined investment period, commonly ranging from 8 to 12 years. VCs charge investors in their funds a management fee, traditionally equal to 2% of the fund's committed capital (intended to cover operating and personnel costs), and a performance fee/carried interest, traditionally equal to 20% of the profits generated by their investment activities (intended to reward good investment decisions). This structure incentivizes VCs to make high-risk, high-reward investments in the hopes that a few explosive wins will more than offset a high number of modest losses. This means that they typically prioritize disruptive, differentiated technologies, aggressive growth strategies and business models that can support a high return on investment.

**Below is a high-level summary of considerations to keep in mind when raising money from a VC and/or CVC firm:**

| Topic | Traditional Venture Capital | Corporate Venture Capital | Comments |
|---|---|---|---|
| **Diligence Process** | Tend to focus on business prospects and expansion, financial metrics and potential red flag issues. | Tend to focus on technologies under development and paths to commercialization. | Diligence intensity varies, but typically CVCs are more likely to dig deep into technical matters, whereas VCs are more likely to dig deep into issues that may impact business expansion and prospects. |
| **Governance Rights** | Tend to seek the right to approve a sale or public listing, unless done in excess of some predetermined valuation threshold(s). | Tend to restrict any potential sale to competitor(s) and seek protection around being bound by restrictive covenants in the event of a sale to a third party. | VCs tend to focus on protecting investment returns, whereas CVCs tend to focus on getting ahead of competitors by gaining priority access to key IP and developing technologies. |
| **Economic Rights** | Tend to focus on rights to proceeds in exit events, antidilution protection, registration rights, dividends, etc. | Tend to focus on what VCs do plus rights of first offer/negotiation when the company evaluates a sale. Sometimes CVCs negotiate for additional equity rights (through warrants) in connection with commercial metrics or collaboration (discussed below). | VCs are generally not potential acquirors of their portfolio companies, whereas CVCs (and their parent companies) can be. In fact, the larger the AUM (assets under management) of a CVC, the more likely the CVC (or its parent company) is to acquire startups in their portfolios.[3] |
| **Value Add to Startups** | VCs are professional investors with experience growing and scaling companies. Generally, value (other than dollars invested) can be driven by referrals to other investors, potential customers, suppliers and others in their network. | CVCs frequently have built-in customer, supplier or industry relationships and are positioned to drive up value by delivering revenue and contribute deep, industry-specific, real-time expertise. Some believe that strategic capital (from a CVC) can have more positive signaling value to potential customers than financial capital (from a VC). Investments by CVCs tend to be accompanied by commercial arrangement (s) between the startup and the CVC (or its parent company) relating to technology development, information sharing, future investments or acquisition prospects, among other things. | Both VCs and CVCs have the potential to add significant value to portfolio companies in different ways. VCs tend to take more of an advisory role, making introductions to others in their network and advising on growth strategies, whereas CVCs tend to be more of an active, hands-on partner in the development or commercialization of technologies. |
| **Approval Processes** | Generally fewer layers of decision making in the investment approval process. | Depending on the CVC's governance structure, they tend to involve more decision makers (associated with its parent company), which leads to more steps in the investment approval process. | Speed of investment is also highly dependent on company needs as well as negotiating leverage. |
| **Follow-On Support** | Tend to act quickly to support companies in their portfolio with respect to future financing activities and set aside pools of capital with this intent from the outset. | Tend to be less active in participating in follow-on financings, although they tend to be more active in growing the commercial relationship and evaluating a potential future acquisition. | In general, thriving companies can receive follow-on investment support from both VCs and CVCs, but struggling companies may be more likely to receive direct financial support from VCs and commercial or strategic support from CVCs. |

**Conclusion**

When raising capital as a startup or investing capital as an investor, it is important to consider the motivations of new investors, who may encourage the company to, for example, (a) take large risks to become the next unicorn and go public (a potential aim of VCs) or (b) make technological advances in a field and be acquired by an insider (a potential aim of CVCs). Evaluating any prospective investor's ultimate objectives, motivations and additional value-add (beyond a check) is critical to ensuring strategic alignment across a fast-growing company's shareholder base.

***Endnotes [Traditional VC v CVC]***

1. See https://nvca.org/sdm_downloads/nvca-2024-yearbook/.
2. This, of course, is a spectrum. Not all CVCs are strategic in nature—CVCs that are geared more toward a high return on investment generally act similar to traditional VCs. For purposes of this article, we use the term CVC as generally synonymous with "strategic" CVC firms, but the goals and incentives of any CVC should be evaluated on a case-by-case basis.
3. See The State of Corporate Venture Capital 2024 Report-Silicon Valley Bank, Q4 FY2024, accessible at: https://www.svb.com/trends-insights/reports/state-of-cvc/.

## Datacenters, AI And Stain on the Grid (Continued from Cover)

### The Digital Surge: Devices, AI, and Data Demand

The average U.S. household possesses over 21 internet-connected devices, including computers, tablets, smartphones, TVs, doorbells, sprinklers, and thermostats.[1] As these devices generate and consume increasing amounts of data, the demand for cloud storage and real-time processing has risen. The "Internet of Things" and the collection of connected home devices have expanded over the past five years, establishing a new baseline for data processing needs.

Adding to this new baseline, the explosive growth of AI—including large language models, generative AI, and real-time inference engines—and the rising demand for computing power necessitate thorough processing, storage, and data transmission capabilities within AI applications. The infrastructure that supports this computing power is concentrated in data centers, many of which are explicitly designed with AI in mind, resulting in larger, denser, and more power-intensive facilities than conventional ones.

Hyperscale operators, including Amazon, Google, Microsoft, and various private data center developers, are racing to secure land, power, and fiber connections in energy markets nationwide. However, they face limitations because traditional grid planning and regulatory processes, which have experienced flat load growth for over a decade, struggle to apply their longstanding rules, procedures, and methods to today's rapid development challenges.

### A Grid Under Strain

U.S. electric grids in quickly growing areas face increasing pressure. The conventional process of connecting new data centers to the grid can take years due to outdated planning assumptions and an administrative process unprepared for the sudden energy demands that significant load demand imposes on grid planning. Traditionally, planning follows lengthy stakeholder processes to align generation buildout with gradually increasing load. This challenge now underscores two significant regulatory issues: capacity and permitting.

First, electric grid capacity is inadequate to support the data center, which can consume as much power as small cities. The rapid expansion of AI facilities compels utilities to rethink long-term capacity planning, which was never designed to accommodate this increase in demand.

Second, permitting new grid infrastructure—whether for generation, transmission, or distribution—typically takes five to ten years. Ideally, data centers would be proposed, financed, and constructed within 18 to 36 months.

The result is a growing disconnect between the growth in demand and the responsiveness of the energy system. In many regions, developers are forced to halt projects or invest in expensive alternatives as utilities enforce moratoriums on new interconnections because of grid limitations.

### Private Equity

Private equity offers significant investment opportunities in this space. With long-term leases, substantial barriers to entry for smaller investors, and the anticipated ongoing growth of cloud and AI computing, this sector will continue to provide considerable ROI for larger investors. It is crucial for investors to understand the energy issues that underpin these investments. This intersection of energy and digital infrastructure leads private equity investors into uncharted territory, compelling them to navigate energy regulations, interconnection studies, and grid reliability planning. Essentially, investors should recognize that the key to success is power. By focusing on power, here are some key developments and suggestions:

**Power-first site selection:** Reliable power has become the top priority for data center developers, often surpassing the importance of proximity to major markets, fiber routes, or availability of cooling water. This shift has triggered a wave of projects aimed at repurposing old or underutilized power infrastructure. We have seen recent stories of retired nuclear, coal, or gas generation plants repurposed to support a data center.

**Vertical integration:** Another variation of this power-first approach is investing directly in new dedicated energy assets, such as wind and solar farms, battery storage systems, and microgrids. Companies are investing in large-scale solar and wind projects, on-site battery storage, and experimenting with microgrids and hydrogen fuel cells to power data centers. Others are deploying large portable generation units and distributed generation sources, reducing reliance on the grid and improving energy resilience.

**Infrastructure partnerships:** Data center developers should also explore alliances with utilities, independent power producers, and grid operators to build energy infrastructure that meets data center demands and can support grid emergencies. These facilities can relieve pressures on the grid and serve as demand response resources to enhance grid reliability.

### Regulatory and Policy Gaps

The regulatory framework governing energy interconnections and capacity planning was established in a different era characterized by slow, linear growth. As this framework has aged, several pain points are now evident:

- Backlogged interconnection queues: PJM, MISO, and other major grid operators are experiencing years-long backlogs in their interconnection queues, which presents an immediate barrier for data centers seeking to come online in 18-36 months.[2]
- Lack of coordinated planning: Grid planning is often segmented by region and operator. In contrast, data center development operates nationally and is driven by capital. There is inadequate alignment on forecasting and priorities.
- Limited incentives: Utilities have few motivations to construct speculative infrastructure or to pre-build capacity in expectation of demand. This hinders responsiveness to rapidly evolving, technology-driven developments.

If regulators, utilities, and private capital are to support the scale of development required by AI and data proliferation, this framework must evolve, and this evolution requires a new model for collaboration.

### Path Forward: A New Model for Collaboration

The solution isn't to slow development but to modernize the systems supporting it. This means:

**1. Proactive Grid Planning**

Regulators and grid operators could adopt scenario-based planning that considers high-growth digital infrastructure. This includes:

- Forecasting data center growth as a discrete load category.
- Collaborating with private developers to share real-time development pipelines.
- Accelerating permitting and siting processes for new transmission and generation.

**2. Grid-Ready Zoning and Pre-Permitted Siting**

States and municipalities can designate "grid-ready" zones where interconnection capacity, land use approvals, and energy resources are pre-aligned. Some states have already experimented with this model, and these efforts should be expanded and standardized.

**3. Public-Private Infrastructure Investment**

Private equity can be more significant in developing energy infrastructure, not just the data centers. Public-private partnerships could enable faster development of shared infrastructure, including substations, transmission lines, and renewable power projects co-located with data centers.

**4. Flexible Interconnection Models**

FERC and regional transmission organizations could explore tiered or phased interconnection models that allow projects to come online incrementally rather than waiting for full-scale studies and upgrades. Innovations like 'energy-as-a-service,' virtual power plants, and small-scale power grids operating independently could also reduce reliance on centralized planning.

**Conclusion: Coordinating for Speed and Scale**

The energy infrastructure that supports the internet, AI, and the data economy is now as critical as roads and ports and must be prioritized. The U.S. needs a more agile, coordinated, and investor-friendly framework to support the next wave of digital infrastructure. Private equity can play a vital role. By collaborating with energy companies, regulators, and policymakers, private equity can help establish connections between the digital and physical worlds, ensuring that power drives the pace of innovation rather than permitting delays. If the U.S. aims to maintain its position as a global leader in AI, cloud computing, and digital infrastructure, this coordination is not optional—it is critical. In the coming years, we will decide whether the power supply will transform into a bottleneck or the backbone of the next industrial revolution.

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***End Notes [Data Centers, AI and Strain on the Grid]:***

1. Deloitte 2023 Connected Consumer Survey (available at: https://www2.deloitte.com/us/en/insights/industry/telecommunications/connectivity-mobile-trends-survey/2023/connectivity-mobile-trends-survey-full-report.html)(visited April 3, 2025).
2. Grid Connection Backlog Grows by 30% in 2023, Dominated by Requests for Solar, Wind, and Energy Storage (published April 10, 2024) (available at: https://emp.lbl.gov/news/grid-connection-backlog-grows-30-2023-dominated-requests-solar-wind-and-energy-storage) (visited April 3, 2025).

## *Target Acquired (continued from page 5)*

**Insights and Risk Factors for Private Equity**

In refusing to hold Welsh Carson vicariously liable for the alleged actions of USAP, the court enforced long-standing jurisprudence on the corporate form and limited liability. While the result is not surprising, the case nonetheless offers insights into the factors courts will consider when assessing an investor's liability for a portfolio company's conduct, potential pitfalls for private equity firms to be mindful of when developing investments, and the FTC's priorities.

A particularly salient factor is the degree of the parent company's ownership or control of the portfolio company. A decisive factor for Welsh Carson was its minority-investor status. Because Welsh Carson held only a minority interest when the limitations period began, the court did not need to analyze whether other allegations—like its earlier controlling stake, tangential involvement in certain acquisitions, and receipt of dividends from USAP's allegedly ill-gotten gains—would be actionable. But relatively passive ownership and profit, combined with conventional investor conduct, still should not have been sufficient to impose liability. Even a parent's knowledge of a subsidiary's collusion with competitors has been found insufficient to establish a conspiracy.[5] Instead, courts generally look for more direct parental involvement. For example, the FTC's case against Syngenta survived a motion to dismiss because the parent company actually signed the allegedly unlawful agreement and managed the relationship with the alleged co-conspirator.[6]

Also relevant is whether any dual-hatted directors or agents of both companies are acting solely for the benefit of the portfolio company, rather than for the benefit of a parent entity for which he or she is currently serving as a fiduciary. The presumption is that directors can and do act as proper fiduciaries. Per the *Bestfoods* Court, this presumption is "strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes [when] . . . plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent."[7] The allegations against Welsh Carson evinced no such conflicting interests. But the presumption has been defeated in cases where plaintiffs alleged a dual agent assured the portfolio company's co-conspirators "owner to owner" that the investor would support the collusive pricing agreements, and where dual agents worked with parent company resources and personnel to develop a product using misappropriated technology.[8]

Still, there are reasons for private equity to be cautious when appointing board members. As a Fall 2024 *Preferred Returns* article explains, even non-voting observer board members can present antitrust risks, given their access to sensitive competitive information. And in January 2025, the DOJ and FTC signaled a renewed interest in targeting interlocking directorates (including observer board members) as an unfair method of competition under Section 5 of the FTC Act and Section 8 of the Clayton Act, submitting a statement of interest in litigation involving defendants who simultaneously served on OpenAI's and Microsoft's boards.

There is also a risk of regulatory scrutiny and enforcement actions—even in cases like Welsh Carson, where the parent company's conduct did not support civil claims. After the FTC's claims against Welsh Carson were dismissed, the FTC continued down the path of administrative enforcement and obtained a consent order. Among other things, the order bars Welsh Carson from increasing its minority-ownership interest in USAP, limits its representation on USAP's board to a single non-chair seat, and prevents it from gaining management rights over USAP.

**Conclusion: The Road Ahead**

With the new administration, the FTC is in a period of change and upheaval. Nevertheless, there are strong reasons to believe new FTC Chair Andrew Ferguson will continue to scrutinize serial acquisitions—which often involve private equity. While previous FTC Chair Lina Khan portrayed the FTC as keeping pace with the new roll-up strategies of private equity, big tech, and others, then-Commissioner Ferguson issued a concurring statement to reject any "antipathy toward private equity" and noted that the FTC was simply pursuing a "run-of-the-mill enforcement" action to combat acquisitions that substantially lessen competition in violation of Section 7.

Though this provides some reassurance, private equity firms should still be wary of the risks highlighted by the Welsh Carson case. Firms could be subject to regulatory scrutiny and litigation, especially when they retain majority ownership or if there are indicia of dual agents prioritizing the parent's interests to the detriment of the portfolio company.

***End notes [Target Acquired]:***

1. *Fed. Trade Comm'n v. U.S. Anesthesia Partners*, No. 4:23-cv-03560 (S.D. Tex.); Elec. Med. Tr. v. U.S. Anesthesia Partners, No. 4:23-cv-04398 (S.D. Tex.). Yetter Coleman, as co-counsel with Ropes & Gray, represented Welsh Carson in these cases.
2. The FTC's parallel claims were dismissed on statutory grounds related to the scope of the FTC's authority. Fed. Trade Comm'n v. U.S. Anesthesia Partners, Inc., 2024 WL 2137649, at *4-6 (S.D. Tex. May 13, 2024), appeal dismissed, 2024 WL 5003580 (5th Cir. Aug. 15, 2024).
3. *Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.*, 2024 WL 5274650, at *3-6 (S.D. Tex. Sept. 27, 2024).
4. *United States v. Bestfoods, 524 U.S. 51, 69-71*, 70 n.13 (1998).
5. *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008).
6. Fed. Trade Comm'n v. Syngenta, 2024 WL 149552, at *24 (M.D.N.C. Jan. 12, 2024).
7. *Id.* at 70 n.13.
8. *In re Packaged Seafood Antitrust Litig.*, 2022 WL 836951, at *3, *10 (S.D. Cal. Mar. 21, 2022); *Financialapps, LLC v. Envestnet, Inc.*, 2023 WL 4975373, at *11 (D. Del. July 31, 2023).

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**September 18-20, 2025**

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