



# M&A Insights: Material Target Company Litigation Treatment, 'Big Beautiful Bill' Impact, and Current M&A Finance Trends

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**GIBSON DUNN**



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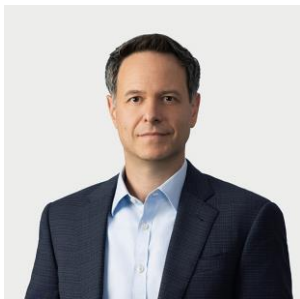
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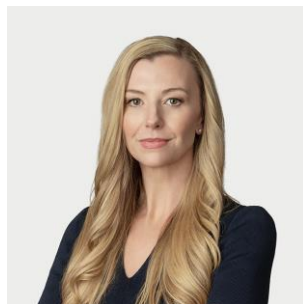
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# Today's Panelists



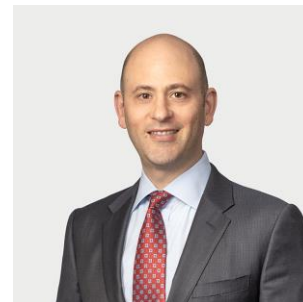
**Brian Scrivani**

**Brian Scrivani** is a partner in the New York office of Gibson Dunn and a member of the Mergers & Acquisitions and Private Equity Practice Groups. Brian's practice focuses on advising private equity firms and public and private clients on a wide range of corporate transactions including leveraged buyouts and other private equity transactions, public company acquisitions, sales and divestitures and mergers-of-equals. He also advises board of directors and special committees on corporate and securities law, fiduciary matters and corporate governance matters including unsolicited offers, proxy contests and other activist defense matters. Brian was named a "Rising Star" in M&A by *The Deal* and *The Legal 500* has recognized him as a recommended practitioner in private equity buyouts.



**Kathryn A. Kelly**

**Kathryn A. Kelly** is a partner in the New York office of Gibson Dunn & Crutcher and is a member of the firm's Tax Practice Group. Ms. Kelly represents clients in a broad range of tax matters, including public and private mergers and acquisitions, cross-border transactions, restructurings, and financing transactions. Before joining the firm, Ms. Kelly served as a law clerk to Judge William B. Traxler, Jr. of the United States Court of Appeals for the Fourth Circuit.



**Douglas S. Horowitz**

**Douglas S. Horowitz** is a partner in the New York office of Gibson Dunn where he is the head of Leveraged and Acquisition Finance and Co-Chair of the firm's Finance Practice Group. He is also an active member of the Capital Markets Practice Group. Doug represents leading private equity firms, public and private corporations, investment banking firms and commercial banks with a focus on financing transactions involving private credit, syndicated institutional and asset-based loans, new issuance of secured and unsecured high-yield debt securities, equity and equity-linked securities, as well as out-of-court restructurings.



**Stephen L. Glover (Moderator)**

**Stephen I. Glover** is a partner in the Washington, D.C. office of Gibson Dunn who has served as Co-Chair of the firm's Global Mergers and Acquisitions Practice. Stephen has an extensive practice representing public and private companies in complex mergers and acquisitions, joint ventures, equity and debt offerings, and corporate governance matters. His clients include large public corporations, emerging growth companies and middle market companies in a wide range of industries. He also advises private equity firms, individual investors, and others.

# Agenda

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| <b>01</b> | <b>Treatment of Material Target Company Litigation<br/>in M&amp;A Transactions</b> |
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| <b>02</b> | <b>Impact of the Big Beautiful Bill on M&amp;A</b> |
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| <b>03</b> | <b>Current Trends in M&amp;A Finance</b> |
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# Treatment of Material Target Company Litigation in M&A Transactions

01

# Assessing the Scope of the Liability

- **What is the nature of the impact of the liability on the target business/operations?**
  - Deal valuation and available financing
  - Go-forward cash flow/balance sheet impact
  - Limitations on business practices
  - Reputational/brand harm
  - Impact on future strategic transactions
- **One-time or systemic?**
  - How easy is it to remedy?
  - How to give third-party assurances of remediation?
- **Regulatory implications**
  - For future target company operations
  - For global platform operations

# Assessing the Structure of the Liability

- **Is the liability organization-wide?**
  - If so, is there a structural fix that could separate the liability (i.e., demerger/spin-off) and what are the associated costs/risks (dissynergies; alter ego claims)?
  - If not, does the organization rely on the tainted entities to perform necessary operational tasks?
- **Where in the organizational structure is the liability contained?**
  - Is any internal reorganization needed to separate the liabilities?
  - If so, is there any tainted entities that cannot be separated?
  - Is there any fraudulent conveyance concerns?
- **What is the best method of addressing?**
  - Seller/Buyer/Joint allocation
  - Bankruptcy
  - Insurance
  - Liability divestment

# Structural Remedies

- **Seller Retention**
  - Control/cooperation issues (maintaining privilege, decision-making authority)
  - Settlement parameters (monetary vs. conduct remedies)
  - Reputational concerns
  - Management time and focus
- **Buyer Assumption**
  - Economic and operational impact
  - Risk of distraction
  - Cooperation issues
- **Joint Responsibility**
  - Joint Control Issues (maintaining privilege, decision-making authority)
  - Privilege Issues
  - Restrictions on business operations, if any, during pendency of resolution
  - Structure of economic participation
  - Method for insuring payment availability (Escrow/holdback; contractual obligations)



# Structural Remedies (con't)

- **Insurance**
  - Is the liability the type that can achieve coverage (Asbestos; PFAS; Worker's Compensation; Talc; Pharma; Environmental; Product Liability)?
  - Scope of/Gaps in Coverage (judgments; settlements; fees)
  - Costing/obligors
  - Risk of litigation control issues
  - Reputational issues
  - Treatment on the Company's balance sheet
- **Litigation Sale**
  - Is it the type of litigation subject to coverage?
  - Is litigation "self-contained"?
  - If not, can it be structurally separated (Demerger; Spin-off; Drop-down)?
  - How to do so on a "value for value" basis?

# Impact of the Big Beautiful Bill on M&A

02

# Permanent Reinstatement of 100% Bonus Depreciation and R&E Expensing

- 100% bonus depreciation for eligible business property acquired after January 19, 2025.
  - Full expensing had been added by the TCJA, subject to a phase down that started in 2023 and expired after 2026.
- Elective expensing for qualifying domestic research and experimental expenditures with respect to amounts paid or incurred after December 31, 2024.
  - TCJA had required any such expenditures to be capitalized and amortized over a five-year period for taxable years beginning after December 31, 2021.
  - **Immediate refunds:** For certain small businesses, the amendment is retroactive (by taxpayer election) to amounts paid or incurred after December 31, 2021.
  - **Accelerated deductions:** For other taxpayers, elective deduction of amounts capitalized in 2022-2024 (and unamortized) is available either in the first taxable year beginning after December 31, 2024 or ratably over the first two taxable years beginning after December 31, 2024.

# Modifications to Business Interest Deductibility

- Relaxes the limitation on the deductibility of business interest by reverting to the limitation that was in effect between 2017 and 2022 (generally, 30 percent of EBITDA).
  - The change is effective taxable years beginning after 2024.
  - Unlike the TCJA, which introduced the cap (and its scheduled reduction to an EBIT-based cap in 2022), makes the more generous pre-2022 EBITDA-based limit permanent.
- Also introduces rules that extend the application of the deductibility cap to business interest that is required to be capitalized (among other changes that reduce the cap in certain circumstances).

# Qualified Small Business Stock Benefits

- Increases the gross asset value cap for QSBS issuers from \$50 million to **\$75 million** and introduces an inflation adjustment.
- Amends the formula for the per-issuer cap on the QSBS exclusion by increasing the dollar-based limit on excluded gain to **\$15 million** (also now adjusted for inflation), up from \$10 million under current law.
- Introduces a **50-percent exclusion** for gain recognized if the stock is held for three years, and a **75-percent exclusion** for gain recognized if the stock is held for four years.
  - The Act retains the 100-percent exclusion under current law if the stock is held for five years or more.
- The changes to the gross asset value cap apply to QSBS issued after July 4, 2025, and the other changes apply to taxable years beginning after July 4, 2025.



# Changes for Multinational Companies

- Makes several adjustments to the TCJA's GILTI regime for the taxation of controlled foreign corporations (CFCs), including:
  - Revising its moniker to “net CFC tested income” or **NCTI**;
  - Raising the effective tax rate to **14 percent** (up from 13.125 percent);
  - **Broadening the tax base by eliminating** the deduction for a deemed 10-percent return on qualifying business assets; and
  - Other **mechanical “fixes”** that may offset the higher tax rate.
- Raises the effective tax rate under the TCJA's parallel FDII regime (restyled as “foreign-derived deduction eligible income” or **FDDEI**) to **14 percent** (up from 13.125 percent).
- Restores a taxpayer-favorable rule repealed by TCJA that had triggered burdensome (and likely unintended) **U.S. tax compliance obligations** for foreign-controlled enterprises with U.S. subsidiaries.
- Modifies the rules that determine which U.S. shareholder includes a CFC's subpart F income and NCTI upon a **mid-year transfer** of the CFC's shares.
- Makes permanent the favorable “**CFC look-through**” rule.

# Non-Enactment of Revenge Tax

- In recognition of an understanding reached by the United States and the Group of Seven, the Trump Administration and Congress **did not enact proposed section 899**.
  - Proposed section 899 would have imposed higher tax rates on persons and entities associated with countries that impose “unfair foreign taxes.”
- Pursuant to the understanding reached with G-7 (which prompted President Trump and Congress to drop proposed section 899), U.S.-parented multinational enterprises would **not be subject to OECD’s “Pillar 2”** minimum tax system.
  - Details of the G-7 understanding (including the mechanics for contemplated “side-by-side” system) are still to come.

# Current Trends in M&A Finance

03

# Current Trends in Acquisition Finance

## Large Cap Transactions

- Investment Grade Markets
- Below IG Markets - Private Debt vs. Syndicated Solutions vs. Pro Rata Bank Markets
- Loans vs. Bonds
- Junior Capital

## Middle Market Transactions

- Private Debt vs. Pro Rata Bank Markets
- Preferred Equity

## Capital Structures

- Leverage Levels
- Minimum Equity Conditions

## Implications for Carve-outs

## Issuing in Euro and converting back to Dollars

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