Private Equity's Accountability Deficit: The Case for Mandatory Disclosure

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Jeffrey N. Gordon
Columbia University and ECGI

Dorothy S. Lund
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Abstract

Private equity is now a major driver of U.S. economic activity and has transformed entire industries. And yet, as the sector's assets under management have skyrocketed, traditional mechanisms for accountability have eroded. In particular, the near-term exit of a portfolio company via an IPO or an arm's-length sale to another company has become increasingly rare. Thus far, scholars have focused on this development as presenting risks for private equity fund investors. We share their concern, particularly as private equity seeks to capture retirement dollars from ordinary investors, although our focus is different. Instead, our Article describes the threat to the U.S. economy and efficient capital allocation when private equity sponsors face minimal external discipline. In support of our thesis, we present an empirical study of private equity transactions over the past two decades that shows that portfolio company holding periods have lengthened and the verifiability of exit realizations has deteriorated. When sales occur at all, they are increasingly made to other members of the private sponsor community or via self-sales through continuation funds, where the back-scratching incentives are high. We further show that other sources of accountability—including internally-generated measures of performance and performance-based compensation—are either biased or eroding. Without accountability, the private equity sector risks significant resource misallocation, akin to an earlier era where management teams built large and inefficient conglomerates that contributed to slow economic growth. It also creates systemic risk in the form of a self-inflating bubble, whereby sponsors can maintain artificially high portfolio valuations via conflicted sales and opaque valuations. This burgeoning form of risk is greatly exacerbated by the inclusion of retail capital and requires a rethinking of the regulatory landscape for private equity. Accountability depends on investors having the ability to assess the comparative performance of private equity sponsors and their portfolio companies. We therefore propose mandatory annual disclosure of financial and operating results of "significant" private equity portfolio companies. Because sponsors typically collect and provide such information to the creditors that finance initial acquisitions, a mandatory disclosure regime should not unduly burden the industry. Such a regulatory change could be adopted without new legislation, pursuant to existing SEC regulatory authority, or could be made a condition for a fund's inclusion in a menu provided by a "prudent" ERISA trustee. By mitigating the risk of inefficient resource allocation, such disclosure would protect not only investors but also the U.S. economy.

Keywords: private equity, securities regulation, mandatory disclosure, M&A, retail investors, financial regulation, SEC

JEL Classifications: K22, K23

Jeffrey N. Gordon
Richard Paul Richman Professor of Law
Columbia University
435 West 116th Street
New York, NY 10027, United States
phone: +1 212 854 2316
e-mail: jgordon@law.columbia.edu

Dorothy S. Lund*
Columbia 1982 Alumna Professor of Law
Columbia University
435 W 116th St
New York, NY 10027 , United States
phone: +1 847 334 2262
e-mail: dorothy.lund@columbia.edu

*Corresponding Author

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Jeffrey N. Gordon[1] and Dorothy Lund[2]

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ABSTRACT

Private equity is now a major driver of U.S. economic activity and has transformed entire industries. And yet, as the sector's assets under management have skyrocketed, traditional mechanisms for accountability have eroded. In particular, the near-term exit of a portfolio company via an IPO or an arm's-length sale to another company has become increasingly rare. Thus far, scholars have focused on this development as presenting risks for private equity fund investors. We share their concern, particularly as private equity seeks to capture retirement dollars from ordinary investors, although our focus is different. Instead, our Article describes the threat to the U.S. economy and efficient capital allocation when private equity sponsors face minimal external discipline.

In support of our thesis, we present an empirical study of private equity transactions over the past two decades that shows that portfolio company holding periods have lengthened and the verifiability of exit realizations has deteriorated. When sales occur at all, they are increasingly made to other members of the private sponsor community or via self-sales through continuation funds, where the back-scratching incentives are high. We further show that other sources of accountability—including internally-generated measures of performance and performance-based compensation—are either biased or eroding.

Without accountability, the private equity sector risks significant resource misallocation, akin to an earlier era where management teams built large and inefficient conglomerates that contributed to slow economic growth. It also creates systemic risk in the form of a self-inflating bubble, whereby sponsors can maintain artificially high portfolio valuations via conflicted sales and opaque valuations. This burgeoning form of risk is greatly exacerbated by the inclusion of retail capital and requires a rethinking of the regulatory landscape for private equity. Accountability depends on investors having the ability to assess the comparative performance of private equity sponsors and their portfolio companies. We therefore propose mandatory annual disclosure of financial and operating results of "significant" private equity portfolio companies. Because sponsors typically collect and provide such information to the creditors that finance initial acquisitions, a mandatory disclosure regime should not unduly burden the industry. Such a regulatory change could be adopted without new legislation, pursuant to existing SEC regulatory authority, or could be made a condition for a fund's inclusion in a menu provided by a "prudent" ERISA trustee. By mitigating the risk of inefficient resource allocation, such disclosure would protect not only investors but also the U.S. economy.

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[1] Richard Paul Richman Professor of Law, Columbia Law School, & ECGI.

[2] Columbia 1982 Alumna Professor of Law, Columbia Law School, & ECGI.

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Jeffrey N. Gordon and Dorothy Lund

Introduction

Private equity's role in the U.S. economy faces an accountability crisis. After a decade of growth, assets under management nearly quintupled from 2013 to 2025.[3] Private equity sponsors now control companies with an enterprise value equal to roughly 29 percent of the S&P 500,[4] and that employ somewhere between 6.5 and 13.3 million workers.[5] As these figures reveal, private equity (or "PE") has become a major force in the U.S. economy, affecting investors, workers, and the allocation of assets across industries. And yet, we show that traditional mechanisms of market accountability have dissipated, which warrants a new regulatory framework for the sector.

In particular, the traditional mechanism for accountability for private equity sponsors, near-term exit via an IPO or an arm's-length sale to another company, has become increasingly rare. Drawing on an empirical analysis of proprietary data as well as third-party evidence, we document that the rate of exits has declined, sponsor holding periods have lengthened, and the verifiable quality of exits has diminished. For example, for the 1,619 private equity exits occurring in 2025, only 26 were exits via an IPO; moreover, corporate acquisitions represented less than a third of exits.[6] Instead, "secondary" sales to other members of the private equity sponsor community, as well as sales to affiliated continuation funds featured prominently, and both have steadily increased in in frequency since 2021. Indeed, "tertiary exits," or secondary sales of companies after initial secondary sales, are now rising.[7] Quite obviously, the back-scratching incentives are high in transactions between affiliated entities.[8] But even when the entities are not related, conflicts can manifest when general partners ("GPs") of struggling funds trade assets at inflated values in reciprocal secondary transactions.[9] And beyond these conflicted exits, there is a huge backlog of private equity-owned companies for which exit is uncertain.

The absence of market-based discipline via arm's length sales or IPOs leads to a host of problems for investors: for example, the risk that limited partner ("LP") investors in private equity funds may experience rent extraction through biased pricing, the add-ons of management and performance fees, or a delay in the recognition of losses when the GP stands on both sides of the

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[3] *See* U.S. Sec. & Exch. Comm'n, *Private Funds — Aggregate Fund Assets* (Apr. 9, 2026), https://www.sec.gov/data-research/statistics-data-visualizations/private-fund-statistics/private-funds-aggregate-fund-assets (showing aggregate gross asset value for private equity funds, as reported on Form PF, Question 8, rising from approximately $1.6 trillion in 2013Q1 to $7.9 trillion in 2025Q2).

[4] *See infra* note 50 and accompanying text (using Form PF data on aggregate gross assets for CPCs, adjusted to include small filers, as the basis for comparison with the enterprise value of the companies in the S&P 500).

[5] *See* Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *infra* note 46. The industry trade association, the American Investment Council, currently estimates that a broader category, "private equity-backed companies," employ 13.3 million employees. AM. INV. COUNCIL, https://www.investmentcouncil.org/ (last visited Feb. 16, 2026).

[6] PITCHBOOK, *2025 Annual US PE Breakdown* 27 (Jan. 13, 2025).

[7] *See* Emily Lai, *Secondaries' Next Layer Raises Old Questions*, PITCHBOOK MKT. INSIGHTS (Apr. 24, 2026), https://pitchbook.com/news/articles/secondaries-next-layer-raises-old-questions.

[8] Alexandra Heal, *Private Equity Investor Body Sounds Alarm on 'Conflict Vehicles'*, FIN TIMES (May 3, 2026), https://www.ft.com/content/88c4bafb-a329-47fa-b1f6-8c9d7c51bc10?syn-25a6b1a6=1.

[9] Chris Cumming, *Private-Equity Holdings Look Overvalued. Who's Going to Fix It?*, WALL ST. J. (Apr. 20, 2026), https://www.wsj.com/pro/private-equity/private-equity-holdings-look-overvalued-whos-going-to-fix-it-f8c1a3c3.

transaction.[10] However, this Article's focus is different: we document the potential for inefficient resource allocation across the economy when a major engine of investment lacks market-based accountability. Specifically, without arm's-length exit, there is no reliable verification of private equity's claim of value creation. And as private equity's influence over the economy grows, the risk of allocative inefficiency increases. Given that a significant fraction of the U.S. economy—across all states and companies of all sizes—is tied up in private equity, this risk is one with macroeconomic consequences.

The exit problem is exacerbated by the weakening of other market-based constraints on PE fund performance. Private equity has historically utilized a "2 and 20" model for compensation, which gives GPs high powered incentives to bring about portfolio company performance. However, the PE model now depends less on "carried interest" that ties sponsor returns to performance, and more on fees earned based on the size of the portfolio, regardless of performance.[11] Obviously, this evolution dampens a GP's incentive to improve the performance of portfolio companies; likewise, the incentive to keep companies private for longer and shift them from pocket to pocket increases.[12]

Another cause of weakened accountability is the rise of private equity as an asset class, which has generated a massive influx of dollars into private equity funds despite growing performance questions.[13] Many institutions mechanically allocate funds to PE in the name of "diversification," without a critical consideration of performance and long-term value creation. This reality reflects a distinctive agency cost of agency capitalism, whereby the self-interest of intermediaries leads to subpar investment decisions for beneficiaries;[14] in this particular case, herding into PE protects the intermediary from criticism.

Even with accumulating evidence of stagnating performance,[15] private equity is on track for another decade of explosive growth thanks to current policy interventions aimed at "democratizing" PE. Today, politicians and the President are pushing regulators to open PE funds to retail investors and to package PE funds for retirement accounts.[16] The unlocking of this $10 trillion pool of capital from unsophisticated investors would substantially exacerbate the accountability problem for PE sponsors: these investors will be competing for a limited number of fund allocations, without the sophistication to scrutinize and monitor the sponsor's claims about performance on an ongoing basis. Although institutional intermediaries who manage and offer the funds are more sophisticated, they

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[10] *See generally* INST. LTD. PARTNERS ASS'N, *The Future of Private Equity Regulation: Insight Into the Limited Partner Experience & the SEC's Proposed Private Fund Advisers Rule* (2023), https://www.sec.gov/comments/s7-03-22/s70322-20158927-326926.pdf.

[11] *See* Marc Moore & Chris Hale, *Towards a Post-Jensenian Private Equity Paradigm: The Agency Costs of Multi-Product Suites*, 30 STAN. J. L. ECON. & BUS. 33, 57-59 (2025); *see also* Andrew Metrick & Ayako Yasuda, *The Economics of Private Equity Funds*, 23 REV. FIN. STUD. 2303 (2010); David T. Robinson & Berk A. Sensoy, *Do Private Equity Fund Managers Earn Their Fees? Compensation, Ownership, and Cash Flow Performance*, 26 REV. FIN. STUD. 2760 (2013).

[12] The sum total of carried interest collected by private equity funds during the post-2000 period is estimated in the $230 billion range. Management fees are not included in that figure. *See* Ludovic Phalippou, *An Inconvenient Fact: Private Equity Returns and the Billionaire Factory*, 30 J. INVESTING 11 (Dec. 2020).

[13] *See infra* note 99.

[14] *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).

[15] *See infra* notes 101, 128-130.

[16] *See infra* notes 198-99.

suffer from their own incentive problems,[17] including pronounced conflicts of interest given the higher fee income that private funds generate.[18] All in all, the prospect of a massive influx of dollars into the industry exacerbates the risk of a self-inflating bubble, whereby sponsors are able to artificially maintain high portfolio valuations via conflicted sales and opaque valuations.

Together, these factors suggest a serious accountability shortfall for an industry that has become central to the U.S. economy and that will increasingly engage a greater share of investors. Indeed, we argue that private equity is veering into the troubled territory of the late 1950s-early 1970s—the conglomerate era—in which companies assembled portfolios of diverse subsidiaries on the assumption that corporate headquarters could do a superior job in overseeing managerial performance at the subsidiary level.[19] This experiment has been deemed a failure.[20] With rare exception, the hubris underlying the move to assemble massive organizations with unrelated business divisions created negative synergies that in turn fueled many of the leveraged buyouts/bust-ups of the 1980s. It also contributed to economic stagflation and decline in the 1970s, as resources were misallocated in favor of acquisitions rather than investments in innovation and long-term growth.[21]

The theorists who promoted the private equity movement understood the temptations of empire building and thus built in a safeguard: the funds that provided the equity investment for private equity-acquired companies were time limited. Maximum terms were set at 10 years, with an expectation that acquired companies would exit within 4 to 5 years. By the end of the period, the PE sponsor would have to "show its work" – that is, exit all investments and therefore submit to accountability for the sponsor's performance. Exits would occur through arm's-length transactions, whether IPOs or sales to another company. But because these accountability mechanisms can no longer be counted on, the prospect of economic inefficiency looms large.

Given the importance of private equity to the U.S. economy—for asset productivity and for investor welfare of a broadening swathe of investors—and in light of structural changes that have weakened accountability, we believe a new regulatory framework is warranted that would mitigate the risk of resource misallocation and systemic harm. Specifically, we propose that the SEC mandate disclosure of operating and other financial results of "significant" portfolio companies held by PE sponsors. "Significance" would be measured *either* through generating $600 million in annual revenues *or* a reported value by the PE sponsor of $1 billion, in effect a mid-cap public company threshold.[22]

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[17] *See* Gilson & Gordon, *supra* note 14, at 865*;* Dorothy Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018).

[18] *See, e.g.*, VANGUARD, *Do Private Investments Belong in 401(k) Plans*? (Sept. 23, 2025), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/do-private-assets-belong-in-401k-plans.html; Alicia H. Munnell, *Private Equity Does Not Belong in 401(k) Plans*, CTR. FOR RET. RSCH. AT BOS. COLL. (July 20, 2021), https://crr.bc.edu/private-equity-does-not-belong-in-401k-plans/; Alicia H. Munnell, *Workers Do Not Need Private Equity in Their 401(k) Plans*, CTR. FOR RET. RSCH. AT BOS. COLL. (Aug. 11, 2025), https://crr.bc.edu/workers-do-not-need-private-equity-in-their-401k-plans/.

[19] Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 SCIENCE 745 (Aug. 17, 1990).

[20] *Id. See also infra* notes 128-132.

[21] *See infra* note 118.

[22] The median market capitalization of a Russell 2000 company is approximately $1 billion; the median revenues of a company in the 40th-60th percentile range by market capitalization of the Russell 2000 is $600 million. The Russell 2000 excludes the top 1000 companies (by market cap) of the Russell 3000. *See* FTSE RUSSELL*, Russell 2000 Index Factsheet 1* (May 31, 2026), https://research.ftserussell.com/Analytics/FactSheets/Home/DownloadSingleIssue?isManual=True&-issueName=US2000USD (reporting median market capitalization of $1.117 billion); FTSE RUSSELL, *Russell US Equity*

This threshold seems appropriate because considerable PE activity addresses middle-market companies.[23] Such disclosure would chiefly consist of audited financial statements under GAAP, comparable to public company disclosure, accompanied by an auditor's attestation, reported annually.[24]

Mandatory disclosure would respond to the accountability deficit (and reduce the prospect of resource misallocation and systemic risk in the process) in three main ways. First, the requirement to reveal financial information of PE-owned portfolio companies tests the continued value creation potential of private equity. The leadership role of private equity sponsors in guiding the economic activity of operating companies in diverse sectors across the U.S., shielded from the disclosure regime of public companies, is an organizational experiment. It may have a been a good idea, or it may have been a good idea at a certain scale, but without disclosure, we can't be sure. As we discuss below, *portfolio-based* performance metrics like "IRR," "DPI" and "MOIC"[25] do not provide accountability on the critical dimension of value creation in *operating companies*. Moreover, these measures lack standardization and verifiability, and are biased because they are commonly benchmarked to a different (and inapplicable) segment of the market.

Second and relatedly, mandatory portfolio company disclosure will enable sharp distinction between the high performing managers and the low performers, improving the allocation of resources in the economy.[26] It is folk wisdom that there are persistent differences between the upper and lower-quartile sponsors.[27] Inadequate disclosure enables this persistence, and due to disparities in bargaining power, LPs may fail to secure the information they need to critically evaluate their investments. With sunlight on performance, it will be difficult for the poor performers to continue to fundraise, hold assets in perpetuity, or sell companies to related entities. Those low performing funds may face

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Indexes: Construction and Methodology 20 (v7.0, May 2026), https://www.lseg.com/content/dam/ftse-russell/en_us/-documents/ground-rules/russell-us-indexes-construction-and-methodology.pdf (stating that the Russell 2000 includes companies ranked #1,001–3,000 by descending total market capitalization).

[23] *See* Ludovic Phalippou, *Apples and Oranges: Benchmarking Games and the Illusion of Private Equity Outperformance,* J. PRIV. MKTS. INVESTG. 28 (2026). Recent literature also suggests that such smaller private-to-private transactions are likelier to produce gains. See Morten Sorensen & Ayako Yasuda, *Stakeholder Impact of Private Equity Investments*, 1 HANDBOOK OF THE ECONOMICS OF CORPORATE FINANCE, Ch. 7 (B. Espen Eckbo, Gordon Phillip & Morten Sorensen, eds., 2023)

[24] We are not alone in identifying the disclosure shortfalls of private equity. *See* Peter Morris & Ludovic Phalippou, *Time to Shrink the "Disclosure Gap" Between Private and Public Equity Markets*, in RESEARCH HANDBOOK ON THE STRUCTURE OF PRIVATE EQUITY AND VENTURE CAPITAL (Elisabeth de Fontenay and Brian Broughman, eds., 2026).

[25] *See, e.g.,* William Craig & Mark Watson, *Understanding Private Equity Performance*, WELLINGTON MGMT. (July 2025), https://www.wellington.com/en/insights/understanding-private-equity-performance: ("*IRR* is the discount rate that makes the net present value of all cash flows equal to zero."); *id.* ("The calculation accounts not only for the magnitude of the returns but also their timing."); id. ("DPI is calculated by distributed capital/called capital. This ratio shows how much money has been returned to the investor compared to the amount it has contributed."); *id.* ("The multiple is represented by the formula (realized value + unrealized value)/invested capital. It reflects the value of the investment (both what has been returned and what is still being held) compared to the cost."); *id.* ("The IRR is time sensitive while the multiple and DPI are not. In addition, the IRR and multiple each account for unrealized value while the DPI does not.").

[26] Itay Goldstein & Liyan Yang, *Information Disclosure in Financial Markets*, ANN REV. FIN ECON. 101 (2017).

[27] *See, e.g.,* Preqin, *Private Equity in 2026* (Dec. 15, 2025), https://www.preqin.com/insights/global-reports/private-equity-in-2026 ("The returns gap has widened between upper- and lower-quartile funds, especially in recent vintages, adding to fund-raising pressure for managers unable to point to a strong track record."). For the original work on this persistence stratification, *see* Steven Kaplan & Antoinette Schoar, *Private Equity Performance: Returns, Persistence and Capital Flows,* 60 J. FIN. 1791 (2005). For skepticism on the persistence of persistence, *see* Robert S. Harris, Tim Jenkinson, Steven N. Kaplan, Ruediger Stucke, *Has Persistence Persisted in Private Equity? Evidence from Buyout and Venture Capital Funds*, 81 J. CORP. FIN. 102361 (2023).

investor demands for the return of capital, forcing exits at a loss and allowing assets to be redeployed by better owners. By the same token, high performing funds will more easily secure funding, lowering their cost of capital and allowing them to deploy their assets and skills where they are most needed.

This ability to sort between high and low performers is critical as PE investments become available to retirement savers. Whatever one thinks about the financial sophistication of the accredited and institutional investors that are presently able to invest in PE, retail participants in 401(k) plans are simply in a different category of risk tolerance and performance assessment. In public markets, mandatory disclosure significantly benefits retail investors because they can free ride on the price formation efforts of securities analysts. Our proposed mandatory disclosure regime would begin to offer similar protection to such investors in private markets.

Third, mandatory disclosure reduces the likelihood that PE activity will create systemic risk. In particular, without verifiable exit and other reliable evidence of value creation, there is the risk that PE activity will fuel a self-inflating bubble. Each participant in the private equity landscape benefits when a fund extracts value from companies or other investors and uses it to improve the fund's returns. Enlarging the pool of investor capital as through recent proposals for "democratization" provides yet another channel for new investors to subsidize the old, hiding the poor performers while also compounding the consequences of an eventual correction. At some point a bubble will burst, exposing performance failures, imposing losses, and triggering a negative spiral among investors, credit providers, and financial intermediaries as all race to minimize losses and adjust to the new reality. Mandatory disclosure of portfolio company performance would reveal to investors and the broader public when and where the problems lie, avoiding systemic economic harm.

Mandatory disclosure would also address systemic risk deriving from private equity's reliance on private credit. Beginning after the financial crisis, financing for PE buyouts began to come from a new financial intermediary, the private credit fund.[28] An important segment of the private credit market provides investors with redemption rights, and as recent experience shows, financial uncertainty associated with PE portfolio companies can produce runs on private credit funds.[29] The absence of reliable disclosure about the financial health of portfolio companies induces a first-mover psychology because the early redeemers stand the greatest chance of recovering par. That redemption pressure can spill over to the banking system through private funds' sell-off of portfolio company debt, which will depress values of similar assets on the balance sheet of banks. Alternatively, to avoid asset sales, private credit funds may draw down on their bank lines. Both courses of action can lead to credit rationing by banks to their customary borrowers,[30] with systemic consequences. As we came to appreciate in dealing with the Global Financial Crisis, the fear of insolvency can be debilitating, leading to runs, liquidity hoarding, and a negative economic spiral. By mandating disclosure of the financials of significant portfolio companies, our rule would provide a basis for confidence in private credit and directly reduce systemic risk.[31]

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[28] *See* Jared A. Elias & Elisabeth de Fontenay, *The Credit Markets Go Dark*, 134 YALE L. J. 696 (2025).

[29] *See* Anna Andriotis, *The Wealthy Investors That Powered Private Credit Are Rushing for the Exists*, WALL ST. J. (Apr. 2, 2026).

[30] *See* Itamar Drechsler, Alexi Savov & Philipp Schnabl, *Credit Crunches and the Great Stagflation*, NBER W.P. No. 35057 (Apr. 2026), https://ssrn.com/abstract=6566852.

[31] Indeed, the SEC has begun to take note of the growth of private credit and the associated potential systemic risk in a recent regulatory release that asks for suggestions for additional reporting by private credit funds. *See Form PF; Reporting*

The boom/bubble/bust cycles of the conglomerate era and subprime residential mortgage securitization in the run-up to the Global Financial Crisis of 2008 illustrate the importance of disclosure. The conglomerate era of the late 1950s-early 1970s was fueled by sharp accounting and limited disclosure that fed the "price/earnings" game that facilitated acquisitions of unrelated companies.[32] Yet company level disclosure and public market pricing allowed analysts to uncover the manifest inefficiency of many conglomerates,[33] which limited the "boom" and meant that the "bust" of the conglomerate era was limited in its long-term effects. Indeed, one of the era's reforms was a heightened disclosure regime of line-of-business "segment" report, designed to minimize recurrence of the results-masking that facilitated conglomerate acquisitions.[34] By contrast, the mechanisms of securitization that came into use in the 2000s resulted in a lack of transparency in the form of off-balance sheet entities, complicated "waterfalls" in the distributed securitizations, synthetic securitizations, and masked exposure of key intermediaries. This opacity enabled a housing market "bubble" that eventually burst, with nearly catastrophic consequences for the economy.[35]

Yet the manifest benefits of our mandatory disclosure proposal can be achieved without overly burdensome costs. Private credit funds, unlike other investors, are direct counterparties to specific portfolio companies and typically insist on audited financials for each specific borrower. As a result, major accounting firms are already auditing the financial statements of the companies covered by our proposal. Sponsors also create audited financials for another reason: they play a role in buttressing the sponsor's NAV reporting at the fund level, pursuant to SEC requirements.[36] Simply put, the financials that are key to disclosure already exist, and so our proposal would entail very little additional expense—just much needed sunlight.[37]

This Article proceeds as follows. Part I describes the rapid growth of private equity and its importance to the U.S. economy and the corresponding accountability deficit. It provides an empirical description of the decline in exits across the PE universe, as well as the deterioration of exit verifiability for a particularly important subset of PE acquisitions: "take-privates," the linear descendants of the original LBO transactions. It shows that other sources of external accountability—performance-based compensation, internally generated measures of value, and limited access to capital—have eroded and thus contribute to the accountability crisis. Part II compares the current moment for private equity to the rise and failure of the conglomerate movement, presenting the risk of allocative inefficiencies. Part III reveals how private equity without accountability contributes to systemic risk. Part IV describes

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Requirements for All Filers, SEC Release No. IA-6959, File No. S7-2026-13, at 100–02 (Apr. 20, 2026). See also *infra nn.* 169 & 170.

[32] *See* Peter Steiner, MERGERS: MOTIVES, EFFECTS, POLICIES 103-19 (1975).

[33] *See infra* notes 128-130.

[34] *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1551-53 (2007).

[35] FIN. CRISIS INQUIRY COMM'N, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (2011); Adam Ashcraft & Til Schuerman, *Understanding the Securitization of Subprime Mortgage Credit*, 3 FOUND, AND TRENDS FIN. 191 (July 2008), https://www.newyorkfed.org/research/staff_-reports/sr318.html; Frederic S. Mishkin, *Over the Cliff: From the Subprime to the Global Financial Crisis*, 25(1) J. ECON. PERSP. 49 (2011).

[36] *See* SEC Form ADV, Part 1A, Item 5.F (reporting of Regulatory Assets Under Management).

[37] Industry objections that this would reduce their competitive advantage vis-à-vis public companies are not well taken. The efficiency case for private equity is based on better governance and incentives, not the "exorbitant privilege" of minimal disclosure obligations. Moreover, major U.S. private equity firms operate extensively in the U.K. market and make portfolio company disclosures under a more elaborate regime than our proposal. *See infra* notes 182-186.

our mandatory disclosure proposal, which calls for the annual disclosure of financial statements for "significant" portfolio companies in the style required by the 1934 Securities Exchange Act. We outline key details for our proposal and reveal that much of what we seek to require already exists, meaning that costs and burdens on the industry are manageable. We conclude by showing how the SEC could require such disclosure under its existing authority; moreover, our proposal could be tied to the fiduciary duties of ERISA trustees as they begin to manage 401(k) accounts composed of private equity investments.[38]

I. The Private Equity Accountability Crisis

This Part describes the accountability crisis facing the private equity sector. We begin by detailing the increased impact of private equity on the U.S. economy. We then describe our study of private equity "exit" transactions, which reveals (among other things) that fewer portfolio companies are being sold in arm's length sales than ever before. We conclude by showing how other sources of accountability—namely, performance-based compensation and external performance measures—have eroded, even as the institutional environment has led to a massive influx of capital into the industry.

A. The Growth of Private Equity and its Importance in the U.S. Economy

Private equity has been the capital markets story of the 21st century. What we now call private equity started as leveraged buyouts pursued by financial entrepreneurs in the 1980s, commonly hostile takeover bids pursuing "bust up bootstrap acquisitions" in Martin Lipton's famous characterization.[39] Resistance to these transactions provided the basis for seminal cases in Delaware's M&A jurisprudence[40] and launched the idea that a new financial intermediary, the leveraged buyout (or "LBO") association, would be a repeat player in the acquisitions market. One such institution, KKR, played a starring role in the initial LBO wave. The RJR-Nabisco transaction of 1988, a ferocious competition between KKR and a management buyout group, was famously portrayed (in a book and a movie) as showing the influence of "Barbarians at the Gate."[41]

Today, "private equity" has become a somewhat capacious term, referring to wide-ranging private equity and debt in transactions and investments worldwide.[42] At its core, PE is a mechanism for "blind pool investing," in which investors commit funds in advance to a sponsor that specializes in finding and managing companies for superior returns for investors. The classic PE strategy consists of the fund manager (the GP) raising capital from investors (the LPs), to raise money to buy a whole

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[38] We do not address specialized criticisms of PE, for example, the quality risk that its highly leveraged structure creates in particular sectors, especially health care, or the greater risk of financial-stress related layoffs. *See* Anonymous, *The Dark Side of Private Equity*, U CHI. BUS. L. REV. ONLINE (2026); Eileen Appelbaum & Rosemary Batt, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET (2014).

[39] *See* Martin Lipton, *Share Purchase Rights Plans ("Poison Pills")* (Nov. 21, 1985) (memo to clients), quoted in LIPTON ARCHIVE, text accompanying note 116.

[40] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (De. 1986).

[41] *See* Bryan Burrough & John Helyar, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1989).

[42] For general discussions of the PE set up, see Victoria Ivashina, *Private Equity Financing*, 1 HANDBOOK OF THE ECONOMICS OF CORPORATE FINANCE, Ch 4 (B. Espen Eckbo, Gordon Phillip & Morten Sorensen, eds., 2023); Per Stromberg & Christian Thomann, *Private Equity Ownership and Firm Performance: A Framework for Interpreting the Evidence*, (ECGI Fin. WP 1147, July 2026) https://ssrn.com/abstract=6962421

company, public or private. After a holding period, the GP will try to sell the company for a profit. Over time, the model has evolved to include non-controlling investments in companies with high expected growth, as well as entrepreneurial activity such as "roll ups" of small companies in a particular business or geographic area to obtain the benefits of scale, as well as dividend recapitalizations that use leverage to pay special dividends to investors.[43] The compensation structure typically follows the "two and twenty" approach, consisting of a 2% management fee based on the size of the fund and 20% of the fund's profits (known as carried interest or "carry"). Often the receipt of carry is contingent on reaching a certain minimum level of performance.[44]

How should we assess the importance of private equity for the U.S. economy? The SEC's reporting scheme for "private funds" sizes the "gross asset under management" of private equity at $7.9 trillion as of the second quarter of 2025, in a recent report.[45] This figure measures the value of the "equity" of private equity and equals approximately 17 percent of the market capitalization of the S&P 500 during the same time period. But this measure understates the economic importance of private equity, because equity ownership of a portfolio company gives the private sponsor control over the entire enterprise, including decisions over layoffs and job reallocation that may accelerate the adjustment costs of economic change.[46]

A better measure of overall economic impact is "Aggregate Gross Asset Value of Private Equity Controlled Portfolio Company Investments," something close to the more conventional "enterprise

[43] Steven N. Kaplan & Per Stromberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121 (2009).

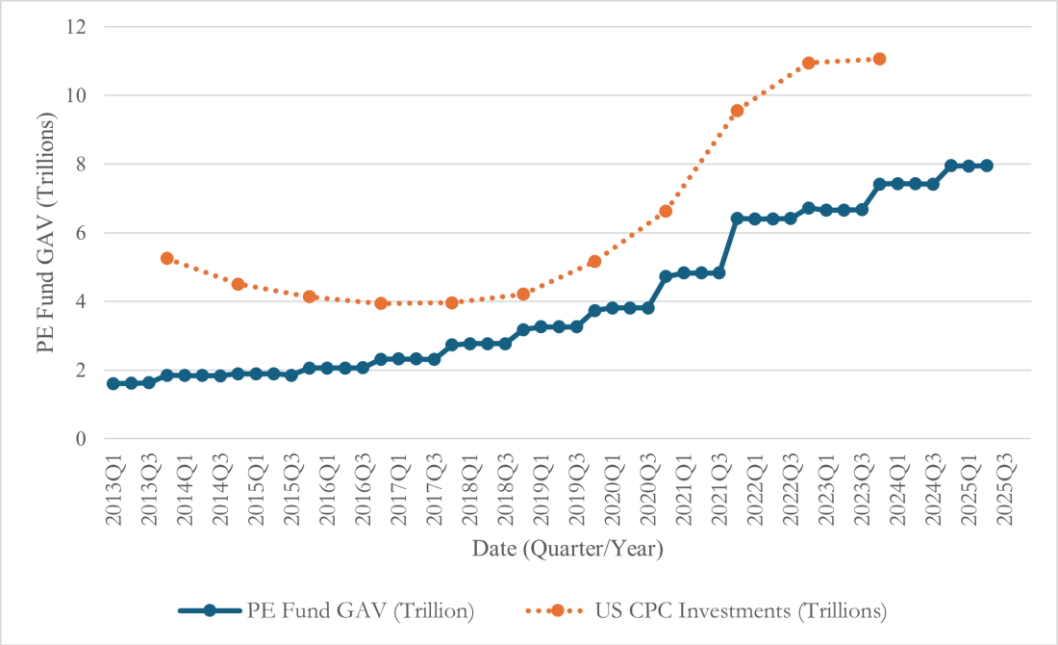
[44] Under the "US approach" to the PE "distribution waterfall," carry is measured and paid out on a deal-by-deal basis, subject to clawback if later realizations are negative. By contrast, the "European approach" permits payout only on the basis of returns on the entire portfolio, meaning all investor capital (plus the hurdle rate) must be recovered first. *See e.g.*, Megann Freston, *American v, European Waterfall in Private Equity*, Allvue Systems (April 26, 2024), https://www.allvuesystems.com/resources/american-vs-european-waterfall/

[45] This reflects the value of PE's equity stake in its "controlled portfolio companies." A narrower measure that values only the "equity" portion of this equity stake, "net asset value," is 7.8 trillion. *See* SEC, *Private Fund Statistics*, tbl.2.1 (Aggregate Gross Asset Value), tbl.2.3 (Aggregate Net Asset Value (2025), https://www.sec.gov/data-research/statistics-data-visualizations/private-fund-statistics (last updated Apr. 9, 2026). By way of comparison, at the outset for Form PF filing in 2013(Q1), PE funds' GAV was $1.6 trillion, and NAV was $1.5 trillion.

[46] *See* Steven J. Davis, John C. Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner & Javier Miranda, *The (Heterogenous) Economic Effects of Private Equity Buyouts*, 71 MGMT. SCI. 9569 (2025) (showing that PE transactions produce significant employment effects, both from job loss and job reallocations, even net employment effects are neutral. Public-to-private transactions on average result in greater than 10% job loss and a similar level of "job reallocation" in the first two years after the buyout; divisional buyouts show similar job loss and even higher job reallocation); Adam Isen, Jordan Richmond, Matthew Smith & Constantine Yannelis, *Buyouts With Payouts: The Impact of Private Equity on Workers and Owners* (Cambridge WP 2025), available at https://www.econ.cam.ac.uk/publications/cwpe/2618 (using tax data matched to employees for 10,000 acquisitions and finding negative employment and wage effects for older employees (45 and older, especially 55 and older) possibly offset by capital gains realizations from stock sold in the buyout). *See generally* Jeffrey N. Gordon, *Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the 21st Century*, 30 STAN. J. L. ECON. & BUS. 172, 217-222 (discussing impact on employees of layoffs associated with M&A); Jeffrey N. Gordon, *Is Corporate Governance a First-Order Cause of the Current Malaise?*, 6(s1) J. BRIT. ACAD. 405, 422-424 (2018) (economic insecurity as an "adjustment cost").

value."[47] At year-end 2023, this measure was $10.3 trillion.[48] But this measure itself is understated, because omits the "small filers" (over $150 million but under $2 billion in AUM) that need not file this information. The SEC has estimated that large filers account for approximately 75% of PE's AUM.[49] A similar adjustment to Aggregate Gross Value would take this PE economic impact measure to $13.7 trillion. This is equal to a 22% unadjusted/29% unadjusted fraction of the enterprise value of the companies in the S&P 500.[50] As Figure 1 shows, by either measure, the economic importance of private equity has rapidly grown in the post-Global Financial Crisis period.[51]

Figure 1. Growth of PE Gross Asset Value and Controlled Portfolio Company Investment Assets (2013-2025)



Source: SEC Form PF compilations

[47] The "Aggregate Gross Asset Value" sums the assets on the left-hand side of the balance sheet. This provides a better sense of the scale of enterprise than NAV, which does not account for liabilities on an operating company's balance sheet, which fund asset purchases. Nevertheless, Aggregate Gross Value (AGV) will typically understate enterprise value, especially as the company remains in the sponsor's portfolio. This is because the AGV starts with the book value of the assets at the time of the PE acquisition, reflected at fair market value under acquisition accounting. *See* FIN. ACCT. STANDARDS BD., FASB Accounting Standards Codification Topic 805, Business Combinations. Asset values are subject to depreciation and amortization, but the accounting measure does not reflect increased value that may accrue over time, especially with respect to intangibles. FASB ASC 350. Notably, the SEC stopped publicly reporting "Aggregate Gross Asset Value of Private Equity Controlled Portfolio Company Investments" beginning with the 2024 report on the view that the only concern of Congress was systemic risk narrowly defined, rather than the broader project of investor protection and serving the public interest, as set forth in §404 of the Dodd Frank Act.

[48] U.S. Sec. & Exch. Comm'n, *Annual Staff Relating to the Use of Form PF Data* 64 tbl. 10.9 (Jan. 17, 2025).

[49] *See* Reporting by Investment Advisers to Private Funds and Exempt Reporting Advisers, SEC Release No. IA-6297, at 71 (May 3, 2023) (declining to adopt the proposed reduction of the large private equity fund adviser reporting threshold from $2 billion to $1.5 billion). Using Preqin and Pitchbook estimates, large filers appear to cover a smaller share of PE AUM – approximately 65% to 70%.

[50] The estimate of the enterprise value of the S&P 500 is based on the SPY ETF.

[51] These values are drawn from the SEC's compilation and aggregation of Form PF filings, which began in 2013. *See supra* note 47 (describing the reporting scheme that implemented the Dodd Frank Act mandate).

This explosive growth is a function of two trends. The first is a change in federal securities law that opened the door to a massive increase in private equity fundraising. Specifically, a 1996 amendment to the Investment Company Act of 1940 gave investment funds owned solely by "qualified purchasers"—defined as $5 million for an individual and $25 million for an "entity"—an exemption from restrictions on illiquid investments, conflicted transactions, and leverage. Such "Section 3(c)(7)" funds face no limit on the number of such investors in their funds, which significantly expanded their fundraising capacity.[52]

The second driver for the growth of these funds is their purportedly superior performance. Scholars analyzing of the initial wave of leveraged buyouts in the 1980s reported substantial increases in operating income and net cash flows, as well as remarkably high returns not only for pre-buyout shareholders, but also investors in post-buyout capital (28% market adjusted, on average) and investors in post-buyout equity (785.6%, on average).[53] From 1984-2005, the sector's information intermediaries reported performance that generally exceeded returns available on the S&P 500, by as much as 3 percent annually.[54] The well-publicized success of the Yale endowment under the leadership of the admirable David Swenson played an influential role with institutional investors.[55]

What accounts for this outperformance? There are three possibilities. The first is that the private equity model—meaning significant equity participation by managers, close monitoring of managerial performance by a sponsor with high equity-related incentives, and considerable debt financing that powers up the equity incentives while providing a hard budget constraint—leads to superior governance and performance.[56] The second explanation is less rosy: that private equity's outperformance is nothing more than a successful bet on low long-term interest rates that have lowered the cost of capital in the leveraged capital structure of most portfolio companies.[57] A third and related "faux outperformance" explanation argues that PE performance is compared to the wrong

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[52] The amendment was one element of the National Securities Markets Improvement Act of 1996. *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L. J. 445, 467-68 (2017) (discussing the effect of 15 U.S.C. § 80a-3(c)(7)); Michael Ewens & Joan Farre-Mensa, *The Deregulation of the Private Equity Markets and the Decline in IPOs*, 33 REV. FIN STUD. 5463 (2020).

[53] *See* Steven Kaplan, *The effects of management buyouts on operating performance and value*, 24 J. FIN ECON. 217 (1989). *See also* Abbie J. Smith, *Corporate ownership structure and performance: The case of management buyouts,* 27 J. FIN. 143 (1990).

[54] *See, e.g.*, Robert S. Harris, Tim Jenkinson & Steven N. Kaplan, *Private Equity Performance: What Do We Know?*, 69 J. FIN. 1851 (2014).

[55] See Josh Lerner & Jay O. Light, *Yale University Investments Office*, Harv. Bus. Sch. Case No. 296-040 (Dec. 1995); Josh Lerner, *Yale University Investments Office: June 2023*, Harv. Bus. Sch. Case No. 9-204-055 (Sept. 2003, rev. Mar. 2004). *But see* Ludovic Phalippou, *The Tyranny of IRR*, 52(4) J. PORT. MGMT 66, 78-79 (Feb. 2026). *See generally* David F. Swensen, PIONEERING PORTFOLIO MANAGEMENT: AN UNCONVENTIONAL APPROACH TO INSTITUTIONAL INVESTMENT (2000). Over the past few years, university endowments have begun to unwind their private equity investments in response to evidence of tepid returns. *See, e.g.*, Melissa Korn & Andrew Ross Sorkin, *Yale's Endowment Pulls Back from Private Equity Amid Trump Tensions*, N.Y. TIMES (June 10, 2025), https://www.nytimes.com/2025/06/10/business/yale-endowment-private-equity-trump.html.

[56] *See* Michael C. Jensen, *Eclipse of the Public Corporation*, HARV. BUS. REV. 61 (Sept.-Oct. 1989); William Magnuson, *The Public Cost of Private Equity*, 102 MINN. L. REV. 1847 (2018).

[57] Ulf Axelson, Tim Jenkinson, Per Strömberg & Michael S. Weisbach, *Borrow Cheap, Buy High? The Determinants of Leverage and Pricing in Buyouts*, 68 J. FIN. 2223 (2013); Paul M. Guest, Mingzhu Wang & Simon Welte, *The Effect of Cost of Capital on Private Equity Buyout Performance*, 100 J. CORP. FIN. 103005 (2026) (in a UK sample, lower interest rates fueled PE returns in the post-2010 period).

set of benchmarks: PE firms generally invest in smaller firms and in particular economic sectors, which produces very different portfolios from the public market indices to which they are frequently compared.[58]

From the perspective of allocative efficiency and the long-term growth of the economy, the only explanation for the increasing importance of PE that should satisfy scrutiny is the superior governance and performance story. The other two explanations raise serious concerns. Speculative bets about interest rates can go wrong and quickly lead to financial contraction and contagious financial distress.[59] Mismeasuring success can produce persistent misallocation of investment capital.

Three attributes of the PE business model are central to the first claim about superior governance. The first is the high-powered financial incentives created by the "2 and 20" business model.[60] As a result of this financial structure, the sponsors have strong incentives to achieve a sale of the company at a profit as they secure 20% of the gains. The second and related attribute is that fund investments have been time limited. Investors have traditionally expected an exit (via an arm's length transaction) within 5 years, and a maximum of ten.[61] The third attribute is the presence of debt, which not only provides creditor monitoring, but sharp incentives for management to increase the profitability of the business to meet interest payments and avoid insolvency. In the next Part, we describe how these governance attributes have diminished in recent years, leading to a deficit in accountability.[62]

B. Private Equity's Accountability Deficit: Missing Exits

As we have discussed, exit is a critical component of accountability in private equity. For management of public companies, accountability comes through the mandatory disclosure system of the federal securities laws, in which the performance of the issuer can be compared to similar firms in the industry and against its prior performance and will receive a grade reflected in the market price of the issuer's stock. Of course, private companies are not subject to disclosure requirements; the

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[58] This criticism is associated with Prof. Ludovic Phalippou. *See* Ludovic Phalippou, *Apples and Oranges: Benchmarking Games and the Illusion of Private Equity Outperformance,* J. PRIV. MKTS. INVESTG. 28 (2026). In commenting on LinkedIn on a recent Bloomberg article on the "faltering" of the Yale investment model that is heavily tilted to PE, he said "Public indices = large cap tech, banks, oil and gas, pharma and food. Private equity = small-mid cap, tech, industrials." Of the time-varying and index-varying measure of Yale's "success," he said, "Nothing changed except sector and size return cycles. Randomness at work. Bad benchmarking creates great-ish stories and very rich intermediaries."

[59] Moreover, there is evidence that buyouts undertaken during a low interest rate period produce lower productivity gains, suggesting that low interest rates invite financial engineering rather than delivering improved performance. *See* Steven J. Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *supra* note 46, at 9585 ("When credit is cheap and easy, PE groups may select buyouts—or structure them—to deliver private returns via financial engineering rather than operating improvements.").

[60] Fee arrangements have evolved over a 30-year period, but the essential structure of management fees (of various types) geared to AUM and "carry" based on asset appreciation (typically after achievement of a hurdle rate) has persisted.

[61] *See, e.g.*, Shourun Guo, Edith S. Hotchkiss & Weihong Song, *Do Buyouts (Still) Create Value*?, 66 J. FIN. 479 (2011) ("Returns are calculated either from just prior to the buyout (pre-buyout) to a subsequent IPO, sale of the firm, or bankruptcy, or from the execution of the buyout (post-buyout) to the subsequent outcome.").

[62] We note that our concern about accountability is increasingly shared in the investment community. A recent survey by the CFA Institute shows that a meaningful fraction of investment professionals, more than a third, worried about the frequency and accuracy of valuation reporting and performance measures. *See* CFA INST., *Private Markets: Transparency Will Define the Next Stage of Market Development* (Sept. 18, 2025), https://www.cfainstitute.org/insights/articles/private-equity-markets-transparency-development.

measures that PE sponsors voluntarily report are insufficient sources of accountability for three main reasons.

The first is the essential mismatch between fund-level measures of performance and the mechanism by which PE is supposed to create value—by pushing management to provide superior operating results at individual companies. It is therefore difficult to evaluate the industry's claim of value creation when the only measures of value are aggregated across funds. Second and relatedly, internal fund-level measures of performance—which include "IRR," "DPI," and "MOIC"—do not track the performance of any portfolio company and can easily be manipulated because they lack standardization and verifiability, a point that we return to in the next Section.[63] Third, external measures of fund performance—the same measures that generated the rise in investment interest in the 1980s and 1990s—may be misleading because they are benchmarked to public indices that are composed quite differently from the typical PE fund. As noted previously, the company size and economic sector of the typical PE fund differ substantially from the S&P 500 index to which comparisons are frequently made.[64]

Without reliable ongoing measures of performance, the best driver of accountability in the PE model is the need to sell portfolio companies in an arm's length transaction, a process that tests gain creation during the period of PE ownership.[65] "Exit" forces PE sponsors to submit to an external assessment of their ability to create value, and thus their entitlement to the fees paid by investors for their value-creating services and, incidentally, the public subsidy of free riding on public company disclosure.[66] Exit washes out the confounding effects of index benchmarking on the assessment of PE performance and thus allows comparisons of value-creation within a sector and on a firm-specific basis.

In the recent periods, that accountability structure has broken down for PE. The fall off in exits is a widely reported fact about PE. For example, the McKinsey Global Private Markets Report for 2025 portrays the matter this way:[67]

> …[T]he global backlog of sponsor-owned assets in their divestment period, awaiting an exit, is bigger than at any point in the past two decades—in terms of value, count, and as a share of total portfolio companies.
>
> Consider these statistics. In 2024, more than 18,000 companies had been under PE ownership for more than four years—more than six times the number in 2005. This means that 61 percent of buyout-backed portfolio companies have been held beyond the four-year mark by sponsors.

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[63] *See infra* notes 113-116.
[64] *See supra* note 58.
[65] The alternative performance measures offered as a substitute, as we shall discuss below, are an inadequate substitute to assess the performance of PE as an organizational model that accounts for an increasing share of the economy.
[66] *Cf.* Per Stromberg & Christian Thomann, *Private Equity Ownership and Firm Performance: A Framework for Interpreting the Evidence* (reviewing the evidence studying the private equity industry and finding that it predicts that temporary PE ownership is optimal), https://www.ecgi.global/publications/working-papers/private-equity-ownership-and-firm-performance-a-framework-for?mc_cid=1816c2a193&mc_eid=4cf14ef8ae.
[67] MCKINSEY & CO., GLOBAL PRIVATE MARKETS REPORT 2025: BRACED FOR SHIFTING WEATHER 72 (2025).

> The average hold time for buyout assets was 6.7 years in 2024, a full year more than the 20-year average of 5.7 years.[68]
>
> It's not just "market conditions" that have made disrupted exit, but rather "mismatch between buyer and seller price expectations." The sponsors "marks" on maturing assets (those held for at least four years) are now (in 2024) substantially higher (17%) than would be justified by actual sales, based on comparable EBITDA multiples.[69]

Ernst & Young, another consultancy, drew similar conclusions on the basis of a 2025 survey of PE professionals at a broad range of firms as well as data gathered from industry sources Pitchbook and Preqin.[70] EY reports that "78% of respondents report holding assets for more than five years" and that as of 2025, "35% of assets have been held [for more than] 6 years." Asked why the firm held on assets for a prolonged period (five or more years), the two most common reasons were: "the asset has not reached [our] growth target" and there existed a "valuation gap."[71]

In the sections that follow, we provide an original documentation of the PE exit problem with a study of public to private transactions from 2005 to 2023, relying on data from Pitchbook. We first describe the different exit types that exist across the PE investment landscape. We then document a troubling pattern of exits: we see unsatisfactory proof of exit, a declining rate of exit, a lengthening holding period before exit, and most worryingly, an increase in exits of diminished verifiability. All of these undermine the most important form of accountability in this industry that encompasses a broad swathe of the U.S. economy.

i. The Nature of Exit Across the Acquisition Types

Before describing our exit study, we first pause to provide more detail about the PE acquisition cycle and what exactly we mean by "exit." PE activity can be broken into three distinct categories. The first involves taking public companies private, also known as "public to private" or "P2P" transactions. Such transactions are a linear descendant of the LBOs (and MBOs) of the 1980s. The second is an "independent to private" or "private to private" transaction. The third is a "divisional" purchase in which a PE fund acquires a division of a public company, a variant on "public to private."

As this analysis reveals, private equity sponsors are major participants in the mergers and acquisitions market. Over the past two decades PE acquisitions annually have accounted for more than 20 percent of total acquisitions, approximately $250 billion in value in recent years.[72]

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[68] *Id.* at 75 (citing Hamilton Lane). *See also* PITCHBOOK, *PitchBook Analyst Note: How Macro Risks Are Shaping the Outlook for US Private Markets* 14 (Feb. 10, 2023) ("[T]he gap has been caused primarily by extreme markups in private valuations that have little chance of ever being fully realized.").

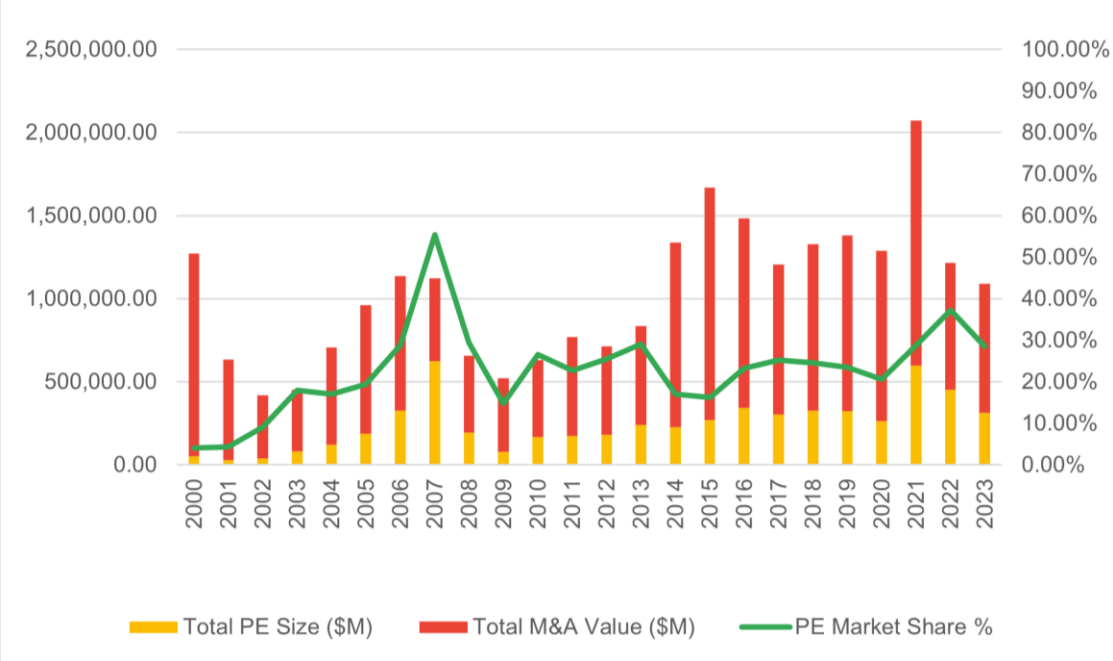
[69] *Id.*

[70] ERNST & YOUNG, *What can private equity do now to finish strong?* (June 11, 2025), https://www.ey.com/en_gl/insights/private-equity/what-can-private-equity-do-now-to-finish-strong.

[71] *See also* Maureen Farrell, *Once Wall Street's High Flyer, Private Equity Loses Its Luster*, N.Y. TIMES (Dec. 23, 2025), https://www.nytimes.com/2025/12/23/business/private-equity-stock-market.html; Mark Maurer, P*rivate-Equity Assets Stuck in 'Zombie Funds' Are at a Record High*, WALL S. J. (July 21, 2026), https://www.wsj.com/finance/investing/private-equity-assets-stuck-in-zombie-funds-are-at-a-record-high-4dbd01be?mod=hp_lead_pos5

[72] The data is not complete because many acquisitions, particularly prices, are not reported in public filings but rather to Pitchbook only, and sometimes not at all.

Figure 2. U.S. Private Equity Acquisitions as Share of Total US M&A, 2000-2023



Sources: Mergerstat and Pitchbook

As discussed, the core PE strategy is to buy a company and invest resources or cut costs in order to create value in anticipation of an eventual exit. There are four ways that PE sponsors have come to exit: an IPOs: a sale to a "strategic buyer" in a so-called "trade sale," a "secondary" (or "tertiary") sale to another PE sponsor, and, more recently, a "self-sale," through a sale to a "continuation fund" with a different group of investors.[73]

Presumably prices obtained in arm's-length exits like an IPO or a trade sale provide a market-based measure of value. Secondary transactions, however, are rife with agency conflict issues—what extra value can a second PE sponsor create that wasn't achievable by the first PE sponsor? Embedded in this question is a series of tangible concerns. One agency issue is the so-called "money-burning" problem, in which sponsors find themselves with a surplus of funds as the investment period of a particular fund runs out. Search costs within the PE sponsor community are low, which smooths the way to a secondary acquisition. A related issue is the "fee extraction" issue, in which funds collaborate to pass around assets to allow the purchasing fund to levy fees from a different set of investors. As Professors Kastiel and Nili explain, secondary exits through a continuation fund put these conflicts in stark relief: a conflict between "legacy" and "new" investors, and between investors and the sponsor, now able to extend the fee-earning period and to use private information for its own benefit in

[73] On the relatively new but increasingly important phenomenon of continuation funds, *see* Kobi J. Kastiel & Yaron Nili, *The Rise of Private Equity Continuation Funds*, 172 U. PA. L. REV. 1601 (2024).

allocating assets to the continuation fund.[74] One upshot is to raise concerns about whether secondaries create a "circular" structure (essentially a Ponzi scheme,[75] which we dub a self-inflating bubble).

There is also the "back-scratching" problem, where one fund agrees to purchase assets at a high price in exchange for similar treatment in a future deal. Obviously, this conflict is particularly pronounced when the funds are related, but they can also crop up in transactions between unaffiliated funds. Although PE sponsors compete in fundraising and identifying buyout opportunities, they also coordinate on many deals. Moreover, the sponsors collectively have an interest in protecting the halo effect of PE as an asset class. As the clock runs down on a holding period or a particular PE sponsor is under pressure from limited partners for a distribution, there is an incentive to accommodate sellers with the understanding that reciprocation is expected, particularly where the acquirer has a money to burn.[76] As a result of these agency issues, it is no surprise that the empirical evidence studying secondary transactions finds evidence of conflict.[77]

Secondary sales have been part of the PE exit story for a long time, but their significance has grown in ways that are troubling.[78] Kaplan & Stromberg report that secondaries grew from 13% of the transactional total value in 1995-1999 to 26% in 2005-2007.[79] As noted above, Pitchbook reports that more than a third of 2025 exits were through secondaries.[80] Jeffries reported that for Q1 2025, secondaries amounted to $103 billion, breaking the record set in Q1 2024 of $61 billion. Moreover, there is a reason to suspect the valuations achieved in the sales: according to Jefferies, "[a]verage

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[74] *Id.* at 1623-35. *See* Alexandra Heal, *Private Equity Backers Raise New Conflict Concerns Over Sweetheart Deals,* FIN. TIMES (Apr. 26, 2026), https://www.ft.com/content/ded6dc6f-9632-450d-ac62-ad80614436da; Jeff Barnes, *Continuation Funds: How PE Managers Restart the Fee Clock on Their Best Assets*, ANGEL INVESTORS NETWORK, May 29, 2926, available at Continuation Funds: What PE LPs Need to Know

[75] Heal, *supra n.* 74. (quoting a senior officer at large asset manager).

[76] *See* Sridhar Arcot, Zsuzsanna Fluck, José-Miguel Gaspar & Ulrich Hege, *Fund managers under pressure: Rationale and determinants of secondary buyouts*, 115(1) J. FIN. ECON. 102 (2015); Swaminathan Balasubramanian, Armando R. Gomes & SangMok Lee, *Mergers and Acquisitions with Private Equity Intermediation*, 87 J. CORP. FIN 102611 (2024).

[77] An empirical analysis of secondaries that covers 1986-2007 concludes with the sound of one hand clapping: "[O]ur evidence paints a comprehensive and nuanced picture of SBOs [Secondary Buyouts]: not all SBOs are money-burning devices." François Degeorge, Jens Martin & Ludvic Phalippou, *On Second Buyouts*, 120 J. FIN. ECON. 124 (2016). It is noteworthy that this article, which can be read as positive evidence for secondaries as an exit strategy despite its mixed message, relies on data from 1986 to 2007. Its positive conclusions are of doubtful relevance for today, because first, the data comes from an era in which targets were commonly subject to mandatory disclosure because of public debt finance (or look-back disclosure in connection with IPOs) and second, it reflects an era long before the more recent flood of money into PE.

[78] Some readers would dispute the claim that "secondaries" are a problem because often PE sponsors may have different capabilities for additional value creation in the private space; Moreover, sponsors have own-firm maximization objectives that would prevent them from over-paying for an asset or accepting a lowball offer. But this objection ignores the dynamics we describe, in which PE sponsors who deal with one another time face common problems that can be addressed through sometimes-cooperative rather than competitive behavior. One sponsor may face limited partners with strong liquidity needs; another sponsor may have more committed capital than currently available opportunities, and their positions may be reversed from time to time. As PE guru Josh Lerner once put it: "When you have repeated relationships, you are just not going to go to war with the same ferocity." *See* Antoine Gara, *The Private Equity Club: How Corporate Raiders Became Teams of Rivals*, FIN. TIMES (Aug. 8, 2022), https://www.ft.com/content/aec70aab-7215-4fa7-9ee3-1224d967dc28. As put by an anonymous industry source in the same article: "Everyone is a competitor, a collaborator and a partner."

[79] Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23(1) J. ECON. PERSP. 121, 129 tbl.2 (2009).

[80] Pitchbook further reports that for so-called middle-market companies for the first quarter of 2026, "[s]ponsor-to-sponsor deals captured 69.5% of exit value … and the IPO window stayed shut." PITCHBOOK, Q1 2026 US PE Middle Market Report (June 12, 2026).

pricing for all LP portfolios was 90% of NAV,"[81] which is another way of saying that reported values had been inflated by 11% on average.[82]

ii. Public to Private Exit Evidence

We focus our empirical analysis on the highest visibility segment of the PE universe—public to private transactions. This segment of the market is particularly important because public companies represent a large segment of American economic activity; as such, private equity purchases have the potential for particularly disruptive effects in terms of layoffs and other employment disruption, as well as macroeconomic effects on the U.S. economy. Moreover, in a public to private deal, the company is no longer subject to securities disclosure requirements, essentially rendering their future activities a black box.

We collected data about public to private transactions that occurred from 2000-2024 from Pitchbook. In total, we accumulated information about 1,407 deals, including information about the sponsor, exit timing (if any), and the type of exit. To ensure data integrity, we screened out deals that were smaller than $50 million and deals that were categorized as incomplete.

We then used a name-based matching algorithm to link entry events to their corresponding exits. At the outset, we standardized company names to account for any name changes during the period and then paired each company with an exit, checking to ensure that there was no double counting of an entry with multiple exits. The end result of this exercise was a company-level exit database.

One of the central findings of our empirical investigation was that it is very difficult to learn much about exits from the available data sources. Pitchbook, which seems to be a favorite of recent empirical research looking at deal level characteristics,[83] collects information through myriad ways, but no one is obliged to report to Pitchbook; therefore, its coverage of exits and especially exit values is, charitably, incomplete.[84] For the full universe of PE acquisitions, the match rate of acquisitions to exits was so low as to beggar belief, well below 50% by both number and acquisition values of particular vintages. This low rate of exit realizations is probably at least in part because the tallying of exits is not systematic and the dollar value of smaller exits is not material for purposes of the trade press or sources that Pitchbook scours for its additional information.[85]

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[81] *Id.* at 3. This is up from 89% in 2024.

[82] The need to accommodate the push for secondaries has generated its own subspecialty. *See* Alexandra Heal, *Lazard to Buy Private Advisory Group Campbell Lutyens in $575mm Deal*, FIN. TIMES (Apr. 30, 2026) ("[Secondaries] have exploded in popularity over the past few years, large driven by private equity firms' troubles selling companies at desired valuations on the open market. This has led them and their investors to find other ways to generate cash.").

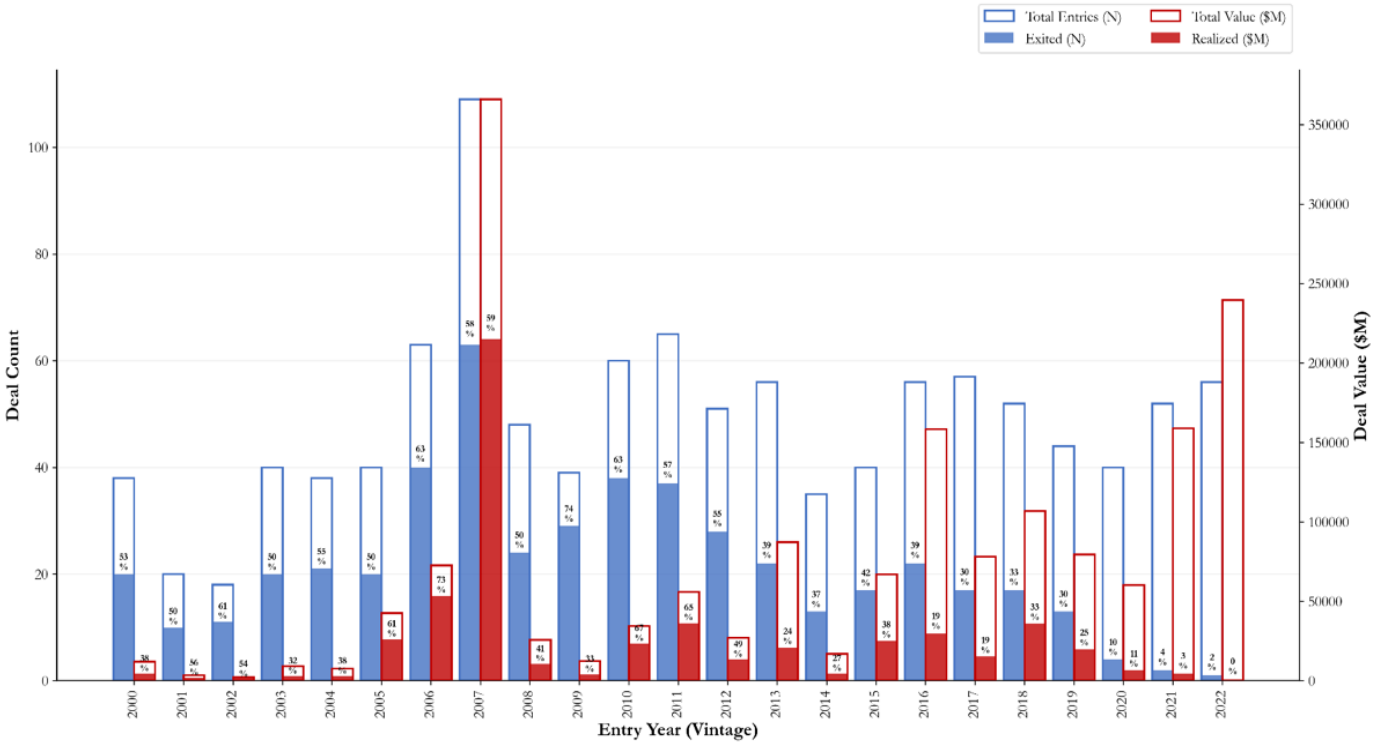
[83] *See* Ludovic Phalippou, *Navigating Private Equity Data: A Critical Review of Key Sources* (Jan. 1, 2026, https://ssrn.com/abstract=6013335.

[84] State Street, because of its custodial relationship with many of the relevant parties, seems to have the best insight into the sector and uses proprietary information to construct the State Street Private Capital Index. But the terms on which it receives and reports information are inconsistent with the accountability measures that we think appropriate.

[85] Some would draw a negative inference from such opacity. *See* William W. Bratton, *Private Equity's Three Lessons for Agency Theory*, 3 BROOK. J. CORP. FIN. & COM. L. 1, 21 (2008) ("Buyout exit, then, is a tricky, sticky business. Big payoffs come from the [IPOs] and negotiated sales to operating companies, even as most targets are disposed of in the low-return back room"). Moreover, data recently provided by Pitchbook and Preqin to the Wall Street Journal suggests that the gaps in exit-matching that we identify may be less because of missing data and more because of the accumulation of

The data were more robust for the public to private acquisitions, although they still appear to contain holes; as such, we do not make definite statements about exits and holding periods, and instead uncover trends. First, consider Figure 3, which describes exit data for public to private acquisitions from 2000-2022.[86] For each vintage, the blue (left-hand) bar shows the number of deals; the filled-in part of the bar shows the number of deals for which we found a matching exit. Similarly, the red (right hand) bar shows the "entry value" of deals at the time when made; the filled-in part of the bar shows what fraction of the vintage's entry value is matched with an exit. The numerals are the specific percentage of matched deals by number and entry value. The match rate for these large transactions is less than 100%, even where the time frame extends for more than a decade, which likely results from data quality issues. For later vintages, however, the match rate sharply declines beginning in 2017 and declines even further thereafter. One might say that exits come close to disappearing.

Figure 3. Take-private exits by number and value, compared to acquisition, 2000-22



Source: Pitchbook, Research Assistant compilation

The dramatic fall-off in exit percentages for the full universe of PE deals, by number and value as measured at the time of acquisition, is explicitly shown in Figure 4. Post-financial crisis acquisitions

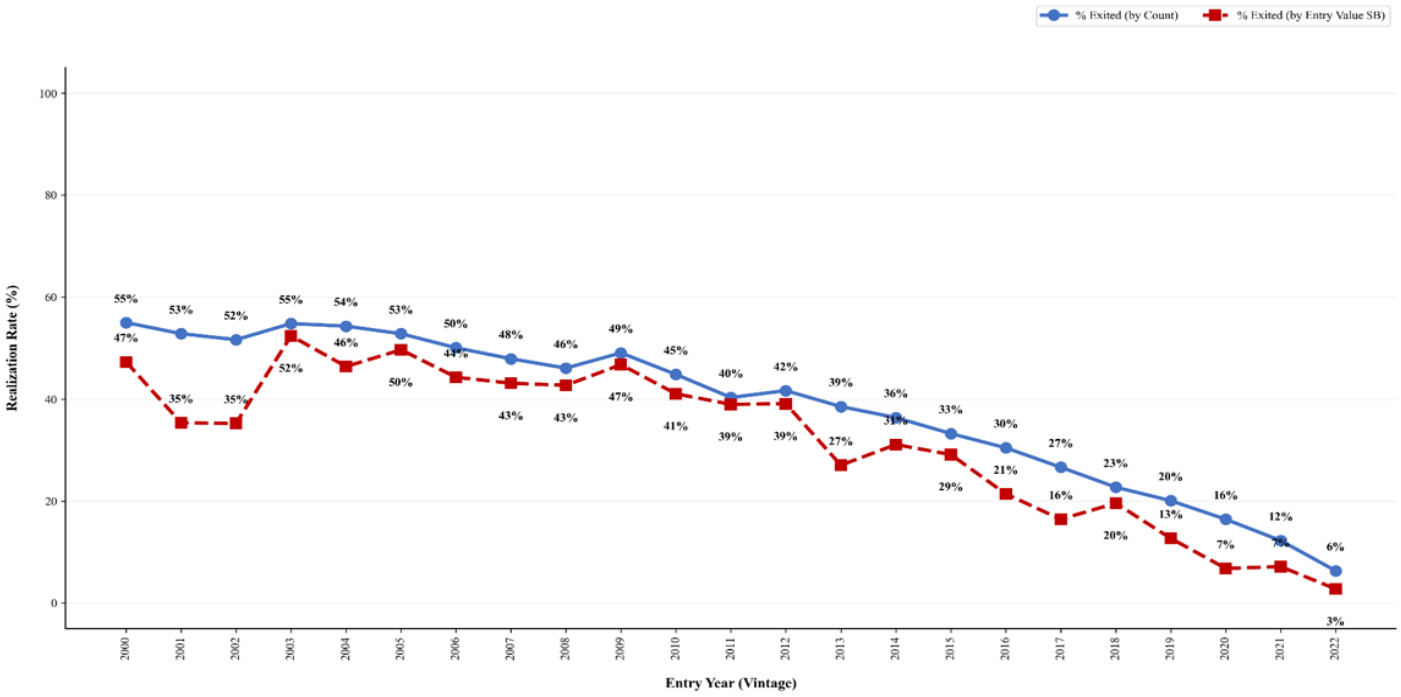
unexited investments. As of 2025, PE funds held approximately $300 billion in assets (measured by NAV) held for 7-9 years (our vintages 2016-2018) and $300 billion in assets held for 10 or more years (our vintages 2015 and earlier). Mark Maurer, P*rivate-Equity Assets Stuck in 'Zombie Funds' Are at a Record High*, WALL S. J. (July 21, 2026), https://www.wsj.com/finance/investing/private-equity-assets-stuck-in-zombie-funds-are-at-a-record-high-4dbd01be?mod=hp_lead_pos5 ("Overall, the estimated value if portfolio companies that haven't been sold [of all vintages] totaled $3.91 trillion as of September 2025."). Of course sponsors are eager for the exit possibilities associated with new money from retirement savers.

[86] This "full universe" reflects deals with an acquisition price of at least $50 million.

simply do not exit at the same rate as before the crisis. Vintages launched in the middle of the peak-PE mid-decade period begin to experience exits at a declining rate. And exits decline over the same period in which PE is booming, as reflected in Figure 1. Note further that the exit percentage by acquisition value is consistently lower than by number. This means that the bigger transactions are less likely to exit than the smaller ones.

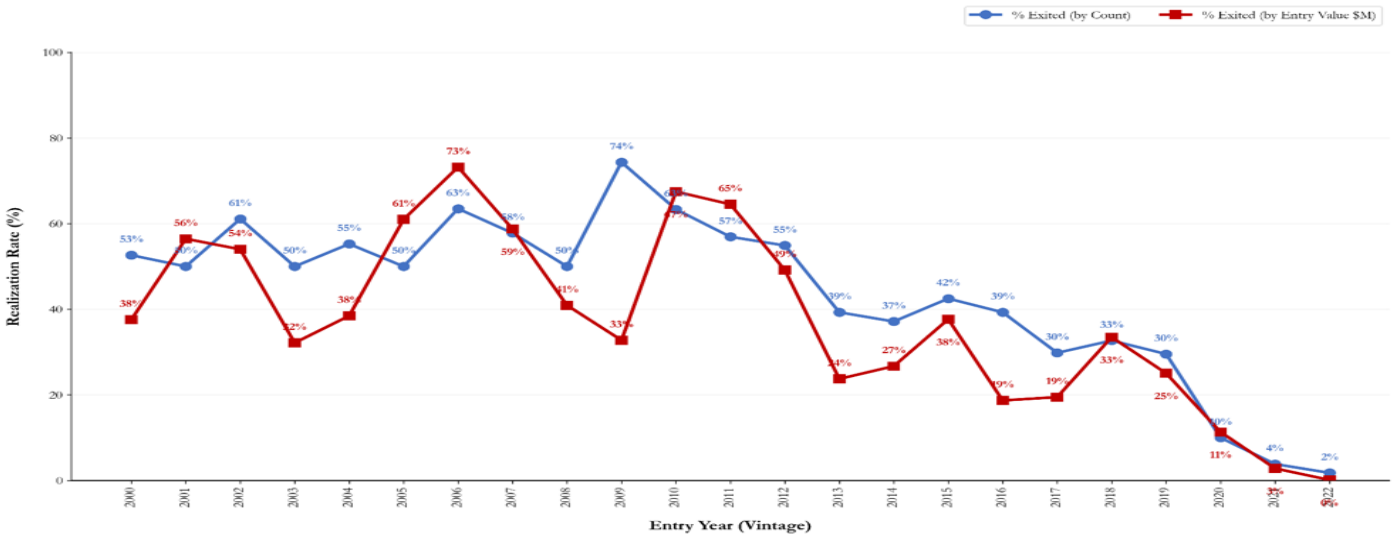
The fall-off in exit percentages for public-to-private deals, by number and value measured at the time of acquisition, is graphed in Figure 5. As with the full universe, the exit rate is declining at a time when PE is booming. In the first half of the decade, the exit percentage by acquisition value is consistently lower than by number, meaning that bigger transactions are less likely to exit than the smaller ones. This difference evens out in the back-half of the period, but exits by number and value have sharply declined by then.

Figure 4. All PE exits by number and value compared to acquisitions, percentages, 2000-22



Source: Pitchbook, Research Assistant compilation

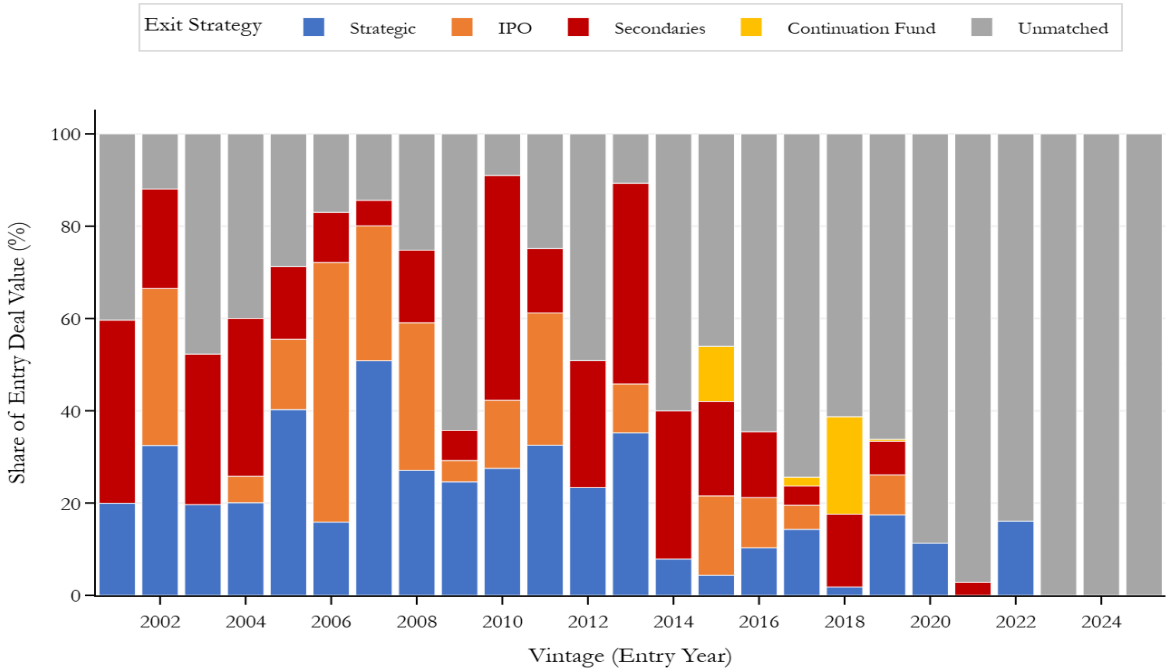
Figure 5. Take-private exits by number and value compared to acquisitions, percentages, 2000-22



Source: Pitchbook, Research Assistant compilation

For the exiting public to private transactions, what is the nature of the exit? Figure 6 shows, for the public to private subsample, both a significant fall-off in the percentage of exits (by number) for the vintage years beginning in 2017/2018 and a significant shift away from sales to a strategic buyer and toward secondary sales. IPOs, which made up a meaningful if small percentage of exits in the first half of the period seem to disappear (with rare exception) after 2016.

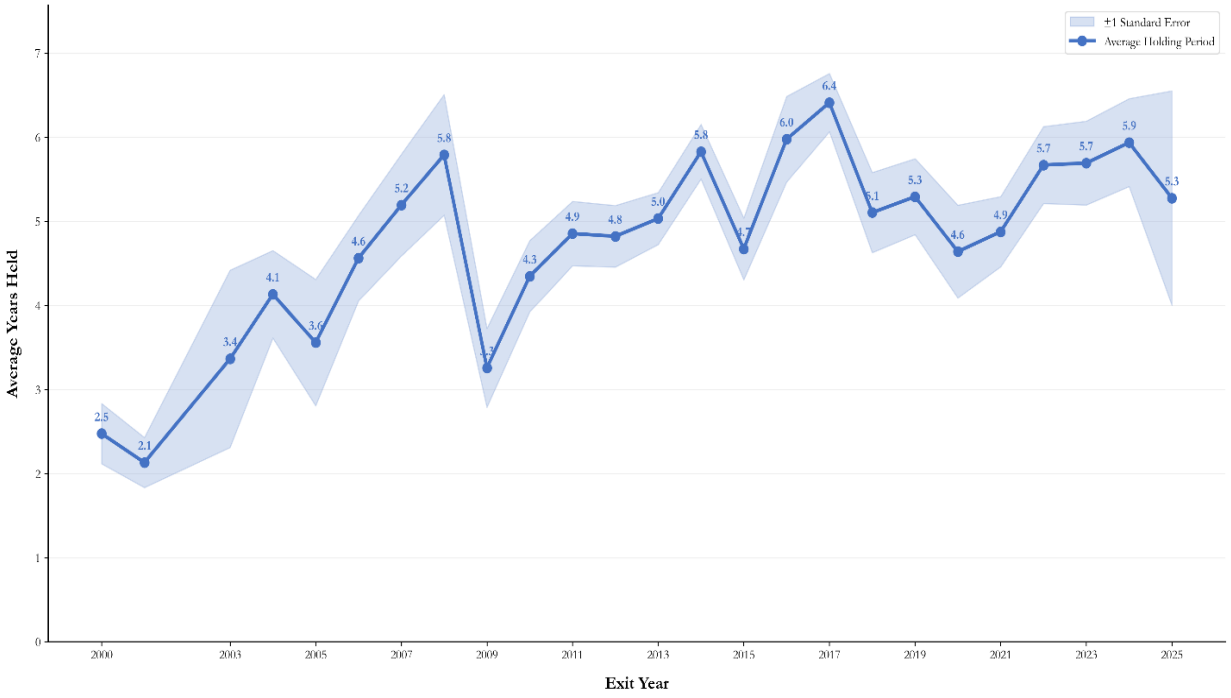
Figure 6. Exit Composition by Vintage, 2000-2024



Source: Pitchbook and reclassification of Pitchbook categories on criteria of arm's-length, research assistant compilation.

Finally, we examined the holding period of public to private transactions by vintage year conditional on exit. Figure 7 shows the average (mean) holding period and the +/- one standard error of the plot. The pattern shows that as PE gains AUM over the post-Global Financial Crisis period, the holding period (conditional on exit) increases.

Figure 7. Average Holding Period Trend (+/- 1 Standard Error), 2000-24



Source: Pitchbook, Research Assistant compilation

Even with imperfect data, the trends shown in these figures put the accountability problem in bold relief. As PE gains AUM over the post-Global Financial Crisis period, the *rate* of exit, measured by number and value of acquisitions begins to decline. Later in the period, the *verifiable quality* of exit also begins to decline. Even for companies that do exit, the holding period increases. This increase in the holding period is itself a negative signal, since a delayed exit postpones the realization of carry.

As discussed, exit is a critical component of accountability for private equity. If a significant fraction of private equity assets is being held for longer and longer, or simply traded from pocket to pocket, there is no way to test the private equity thesis that its activity leads to value creation. Comparative judgement about the efficiency of public company governance is distorted. Concerns about conglomeration and resource misallocation loom large.

C. Beyond Exit: Other Sources of Diminished Accountability for PE Portfolio Companies

This Section highlights three additional sources of diminished accountability for PE funds and their portfolio companies. It begins by discussing the evolution away from performance-based fees (paid as carried interest) and toward management fees based on the size of the portfolio. It then turns to discussing the evolution of private equity as an asset class and the expectation that prudent

diversification encompasses private market investing. As a result of this trend, sophisticated investors have increasingly poured money into private equity funds, fighting for access to a limited number of sponsors. This influx of capital will only increase with recent pushes to open private equity investing to a new class of unsophisticated retail investors. Finally, we discuss how publicly available measures of fund performance fail to provide sufficient accountability for portfolio company performance.

i. Fees

Compounding the exit issue is the fact that the business model of private equity has evolved to focus less on performance-based fees, and more on management fees paid regardless of performance. Although performance-based fees are not a guarantee of performance—you could give a law professor $1 million for each fly knocked over the Yankee Stadium wall and you might never face a payday—they offer better incentives to monitor and invest energy in portfolio companies than the alternative. But the success of the industry has spawned an evolution in fee structure, where management fee streams have overtaken performance-based carry.[87]

Recall that the typical private equity compensation model is 2% of committed capital, charged annually for the life of the fund, and then 20% of the realized performance (typically after reaching a pre-specified hurdle). This means that the GP of a $1 billion fund may earn $20 million in annual fee revenue, potentially $200 million over a 10-year life, regardless of the performance of the companies that are bought or sold. Moreover, while the performance fee is typically contingent (on outperforming certain benchmarks, or returning capital to the limited partners[88]), the two percent fee is stable.[89]

As this brief introduction makes clear, this fee structure encourages not just buying and investing in companies, but fundraising that results in a consistent source of income. And as the industry is flooded with cash—a point we return to in the next Section—the ability to fundraise into perpetuity becomes easier, even as finding attractive investment opportunities becomes more challenging.

It is no surprise, then, that many private equity organizations count most of their income from management fees. Consider Apollo Global Management, which reported $921 million in carried

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[87] A variant on this problem are the cases in which sponsors claim performance fees on the basis of unrealized gains, particularly in funds that permit partial redemption. See Jonathan Weil, *How Some Private-Equity Managers Collect Big Fees on Paper Gains*, WALL ST. J. (June 28, 2026_, https://www.wsj.com/finance/investing/how-some-private-equity-managers-collect-big-fees-on-paper-gains-2f449976 (noting examples including StepStone Private Venture and Growth Fund posting a 43% for its fiscal year by marking up illiquid assets while capping redemptions at 2.5% of its shares outstanding each quarter to protect against a run on its assets; other expenses of large performance fees exceeding cash realizations including TPG Private Equity Opportunities and KKR Private Equity Conglomerate).

[88] *See infra* n 43 (discussing the American distribution "waterfall").

[89] This description of fees is subject to the variation in limited partnership agreements. The 2% headline figure generally applies during the "investment period," when the sponsor is generating deals (typically years 1-6 of a typical 10-year term). In later years, the "fee base" may shift from "committed capital" to "invested capital," reduced by exits or other distributions, and in the later "harvesting years," the percentage may decline to 1.5% or less. But these fees are often augmented by additional fees for services provided to portfolio companies, for "monitoring" or arranging financing, although parties may agree that these fees "offset" the standard management fee. *See, e.g.*, Ludovic Phalippou, Christian Rauch & Marc P. Umber, *Private Equity Portfolio Company Fees*, 129 J. FIN. ECON. 559 (2018). In Metrick & Yasuda's simulation based on contemporary arrangements, most of the sponsor's expected compensation comes from fees, not carry. Metrick & Yasuda, *supra* note 11.

interest from 2024, and $2.8 billion in management fees.[90] Likewise, in 2024, Blackstone generated $7.2 billion in management fees, and only $3.8 billion in carried income.[91] And in 2024, KKR broke new records for fundraising, and therefore management fees: it earned $3.5 billion in management fees in its asset management business, and only $608 million in carried income.[92] It reported that "Of the $312 billion of carried interest eligible AUM, $217 billion is above cost and accruing carry," which is another way of saying that approximately one third of AUM has deteriorated in value since acquisition.

Such an evolution would have been deeply concerning to Michael Jensen, the earliest booster of the private equity model. In 1989, he explained: "I look with discomfort on the dangerous tendency of LBO partnerships, bolstered by their success, to take more of their compensation in front-end fees than back-end profits earned through increased equity value. As management fees and the fees for completed deals gets larger, the incentives to do deals rather than *good* deals also increases. Institutional investors and the economy as a whole are best served when the LBO partnership is the last member of the LBO Association to get paid and when the LBO partnership gets paid as a fraction of the back-end of the deals, including losses."[93]

In an environment where fees tied to performance make up a smaller fraction of sponsor income, exit becomes even more important for accountability. The original contract that emerged between the LBO organizations and specified a hard constraint: finite life. Sponsors could not indefinitely hold onto a portfolio company; exit was required. The model placed a premium on gains but also time, because the investors' assessment of PE's performance would take account of the time value of money. Holding gain constant, performance and the holding period would be inversely related. Therefore, the absence of exit and the increased emphasis on management fees present compounding accountability issues: as exit diminishes, the importance of carried interest in guiding sponsor behavior also diminishes, further weakening the incentive to identify attractive investment opportunities and invest in value creation.

ii. Institutional Environment

We have described the increasing importance of management fees in the world of private equity, which is the product of a related trend: an institutional environment that leads to self-sustaining fundraising opportunities for private equity funds. As KKR itself now proclaims, "private equity has become a mainstream asset class."[94] Private equity returns are said to vary with the returns of the public market and therefore an investment allocation to this "asset class" enhances portfolio

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[90] *See* APOLLO GLOB. MGMT., INC., *Apollo Reports Fourth Quarter and Full Year 2024 Results* 5, 14 (Feb. 4, 2025), https://ir.apollo.com/_assets/_4a183041ff22f15d5404e90bf1c78608/apollo/news/2025-02-04_Apollo_Reports_Fourth_Quarter_and_Full_Year_2024_540.pdf.

[91] *See* BLACKSTONE INC., *Blackstone Reports Fourth Quarter and Full Year 2024 Results* 1 (Jan. 30, 2025), https://www.blackstone.com/wp-content/uploads/sites/2/2025/01/Blackstone4Q24EarningsPressRelease.pdf.

[92] *See* KKR & CO. INC., *KKR Reports Fourth Quarter 2024 Financial Results* 3 (Feb. 4, 2025), https://mms.businesswire.com/media/20250204725162/en/2371844/1/KKR_Q4%2724_Earnings_Release.pdf?download=1&_gl=1*7fz47q*_gcl_au*MTAwNDA3ODE1MC4xNzgzMTAzMzI0*_ga*OTA3MDcyMDUxLjE3ODMxMDMzMjU.*_ga_ZQWF70T3FK*czE3ODMxMDMzMjQkbzEkZzAkdDE3ODMxMDMzMjQkajYwJGwwJGgw.

[93] Jensen, *Eclipse of the Public Corporation*, *supra* note *56*,

[94] Amanda Siegel Lansky & Courtney Schwartz, *In Brief: Private Equity Decoded: An Asset Class Playbook*, KKR (Dec. 2025), https://www.kkr.com/insights/asset-class-playbook-private-equity.

diversification, the holy grail in optimizing risk adjusted returns.[95] The expansive growth of private markets has accelerated this trend—as the public market diminishes in importance in the overall investment universe, the argument that prudent diversification requires access to private markets strengthens considerably. Investment consultants to public pension funds, endowments, and sovereign wealth funds have played a large role, arguing that PE provides an "illiquidity premium," "low correlation with public markets," and "access to alpha."[96] Moreover, claims that private equity returns are superior to public equity returns (or at least, they were several decades ago)[97] have historically increased the willingness for institutional investors to increase allocations to private equity investments. In particular, public pension funds hoping to overcome projected retirement benefit shortfalls make high PE allocations based on the extrapolation of prior results rather than updated projections.[98] In light of the higher fee structure than for public equity investing, asset managers are eager to promote these private market alternatives.

The upshot has been the flow of trillions of dollars into the private equity industry.[99] It has also led to remarkable consolidation, allowing a handful of large financial conglomerates to accumulate assets at a rapid pace.[100] The ready availability of investor capital diminishes accountability: even underperforming funds are able to secure capital,[101] and investors are generally hesitant to question the sponsors for fear that it could jeopardize their access to the next fund.[102]

Simply put, investors—even sophisticated wealthy individuals ("accredited investors") and institutional investors ("qualified institutional buyers")—are not always well positioned to make informed decisions about whether to invest in a fund, and then after investing, monitor the fund's performance on an ongoing basis. As limited partner complaints demonstrate,[103] only the largest institutional investors (and those that co-invest with the fund in the portfolio company) have monitoring clout. And pushes to democratize private equity would further reduce accountability by drawing trillions of additional unsophisticated investors into private equity investments.[104] Although institutional asset managers will serve as a gatekeeper, they may lack leverage to demand the information needed to judge performance; more cynically, because private equity investments garner higher fees than many alternatives, asset managers have strong incentive to offer and even push

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[95] Harry M. Markowitz, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS 3 (1959); Harry M. Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952).

[96] *See, e.g.*, Aleksandar Andonov, Matteo Bonetti & Irina Stefanescu, *Choosing Pension Fund Investment Consultants* 3 (Mar. 2026), https://ssrn.com/abstract=4306217 ("As the consulting industry has become more concentrated, this micro-level convergence around consultant hiring aggregates into a broad clustering of portfolio structures and common exposures across the $6.7 trillion U.S. public pension industry.").

[97] *See* Robert S. Harris, Tim Jenkinson & Steven N. Kaplan*, How Do Private Equity Investments Perform Compared to Public Equity*?, 14 J. INV MGMT. 14, 15 (2016).

[98] *See* Aleksandar Andonov & Joshua D. Rauh, *The Return Expectations of Public Pension Funds*, 35 REV. FIN. STUD. 3777 (2022).

[99] *See MCKINSEY & CO.*, *GLOBAL PRIVATE MARKETS REPORT 2025: BRACED FOR SHIFTING WEATHER* 11 (2025) (exhibit showing global growth from 2000 to 2004); *Id.* at 9 (exhibit showing North America growth).

[100] Moore & Hale, *Towards a Post-Jensenian Private Equity Paradigm*, *supra* note 11.

[101] Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *supra* note 46 at 9571 (2025) (citing papers showing that buyout groups with a track record of poor performance (and poor expected performance) still raise follow-on funds).

[102] *Cf.* Kastiel & Nili, *The Rise of Private Equity Continuation Funds*, *supra* note 73 (showing that private equity investors rarely litigate due to concerns about access).

[103] *See generally* INST. LTD. PARTNERS ASS'N, *The Future of Private Equity Regulation*, *supra* note 10.

[104] *Id.*

investors to choose them.[105] For this reason, democratization of private equity is likely to result in a very large influx of capital, with an uncertain level of scrutiny in the process.[106]

The presence of creditor financing in private equity does not solve the accountability problem. In theory, highly leveraged companies will be subject to external discipline in the form of creditor monitoring, especially from the sponsors of private credit funds. But creditor monitoring is compromised in this setting: studies show that PE borrowers face less creditor discipline than public borrowers in the face of a breached covenant, suggesting that creditors are also subject to the same relationship-preserving pressures as equity investors.[107] The shift to private credit has exacerbated this issue—direct lenders are often more willing to loosen lending standards, offer covenant-lite loans, and accommodate sponsors to avoid taking write-downs.[108] Even in a world of strong creditor monitoring, creditors seek only to ensure that they are repaid, not that the company perform well enough to generate returns for equity investors. As such, creditor monitoring at its best is not a solution to the accountability problem we identify.

iii. Inadequate Performance Measures

As discussed, private equity funds offer various measures of performance to investors, and yet, these measures do not provide accountability for two mains reasons: first, due to the inaptness of *portfolio* measures of performance ("external validity"), and second, due to the unreliability of the performance measures on offer ("internal validity").

First, on the question of external validity, the current accountability model is based on the performance of a particular PE *fund*, which is in fundamental tension with the method by which PE ownership is supposed to create value. The fund-performance model imagines the PE sponsor as a kind of active investor constructing a portfolio of investments—in essence, a special kind of closed-end fund in which the sponsor makes targeted governance interventions. Evaluating PE performance in this way mis-portrays what is supposed to be the PE project—achieving superior operating results at the *portfolio company level*. Even putting aside the credibility problems with current measures of fund-level performance, these measures simply provide a radically incomplete account of the sponsor's success in the place where it matters most.[109]

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[105] *See* Benjamin C. Bates, *Retail Access to Private Markets: What Are the Risks*? (Feb. 2006), https://ssrn.com/abstract=5381902 (providing suggestive evidence that funds sold only to wealthier investors perform better on average than funds sold more broadly and that poorer-performing products may be channeled to investors who are less wealthy and less financially sophisticated).

[106] *See, e.g.*, *VANGUARD*, *Do Private Assets Belong in 401(k) Plans?* (Sept. 23, 2025), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/do-private-assets-belong-in-401k-plans.html.

[107] *See* Sharjil Haque & Anya Kleymenova, *Private Equity and Debt Contract Enforcement: Evidence from Covenant Violations*, FIN. & ECON. DISCUSSION SERIES (Nov. 2023), https://doi.org/10.17016/FEDS.2023.018r1.

[108] *See, e.g.,* Finbarr Flynn & Harry Suhartono, *Pimco Sees Crisis of 'Bad Underwriting' in Private Credit*, Bloomberg (Mar. 11, 2026), https://www.bloomberg.com/news/articles/2026-03-11/pimco-blames-sloppy-underwriting-for-private-credit-reckoning; INT'L MONETARY FUND, *Global Financial Stability Report: The Last Mile: Financial Vulnerabilities and Risks* 71-72 (Apr. 2024); FIN. STABILITY BD., *Report on Vulnerabilities in Private Credit* 23-26 (May 6, 2026).

[109] Academic efforts to study whether and how PE affects the performance of portfolio companies quite limited precisely because of data limitations associated with non-disclosure. See generally Jonathan B. Cohn, Edith S. Hotchkiss & Erin M. Towery, *Sources of Value Creation in Private Equity Buyouts of Private Firms*, 26 REV. FIN. STUD. 257 (2022) (surveying literature). Cohn et al present a study of 288 firms acquired in private-to-private transactions between 1995-

This framing flaw becomes apparent in the way that "private equity" and "venture capital" are commonly bundled together as "private capital" for purposes of performance evaluation. Per now-common lore, the VC model is to place many bets on start-ups and other early-stage innovative companies with the hope that some percentage will become top performers, ideally "unicorns."[110] It therefore makes sense to see VC's as assembling a portfolio of sophisticated bets, with performance to be judged at the portfolio level. In this regard, the focus on PE *fund* performance has a certain path dependency to it—the original PE limited partnership deal structure was based on the VC models that had preceded it.[111] But the idea of generating high *fund-level* performance has never been the thesis behind PE's value creation—instead, the claim has been improved performance of *companies* in public-to-private transactions as well as helping private companies develop their real options. To take another example of an important difference between the models: The optimal failure rate of VC investments is high; thus they are equity financed, since debt sees only the downside risk and not the upside. The optimal failure rate of debt-financed PE companies is very low, because debt sees only the downside and the deadweight costs of bankruptcy are positive. In other words, the PE investment thesis relies on value creation for every company within the portfolio.[112]

The portfolio performance approach also produces significant deadweight costs of financial management. In the absence of exit, which generates cash for distribution, PE sponsors engage in financial management to provide faux distributions to their investors, which have liquidity needs for their core activities. Such measures can include recapitalizing individual portfolio companies to generate cash for distribution or obtaining so-called "NAV loans" – loans provided on the basis of the value of portfolio assets, to fund, in effect, a dividend from the portfolio as a "conglomerate." Neither of these financial maneuvers is aimed at maximizing the value of any portfolio company. Compare financial management at a standalone public company. Loosely speaking, the "unanimity theorem" is at work: shareholders should "unanimously" want management to pursue a single objective when it comes to financial management: to maximize the share price. A shareholder who needs liquidity can sell shares or borrow against their value, and firm-specific disclosure aids in this objective. Likewise, to determine whether a particular private equity fund is delivering value, some measure of individual company performance is necessary.

Second, on the question of internal validity, the available measures of portfolio performance are flawed to the point of being actively misleading. The most common cited measure of performance

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2009, using firm level data obtained on a confidential basis from the IRS, which shows a "modest increase in profitability" relative to a propensity-matched sample of public firms; the main benefit is a relaxation of financial constraints making it possible for the portfolio company to exploit growth opportunities and increase sales. And yet, this study focuses a small sample relative to the number of private deals over the period, took tremendous effort, and of course does not cover transactions enabled by the influx of addition funds in the post-global financial crisis period.

[110] *See* Sebastian Mallaby, THE POWER LAW: VENTURE CAPITAL AND THE MAKING OF THE NEW FUTURE (2022).

[111] William Sahlman, *The Structure and Governance of Venture-Capital Organizations*, 27 J. FIN ECON. 473 (1990).

[112] The inaptness of the portfolio model for PE valuation may help explain the diverging paths for "persistent" outperformance among the firms in PE vs. VC. The persistence of outperformance by the top firms was true for both VC and PE firms in the earlier period but now is true only for top VC firms. *See* Robert S. Harris, Tim Jenkinson, Steven N. Kaplan, Rüdiger Stucke*, Has Persistence Persisted in Private Equity? Evidence from Buyout and Venture Capital Funds*, 81 J. CORP. FIN. 102361 (2023). This may be because VC investment and management success is subject to market discipline in ways that PE firms no longer are. VC portfolio companies cannot rely on earnings or retained earnings for their growth; if they delay fundraising via an IPO, they need to persuade outside investors to fund successive rounds of equity investment. By contrast, PE portfolio companies rarely go for post-buyout external funds. Without exits, there is only muted accountability.

is "IRR," or "internal rate of return." As Professor Phalippou demonstrates, the reported figures, if taken to mean consistent annual growth rates obtained within a portfolio, would produce fantastical results because of the geometric effects of compounding.[113] Instead, the figures are constructed in a way that is disconnected from demonstrable value creation across the portfolio of firms. Early successes are taken to represent growth rates of the portfolio as a whole and across the portfolio's full duration.

Moreover, the growth rate can be inflated by the strategic use of borrowing. Suppose that an acquisition is financed by a draw-down from a "subscription" line of bank credit, and that this loan is taken out by a capital call from the limited partners shortly before the exit event that marks the realization of gain on the investment. The IRR on the limited partners' capital will dramatically overstate the sponsor's ability to create value, which ought to reflect gain over the holding period of the investment rather than the opportunistically timed gain on the LP's capital call.[114] Moreover, reported IRR is commonly based on the sponsors' "marks" of unrealized value among the companies owned by the fund. For these reasons, investors are increasingly souring on such a metric in favor of cash distributions.[115]

Subsidiary measures of performance include "DPI" (distributions to paid in capital) or "MOIC" (multiples of invested capital). These measures may be useful for limited partners' liquidity planning – how much money is returned for the money actually put in – but can be easily manipulated by the sponsor. Moreover, because these measures don't embed a time-value-of-money normalizer, they are, at best, an incomplete measure of sponsor performance. Similarly, "Total Value to Paid-In" depends on sponsor estimates of NAV, an increasingly large amount of which is "unrealized." This merely recapitulates the problem of measuring performance without exit. There is no reliable principle of verification.[116]

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[113] *See* Phalippou, *The Tyranny of IRR*, *supra* note 55, at 78-79.

[114] Standard setting for private funds reporting has been taken on by CFA Institute reporting has been taken on by the CFA Institute, which has promulgated "Global Investment Performance Standards." *See* CFA. INST., GIPS STANDARDS HANDBOOK FOR FIRMS: EXPLANATION OF THE PROVISIONS IN SECTIONS 1-8 (Nov. 2020), https://www.gipsstandards.org/wp-content/uploads/2021/04/gips-standards-handbook-firms.pdf. Adherence to the GIPS standard is not obligatory. But GIPS adherence is no solution to this mischaracterization of value creation in fact because (in the 2020 version) it specifically embraces "since-inception internal rate of return." *See* CFA. INST., MEMORANDUM RE: FINRA'S REGULATORY NOTICE 20-21 AND REFERENCES TO THE GIPS STANDARDS 2 (July 13, 2021), https://www.gipsstandards.org/wp-content/uploads/2025/04/memo-finra-reg-20-21-references-gips-standards-1.pdf. It is also notable that PE's returns are provided on an absolute basis, not market-adjusted or risk-adjusted. *See* Paul Gompers, Steven N. Kaplan & Vladimir Mukharlyamov, *What Do Private Equity Firms Say They Do*? 121 J. FIN. ECON., 449 (2016).

[115] *See* Luis Garcia, *Private Equity's Drought Claims Its Latest Victim – the IRR Metric*, WALL ST. J. (May 19, 2026), https://www.wsj.com/pro/private-equity/private-equitys-exit-drought-claims-its-latest-victimthe-irr-metric-0c176b83.

[116] *See, e.g.*, Stephanie Larocque, Sophie Shive & Jennifer Susteric Stevens, *Private Equity Performance and the Effect of Cash Flow-Flow Timing*, 48(9) J. PORT. MGMT. PRIV. MKTS. 86 (2022). Academics have pioneered some alternative measures, for example, the Public Market Equivalent Indices. In this measure, distributions are discounted to present value, added to retained NAV, and compared an equivalent purchase in a matched index. From there, a ratio is computed to compare PE with index performance. *See, e.g.*, Steven N. Kaplan & Antoinette Schoar, *Private Equity Performance: Returns, Persistence, and Capital Flows,* 60 J. Fin. 1791, 1797-1801 (2005). *See generally* Peter Morris & Ludovic Phalippou, *Thirty Years After Jensen's Prediction: Is Private Equity a Superior Form of Ownership?*, 36 OX. REV. ECON. POL. 291, 299–302 (2020) (summarizing empirical evidence on performance); William Magnuson, *The Public Cost of Private Equity*, *supra* note 56, at 1863–64.

In sum, the private equity accountability crisis created by diminished exits is unlikely to be corrected by investors armed with accurate and complete measures of fund-level performance. The available metrics can be easily manipulated by the fund; moreover, fund-level measures of performance obfuscate the PE-value creation thesis of firm-level performance. And this issue is compounded by the other accountability issues we have identified: the availability of a steady funding stream from investors who lack sufficient information to test the industry's claims about value creation and the fact that a sponsor's compensation is increasingly untethered from performance. The next Part reveals how this accountability problem has macroeconomic consequences by analogizing to the conglomerate era that dominated a half-century ago.

II. Private Equity Without Accountability: the Return of the Conglomerate

This part argues that PE without accountability runs into the same problem of hubris at scale that undermined the conglomerate movement of the 1950s, 1960s, and early 1970s—with all of the same economic risks.[117] The hostile takeover wave of the 1980s was in many respects to reverse the negative synergies of the conglomerate wave because the conglomerate wave had resulted in substantial misallocation of economic resources for a significant period.[118] There were powerful lessons learned that remain in the canon, in particular that management skill is not a general purpose technology. This conclusion has influenced the shape of public M&A in the years that followed. Acquisitions that result in unrelated diversification, typical of the conglomerate form, are highly disfavored today and are prone to produce negative acquiror returns upon announcement.

These lessons remain relevant for private equity. In the conglomerate era, management failed to create value in their assemblage of unrelated businesses; moreover, the inadequacy of market-based mechanisms to check conglomeration led to massive resource misallocation. Today, similar mistakes are being made at the private equity fund-level: sponsors are assembling diverse companies under a general claim of value creation without accountability measures to assess that claim. Of course, there are also important differences between these two time periods and economic actors; our goal is not to equate them, but to point out concerningly analogous trends. Organizational history will rarely repeat, but it may rhyme.

This Part proceeds as follows. We first describe the rise and fall of the conglomerate merger wave of the 1950s, 1960s and 1970s, and then detail the similarities between PE and conglomerates, as well as important differences. We conclude by describing the potential for resource allocation that results.

A. Rise and Fall of the Conglomerate Movement

The rise of the conglomerate movement was premised on an academic thesis that managerial skill, like other assets, could be utilized to create scope economies. In the 1920s, GM (under Alfred Sloan) and DuPont (under Pierre S. duPont) had pioneered the organizational innovation of the "M-form" firm, in which lines of business were organized as discrete divisions or subsidiaries with

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[117] *Cf.* Moore & Hale, *Towards a Post-Jensenian Private Equity Paradigm*, *supra* note 11 (charting the evolution of private equity firms from "slim boutiques to their contemporary status as sophisticated multi-product suites").

[118] This history borrows from Gordon, *Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the 21st Century*, *supra* note 6, at 189-90. *See also* Ronald J. Gilson & Bernard S. Black, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 312-62 (2d ed. 1995) (chapter on "Diversification and Financial Synergy" as M&A motives).

substantial operational authority and autonomy.[119] Headquarters staff monitored managerial performance at the divisional or subsidiary level, with appropriate rewards and sanctions, and made capital allocation decisions. With a high level of autonomy, the presidents of each division could be held accountable. Performance could be observed by headquarters and shortfalls could swiftly lead to interventions.

With this organizational innovation, GM leapfrogged over Ford, which was organized on the prior "U-form" model, in which managers responsible for a particular automobile line drew resources in design, marketing, and manufacturing from centrally managed capacity, with important decisions pushed up the ladder. The U-form muted the responsibility of the divisional manager who had much less control over production.

Given GM's success, it seemed like a logical move to deploy this organizational innovation to the management of the diverse subsidiaries.[120] This view was advanced by the post-World War II belief in the power of managers to gather sufficient information and centrally plan a complex organization that was successfully employed in the war effort,[121] as well as the growth of new financial engineering technologies.[122]

But the conglomerate movement is also a story of management hubris combined with regulatory arbitrage. Managers wanted growth for pecuniary reasons (at that time, executive compensation was highly correlated with firm size) [123] as well as non-pecuniary ego-based reasons, such as the desire to empire-build. At the same time, the unrelated acquisitions that fueled the buildup of conglomerates were not subject to the same antitrust scrutiny as vertical and horizontal mergers, which were the targets of aggressive antitrust enforcement in that period.[124]

This combination of factors led to a huge boom in conglomerate M&A. Over the course of the conglomerate era, companies like ITT, Litton Industries, Ling-Temco-Vought (LTV), three prominent examples, acquired hundreds of companies, often relying heavily on debt to do so.[125] As

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[119] *See* Alfred Chandler, Jr., STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE 382-83 (1966); Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON LIT. 1537, 1555-60 (1981).

[120] *See* Oliver Williamson, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 137-38 (1975) ("Thus once the merits of the M-form structure for managing separable, albeit related lines of business (e.g., a series of automobile or a series of chemical divisions) are recognized and digested, its extension to manage less closely related activities was natural."). *See also* Neil Fligstein, *The Spread of the Multi-divisional Form among Large Firms, 1919-1979*, 50 AM SOCIOL. REV. 377 (1985).

[121] *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1513, 1542 (2007).

[122] *See, e.g.*, Peter O. Steiner, MERGERS: MOTIVES, EFFECTS, POLICIES 103-19 (1975) (discussing the P/E Ratio, the "PE game," and incentives to merge).

[123] *See* Carola Frydman & Raven E. Saks, *Executive Compensation: A New View from a Long-Term Perspective, 1936-2005*, 23(5) REV. FIN. STUD. 2099 (2010).

[124] For further elaboration, *see* Gordon, *Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the 21st Century*, *supra* note 46, at 189-90. For more detailed discussion of the rise and fall of the conglomerate movement, *see* Gilson & Black, The LAW AND FINANCE OF CORPORATE ACQUISITIONS, *supra* note 118, at 320-61.

[125] Consider the example of ITT, which by 1960, had become "a major provider of telephone switching equipment and telecommunications services." Over the 1960-1977 period, the company "acquired more than 350 companies and had a portfolio that included well-known businesses such as Sheraton hotels, Avis Rent-a-Car, Hartford Insurance and Continental Baking, the maker of Wonder Bread. During that time, ITT grew from a medium-sized business with $760 million in sales to a global corporation with revenue of $17 billion." *See* ITT INC., *History: More than a Century of Value-*

an example of the types of companies that were brought together, Beatrice Foods included subsidiaries specializing in packaged goods, dairy products, plumbing supplies, audio equipment, luggage, and trailers.[126] The conglomerate form was widely pursued by many important business firms, with GE serving as the most prominent example.[127]

It turned out that the conglomerate form was a failed organizational experiment. One important empirical analysis of the mid-1970s showed that, measured in stock market returns, the conglomerates performed no better than, and in some model specifications, worse than randomly assembled portfolios that mimicked the business composition of the actual firms.[128] A study of mergers in the conglomerate era using detailed operating results found that post-merger performance deteriorated, particularly for unrelated acquisitions.[129] Other empirical studies generated similar conclusions.[130]

The conglomerate wave of the 1950s-1970s transformed into bust-up wave of the 1980s and the conglomerate era came to an end.[131] The gain from these bust-ups consisted in reversing the negative synergies of the conglomerate form, the most important of which arose from the failed application of the M-Form model to diverse businesses. Headquarters GM may well be competent to evaluate the sources of success or failure across the various GM automotive divisions, but that did not imply that ITT headquarters would have similar success in evaluating, much less curing, managerial underperformance at business units spanning multiple SIC codes. Martin Davis, after appointment as

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Creating Transformation, https://www.itt.com/about/history. Over a similar period, Litton Industries transformed itself from a defense contractor focusing on electronics into a large-scale conglomerate, acquiring businesses in ship-building, publishing, type-writing manufacturing, food products, medical products, office furniture, microwaves, growing annual sales from $3 million to $1.8 billion. FUNDING UNIVERSE, *Litton Industries, Inc. History*, https://www.fundinguniverse.com/company-histories/litton-industries-inc-history/; ENCYCLOPEDIA.COM, *Litton Industries, Inc.*, https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/businesses-and-occupations/litton-industries-inc. LTV, starting as an electronics business, went on an acquisition binge in the 1960s, that brought in sporting good, pharmaceuticals, meat-packing, an airline (Braniff), a car rental company (National), and a steel mill. "By 1969 LTV had purchased 33 companies, employed 29,000 workers … was one of the 40 biggest industrial corporations" with sales of $3.6 billion (over $30 billion in 2026 dollars). *See* Diana J. Kleiner, *LTV Corporation*, HANDBOOK OF TEXAS ONLINE (Mar. 1, 1995, updated Aug. 3, 2020), https://www.tshaonline.org/handbook/entries/ltv-corporation; Matt Garcia, ELI AND THE OCTOPUS: THE CEO WHO TRIED TO REFORM ONE OF THE WORLD'S MOST NOTORIOUS CORPORATIONS 51–52 (2023). *See* U.S. BUREAU OF LAB. STATS., *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm.

[126] *See* George P. Baker, *Beatrice: A Study in the Creation and Destruction of Value*, 47 J. FIN. 1081 (1992).

[127] For a surveys, classifications, and assessments, *see* Dennis C. Mueller, *The United States, 1962-1972*, in THE DETERMINANTS AND EFFECTS OF MERGERS: AN INTERNATIONAL COMPARISON (Dennis C. Mueller, ed., 1980); Richard P. Rumelt, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE (1974).

[128] *See* R. Hal Mason & Maurice B. Goudzwaard, *Performance of Conglomerate Firms: A Portfolio Approach*, 31 J. FIN. 39 (1976).

[129] David J. Ravenscraft & F.M. Scherer, MERGERS, SELL-OFFS & ECONOMIC EFFICIENCY (1987) (using FTC line-of-business data, then available).

[130] *See* Gilson & Black, *supra* note 118, at 339-46. *See generally* Raghuram Rajan, Henri Servaes & Luigi Zingales, *The Cost of Diversity: The Diversification Discount and Inefficient Investment,* 55 J. FIN. 35 (2000) (estimating an average deadweight loss of 10%).

[131] *See, e.g.*, Gerald F. Davis, Kristina Diekmann & Catherine Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form*, 59 AM SOCIOL. REV. 547 (1994); Sanjai Bhagat, Andrei Shleifer & Robert W. Vishny, *Hostile Takeovers in the 1980s: The Return to Corporate Specialization*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS (1990).

CEO of conglomerate Gulf + Western in 1983, concluded, "[C]onglomeration is dead. It doesn't make any sense…. You can't manage across that kind of diversity."[132]

And the failed conglomerate experiment had real consequences for the real economy. In particular, conglomerate managers allocated investment based on where cash flows were needed, in essence rewarding the worst performing divisions and subsidizing them with the cash of high performing areas of the business.[133] In addition, cash flows were commonly allocated to divisions with high internal political influence but worse investment opportunities.[134] Beyond these allocative inefficiencies, management struggled to provide oversight and guidance across the conglomerate's disparate parts.[135] Economies of scope only went so far in addressing inefficiencies. For these reasons, diversified conglomerates tended to trade a significant discount relative to the sum of their parts.[136] And in the aggregate, the conglomerate merger wave tended to shift capital away from high-productivity sectors of the economy, reducing aggregate productivity and growth.[137]

B. Private Equity and the Conglomeration Threat

Today's private equity boom bears an uncanny resemblance to many of the attributes of the conglomerate wave, particularly in terms of the breadth and boldness of the PE acquisition machine. The table below summarizes some of the salient sources of concern, drawing from the SEC's compilation of aggregate Form PF data on private equity sponsors (formally, "advisers") and the private equity funds over the 2013 to 2025 period. Under the Investment Advisers Act of 1940, all PE advisers with assets under management of at least $150 million are required to report to financial regulators annually; advisers with AUM of at least $2.0 billion ("large filers") are required to report quarterly and to provide more data.[138] This reporting covers an estimated 75% of PE's AUM.[139]

Over the 2013-2025 period, this disclosure reveals explosive growth in PE: the number of funds more than tripled over the period and more than doubled since 2017. The number of large filers—sponsors with more than $2 billion of AUM—has also more than tripled that period, and the number of funds launched by these large filers has tripled as well, for a total of 10,364. In 2025, there

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[132] *See* Davis et al., *supra* note 131, at 563 (quoting Clem Morgello, *Martin Davis of Paramount Restructuring to Create Value*, 23(12) INSTITUTIONAL INVESTOR, 83 (1989)).

[133] *See, e.g.*, Hyun-Han Shin & Rene Stulz, *Are Internal Capital Markets Efficient*?, 113(2) Q. J ECON. 531 (1998); Rajan et al., *supra* note 130.

[134] *See* Rajan et al., *supra* note 130. One could imagine that access to internal capital markets could benefit the conglomerate's components and drive long-term value, and in fact, that was one of the theoretical arguments justifying the movement. *Id.* But subsequent evidence has essentially debunked this belief.

[135] As repentant conglomerateur Martin Davis testified above.

[136] Rajan et al., *supra* note 130; Philip G. Berger & Eli Ofek, *Diversification's Effect on Firm Value*, 37 J. FIN. ECON. 39 (1995) (finding a 15% loss).

[137] David S. Scharfstein & Jeremy C. Stein, *The Dark Side of Internal Capital Markets: Divisional Rent-Seeking and Inefficient Investment*, 55(6) J. FIN. 2537 (2000).

[138] *See* Investment Advisers Act of 1940 § 204(b), 15 U.S.C. § 80b-4(b); 17 C.F.R. § 275.204(b)-1(a); Form PF, General Instructions 1, 3, 17 C.F.R. § 279.9 (2026); Form PF; Reporting Requirements for All Filers, 91 FED. REG. 22,232, 22,236 (proposed Apr. 24, 2026) (proposing to raise the Form PF filing threshold for all filers from $150 million to $1 billion in private fund assets under management).

[139] *See Reporting by Investment Advisers*, *supra* note 49 (declining to reduce the large private equity fund adviser reporting threshold from $2 billion to $1.5 billion).

were 1036 funds with at least $1.4 billion in assets.[140] The aggregate gross assets of the controlled portfolio companies (of the large filers only) was $10.3 trillion in 2023, more than doubling over the period.[141] Assuming that each fund owned and controlled several companies, these numerical values translate into an escalating number and value of companies overseen by PE sponsors.

Moreover, PE portfolio companies are spread across the industry map. As of the second quarter 2025, Form PF data reports 24 different industries with substantial PE investment, ranging from Software Publishers (13.4% of total GAV reported) to Supermarkets (0.2% of total GAV). Moreover, PE engagement with different industries has been time-varying. Software Publishers was a relatively minor part of the PE footprint in 2013, 2.8% of GAV in 2013. Today it is much more significant, not just as a percentage of GAV but also because the denominator has grown five-fold. Supermarkets were a relatively more important PE business in 2013 (0.8% of GAV) than in 2025 (0.2%). Natural gas distribution fluctuated in its relative importance over the period, from 0.5% of GAV in 2013, to 1.0% in 2018. By 2025, it had shrunk back to 0.5% of GAV in 2025, but the denominator is so much bigger that the overall PE footprint in the industry is quite large.

Table 1. Growth of PE Activity

	2013(Q1)	2017(Q1)	2023(Q1)	2025(Q2)	% Change 2013-2025	% Change 2017-2025	% change 2023-2025
# of funds (T. 1.1.)	6891	10,366	20,983	25,012	263%	140%	19%
# funds, large filers (T. 1.2)	1873	3006	7417	10,364	453%	244%	40%
# advisers (T. 1.3)	818	1096	1766	1935	137%	77%	10%
# large advisers (T. 1.3)	173	250	453	542	213%	116%	20%
Gross Asset Value (GAV), all filers (T. 2.1)	$1.605 Tr	$2327 Tr	$6.654 Tr	$7.949 Tr	395%	241%	19%
GAV, large filers (T. 2.2)	$1.094 Tr	$1.648	$5.226 Tr	$6.461 Tr	491%	302%	24%

[140] Since there were 10,364 large-filer funds, the top decile comprised approximately 1,036 funds. If the 90th-percentile cutoff was $1.4 billion, then those funds alone represented at least approximately $1.45 trillion in sponsor GAV.
[141] *See supra* note 49 (explaining why Aggregate Gross Assets for the universe should be at least 25% more).

GAV, large filer funds (90th %tile), (T. 2.6)	$1.4 B	$1.3 B	$1.4 B	$1.4 B	0	8%	0%
# large filer funds in 90th %tile	187	300	741	1036	454%	245%	40%
Aggregate Gross Assets of Controlled Port Cos. T. 10.9 [report 2024(Q1)]	$5002 Tr [2013(Q4)]	$3.775 Tr [2016 (Q4)]	$10.330 Tr [2023(Q4)]	Not available	106%	[2017-2025] 174%	N.A.

Source: SEC Form PF

As of second quarter 2025, Table 1 shows hundreds of PE funds with investments across these 24 diverse economic sectors: 1685 in software publishing, 1078 in computing infrastructure, 886 in custom computer programming, but also, 215 in dental offices, 246 in consumer lending, 278 in engineering service, 146 in full-service restaurants, and 120 with holdings in hotels and motels. The available data does not nail the point that private equity sponsors commonly have managerial oversight responsibility equivalent to a 1960's master conglomerateur, but the evidence is strongly suggestive.

Further evidence of the risks of conglomerate creep is to be found in looking at some of the large public companies that do private equity, industry leaders KKR, Blackstone, Carlyle, and TPG. In its private equity business, KKR reports AUM of $231 billion. Its listed online private equity portfolio includes 143 companies in 11 industry segments.[142] Blackstone reports corporate private equity AUM of $165 billion across 99 portfolio companies, with $36 billion of PE dry powder.[143] Carlyle reports AUM $159 billion in its private equity business, including 149 companies acquired within 5 years of Q2 2026 in 13 segments.[144] TPG reports AUM in PE of $121 billion,[145] representing

[142] KKR & CO. INC., Quarterly Report (Form 10-Q) 115 (May 8, 2026) (reporting $231 billion in private equity AUM as of March 31, 2026); KKR, *Portfolio* (Mar. 31, 2026), https://www.kkr.com/invest/portfolio?assetClass=asset-class:private-equity ((listing private equity portfolio companies by industry as of March 31, 2026).

[143] BLACKSTONE INC., *Private Equity*, https://www.blackstone.com/our-businesses/private-equity/ (reporting $165 billion in private equity AUM and $36 billion of additional capital to invest in PE, as of March 31, 2026, as well as 99 private equity portfolio companies as of December 31, 2025.). Blackstone also reports that its "Private Equity segment encompasses global businesses with approximately 675 employees managing $352.2 billion of Total Asset Under Management as of December 2024." *See infra* note 185. In the same report submitted pursuant to the UK Walker Guidelines, it indicates that across its various business units, its global portfolio "spans ~270 companies that employ over 700,000 around the world."

[144] THE CARLYLE GROUP INC., Quarterly Report (Form 10-Q) 60 (May 8, 2026) (reporting $159 billion in private equity AUM as of March 31, 2026);

[145] TPG INC., Quarterly Report (Form 10-Q) 51, 78 (May 1, 2026) (reporting $121 billion in fee-earning private equity AUM across its Capital, Growth, Impact, Real Estate, and Market Solutions platforms as of March 31, 2026).

more than 400 portfolio companies in six different industry sectors: healthcare, software and enterprise technology, "IDMC" (internet, digital media, and communications), consumer, and business services.

As this brief summary reveals, these PE sponsors each manage dozens of firms in diverse business segments. To be sure, no single person tries to oversee it all, but the governance model, in which specialist teams at the sponsor level interact with board members and managers at the portfolio companies across multiple business areas raises problems of managerial capacity—breadth, depth, cognition—that are drawn from the list of concerns generated during the conglomerate era

Moreover, as private equity has boomed in economic importance, these firms have grown enormously. In his famous 1989 article, *The Eclipse of the Public Corporation*,[146] Michael Jensen reported survey results of seven leveraged buyout partnerships that showed an average of 13 professionals.[147] These numbers had grown ten times larger by the early 2000s, when Steven Kaplan reported that KKR disclosed 139 investment professionals in 2007 and that at least four other PE firms "appear to have" more than 100 professionals each.[148] KKR now lists on its website 113 senior investment professionals in private equity (title of "partner, managing director, director, and principals), doubtless countless junior professionals, and reports offices in 36 cities and 17 countries.[149]

And as private equity groups expand, buyout activity does as well—the more people, the more acquisitions, but this growth does not necessarily translate into higher attention and performance. The most careful work on the effect of private equity buyouts on performance, including employment, by an economist team collecting establishment level data over a multi-year period, concludes with the following observation: "[our] results suggest that past success encourages a PE group to scale up its buyout activity, diluting the attention that key group personnel devote to individual portfolio companies. In turn, this dilution of attention leads to slower growth at portfolio companies."[150]

Therefore, PE funds are expanding not just in size but also in scope, resembling more and more the large conglomerates that preceded them and presenting many of the same risks. And yet, two differences between the two business models are worth noting. For one, the conglomerate model

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[146] Jensen, *Eclipse of the Public Corporation*, *supra* note 56.

[147] *Id.*

[148] Kaplan & Strömberg, *Leveraged Buyouts and Private Equity*, *supra* note 79, at 12.

[149] Carlyle reports 770 investment professionals in 27 offices worldwide. THE CARLYLE GROUP INC., Annual Report (Form 10-K) 7 (Feb. 27, 2026). TPG reports 690 investment and operations professionals in 16 countries "organized into industry sector teams, which share investment themes across platforms to drive firmwide pattern recognition…. [W]e have developed an ecosystem of insight, engagement and collaboration across our platforms and products." TPG INC., Annual Report (Form 10-K) 4 (Feb. 17, 2026).

[150] Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *supra* note 46, at 9582 (citations omitted). It bears emphasis that this cautionary signal about performance deterioration increasing in size was based on data collected over the 1980-2013 period – in other words, well before the tidal wave growth of PE in the subsequent decade. As noted above, PE assets *quintupled* over the post 2013 period. *See supra* note 3. Some recent evidence suggests a negative size effect, *see* Abhishek Bhardwaj, Abhinav Gupta, Sabrina T. Howell, & Kyle Zimmerschied, *Does Fund Size Affect Private Equity Performance? Evidence from Donation Inflows to Private Universities*, NBER W.P. No. 33596 (Mar. 2025) and more value-creation in PE from industry specialists rather than generalists, *see* Christophe Spaenjers & Eva Steiner, *Specialization and Performance in Private Equity: Evidence from the Hotel Industry*, 162 J. FIN. ECON. 103958 (2024). *But see* Gregory Brown, *Scale, Scope and Speed in Private Capital Funds* (Inst. for Priv. Cap., Feb. 24, 2025) (concluding that "worries about diseconomies of scale are likely overblown").

is based on purchasing various companies and embedding them in the firm's organizational structure indefinitely; in contrast, the PE fund business model is premised on the sale of a firm at a high valuation, and ideally in the near term.[151] But as we have discussed, the accountability benefit of such an exit is now delayed, if it occurs at all. In fact, the PE industry has recently launched the "evergreen fund" that also holds assets indefinitely, with lower investment minimums to target retail investors.[152] As this evolution reveals, the "exit" difference from a 1960s conglomerate diminishes by the day.

A second important difference concerns incentives: conglomerate managers typically had low-powered incentives, mostly earning a salary that corresponded loosely to the size of the organization.[153] Private equity funds, by contrast, link sponsors' payouts to performance in the form of the "two and twenty" model for fee income. This distinction is important, but as we have discussed, it is diminishing: a higher percentage of sponsor income than ever before is in the form of fixed fees that vary based on the size of the portfolio, rather than performance. In other words, today's typical sponsor will benefit from growing compensation so long as they keep accumulating assets, not unlike the conglomerate CEO.

C. The Threat of Resource Misallocation

As a result of the private equity accountability crisis, there is a risk that some amount of the trillions of dollars locked into the private equity model is profoundly misallocated—just as occurred during the conglomerate era. In the paragraphs that follow, we discuss several hypothetical examples of resource misallocation that can occur in a world of private equity without accountability.

Recall that the joining of disparate firms in conglomerates led to substandard performance overall and the misallocation of resources across sectors.[154] A mismanaged subsidiary would be propped up by a profitable one based on an internal bureaucratic logic rather than an optimal investment logic. This potential for resource misallocation also plagues private equity in related ways. We have already discussed one driver of inefficiency—the need to manage the liquidity needs of limited partners. This need may produce recapitalizations at portfolio companies to generate distributions instead of investment to develop value-increasing real options.

Another driver of resource misallocation that is particularly evocative of the conglomerate era and the flaws associated with reliance on internal capital markets is the use of "NAV" loans.[155] The NAV loan is secured by the value of the fund's equity ownership in the portfolio companies, its NAV, and may be used for cash distributions to the limited partners or for investment in a portfolio company that needs additional capital. NAV loans sit above the LP's equity but below debt issued by specific portfolio companies. In effect, it is debt issued by a conglomerate Holdco for general purposes throughout the conglomerate, including dividend payments. In this scenario, portfolio companies may

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[151] Though GE, the most successful of the industrial conglomerates, retained only the businesses that became industry leaders, selling off the relative failures, a different sort of exit strategy.

[152] Dennis McCabe, *The Compelling Case for an Allocation to Semi-Liquid Evergreen Private Equity*, MORGAN STANLEY (Mar. 12, 2026), https://www.morganstanley.com/im/en-us/individual-investor/insights/articles/evergreen-private-equity-funds.html.

[153] *See supra* note 123.

[154] *See supra* notes 118 128-130.

[155] *See* Bobby V. Reddy, *Private Equity and Net Asset Value Loans–Ticking Time Bomb or Ticking All the Right Boxes?*, 15 HARV. BUS. L. REV. 699 (2025).

find themselves competing for scare investment capacity allocated by headquarters. We have already seen the perverse temptations of that internal capital markets scenario.[156]

Another problem reminiscent of the conglomerate era is the difficulty in managing across different businesses. When a private equity fund acquires businesses across different sectors and regions, operational complexity increases and may overwhelm even the most sophisticated manager. This issue is particularly evident in a roll up, where multiple companies must be integrated, and management's focus may fall on integration and fixing problematic acquisitions, rather than supporting the businesses in more basic and critical ways. As a result, growth and business efficiency may suffer.

The private equity model's emphasis on debt utilization provides another challenge. Consider a hypothetical private equity fund that is rolling up a "platform" artificial intelligence company with additional "bolt-on" companies. The platform company needs major capital investments to achieve its full potential, but instead, the fund uses its cash to service the debt needed to acquire the other companies. If the platform company had remained as a stand-alone entity, the capital needs would have been readily apparent, but the roll up causes the fund to focus its efforts on combining disparate parts, rather than investing in any one of them. In the best-case scenario, synergies from the roll up would eventually accrue to benefits and investment in the company. In the worst-case scenario, a misguided integration playbook could threaten the company's competitive advantage further.

More generally, the leverage used to acquire a portfolio company may limit its optimal growth path.[157] Consider, for example, a private equity owned pharmaceutical company that comes to have several drugs in development (or other real options), all of which need additional investment beyond internally generally cash for development. A NAV loan may be unavailable. The company is already levered; a sale to a continuation fund to show a post-acquisition profit would add to leverage and soak up additional free cash flow, harming the company's growth prospects even if it shows a "gain" of the sponsor's book. In this way, the PE model's constraints may inhibit a company's potential and performance.

As these examples reveal, the private equity playbook could lead to resource misallocation and slow economic growth, in parallel to the industrial conglomerates of the 1950s-early 1970s. Moreover, the scope of the economic impact is far larger. At the late 1960s height of the conglomerate wave, there were perhaps 50 major conglomerates, reflecting 10%-15% of the public equity market capitalization of the time and a similar fraction of U.S. GDP.[158] Approximately 3% of the workforce was employed by conglomerates.[159] As discussed, the impact of private equity on the modern economy is even more significant. Collectively, as of 2024, the enterprise value of PE-controlled companies is 29 percent of the enterprise value of the S&P 500; employing somewhere between 6.5 and 13.3 million workers.[160] As of 2024, private equity owned companies generated $4.7 trillion in economic output

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[156] *See supra* Section I.C.iii.

[157] Real world examples in which levered private equity owned companies struggled or failed in the aftermath of the restructuring include Red Lobster, Steward Health Care, and Toys 'R Us.

[158] Paul Simmonds, *The rise and fall of the conglomerate*, 63 CORP, SECTOR REV. 14 (2008).

[159] *Id.*

[160] *See* Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *supra* note 46. The industry trade association, the American Investment Council, currently estimates that a broader category, "private equity-backed companies," employ 13.3 million employees. AM. INV. COUNCIL, https://www.investmentcouncil.org/ (last visited Feb. 16, 2026).

(accounting for supplier and employee consumption as well), representing 16% of U.S. GDP.[161] In terms of capital deployed, private equity fundraising has dwarfed public market capital raising for several years, a trend that will only increase as efforts to democratize private equity continue.[162]

Our point is not to deny the value-creation potential of private equity. Rather, it is to point out that the scope and scale of private equity increase the prospect of large-scale resource misallocation when the sector lacks external validation of its activities. Moreover, investors and the broader public will not be aware of these inefficiencies under the existing regulatory landscape.

III. Private Equity Without Accountability: Systemic Risk

Beyond resource misallocation, private equity without accountability contributes to systemic risk in the economy in two main ways. The first is that easy access to capital can lead to a self-inflating bubble, whereby sponsors are able to artificially maintain high portfolio valuations via conflicted sales and opaque valuations. The second results from the risk that concerns about private equity investments will lead to runs on private credit. The Sections that follow describe these risks in greater detail.

A. A Self-Inflating Bubble

Without accountability, there is a risk that private equity activity will fuel a self-inflating bubble. And here, the key fact is the availability of easy money brought about by the coming democratization the industry. The unlocking of trillions of dollars in additional capital exacerbates the systemic risk created by the sector's activity. Consider, as an illustrative example, a hypothetical Fund 1 that is bogged down by a series of struggling investments. To buy time, that fund creates an affiliated continuation fund (Fund 2) and sells several portfolio companies at an inflated value, reporting a high IRR to Fund 1's investors. Fund 2 investors lack either the bargaining leverage or sophistication to demand or correctly evaluate the portfolio companies' financials, and instead invest based on excitement over Fund 1's reported IRR. In addition, Fund 1 investors will have little incentive to investigate potential problems so long as they benefit from the returns generated by the inflated sale price.

In this scenario, assets can simply trade from fund to fund so long as there is another set of unsophisticated investors willing to put up money. Already, the private equity industry has experienced demand for investment that outpaces top tier opportunities; the unlocking of an additional $10 trillion from unsophisticated investors increases these concerns exponentially. As such, the risk that assets will trade at inflated values increases, just as the availability of investor capital delays the likelihood of an eventual correction.

A massive influx of capital can also be expected to inflate the values of PE-owned companies via the law of supply and demand. When PE funds compete for scarce investment opportunities, purchase prices rise, which only hinders the private equity fund's ability to generate additional value and returns.

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[161] BROOKFIELD, *Why Does Private Equity Matter to the Broader Economy?* (Mar. 2, 2026), https://privatewealth.brookfield.com/insight/why-does-private-equity-matter-broader-economy.

[162] ARES, *The Evolving Role of Public and Private Equity* (July 31, 2024), https://www.areswms.com/accessares/private-market-insights/evolving-role-public-and-private-equity.

Simply put, by unlocking trillions in investor dollars, democratization is likely to increase the risk that PE activity creates bubbles in the economy. At some point, a bubble will burst, and the ensuing scope of harm (given the scale of PE activity and the retirement assets involved) is likely to be large. The correction may come when the pipeline of investors needed to support the bubble slows to a trickle; it could also come in the form of investor redemptions in the face of a recession given the increasing prevalence of evergreen and interval funds that allow investors to withdraw funds. Worse still, economic downturns also tend to increase debt service costs and weaken cashflows, pushing portfolio companies toward distress simultaneously. In other words, an economic downturn could increase the speed of portfolio company failure, even as it drains PE funds from capital needed to weather the storm.

Quite obviously, such failures would have ripple effects on investors and lenders, and therefore other portfolio companies and counterparties. Stress in one node of the PE ecosystem can cascade, as the next Section reveals in the context of private credit. But before turning to this specific source of risk, we note that mandatory disclosure of private equity portfolio company financials would have the benefit of reducing the likelihood or extent of a bubble. With sunlight on performance, Fund 1 seeking to sell a lemon would find itself with far fewer suitors; over time, the poor performers would sell assets at a loss and exit. The overall effect would be a better match between investors and beneficial investment opportunities, and a substantially reduced risk of systemic risk.

B. The Private Credit Risk

Like private equity, private credit (or a privately negotiated loan between a business and non-bank lender) has had an outsized impact on the U.S. economy over the past decade.[163] The industry has come under recent stress as it faces mounting redemptions and defaults. Historically, misbegotten credit bubbles are a key determinant of subsequent financial instability.[164] These risks are related to the private equity accountability crisis we identify.

Most PE acquisitions today are financed by private credit funds, and an important segment of the private credit market provides investors with redemption rights. As recent experience shows, financial uncertainty associated with PE portfolio companies can produce runs on private credit funds.[165] This run risk is exacerbated by growing suspicion about the reliability of private credit funds' reporting[166] and in particular the private credit ratings that are an important factor in private credit issuance.[167] The absence of reliable disclosure about the financial health of portfolio companies induces a "first mover" psychology because the early redeemers stand the greatest of recovering par. There is a risk that this redemption pressure will spill over to the banking system and the rest of the economy. How?

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[163] Elias & de Fontenay, *supra* note 28.

[164] Robin Greenwood, Samuel G. Hanson, Andrei Shleifer & Jakob Ahm Sørensen, *Predictable Financial Crises*, 77 J. FIN. 863 (2022).

[165] *See* AnnaMaria Andriotis & Peter Rudegeair, *The Wealthy Investors That Powered Private Credit Are Rushing for the Exits*, WALL ST. J. (Apr. 2, 2026), https://www.wsj.com/finance/investing/the-wealthy-investors-that-powered-private-credit-are-rushing-for-the-exits-7a3db81e.

[166] *See, e.g.*, Olivia Fishlow & Ava Benny-Morrison, *BlackRock Private Credit Fund's Valuations Are Probed by DOJ*, BLOOMBERG (May 15, 2026), https://www.bloomberg.com/news/articles/2026-05-15/blackrock-private-credit-fund-s-valuations-being-probed-by-doj.

[167] *See* Xuelin Li, Sangmin S. Oh & Giacomo Ricciardi, *Rating Without Market Discipline* (Columbia Bus. Sch. Rsch. Paper, May 31, 2026), https://ssrn.com/abstract=6859158.

In response to redemption demands, the private credit fund may be forced to engage in fire sales of portfolio company debt to raise cash; this in turn will reduce the valuation of similar assets held on bank balance sheets. Alternatively, to avoid such asset sales, private credit funds may draw down on their bank lines. Both courses will produce credit rationing by banks to their customary borrowers.[168] This is classic systemic risk. As we came to appreciate in dealing with the Global Financial Crisis, uncertainty about solvency can be debilitating, leading to runs, liquidity hoarding, and a negative economic spiral.

Mandating disclosure of the financials of significant portfolio companies would provide a basis for confidence in private credit and directly reduce the systemic risk associated with a system of private credit provision through funds that provide investor liquidity. Indeed, the SEC has begun to take account of the systemic risk associated with private credit funds in a recent regulatory release that asks for suggestions for additional reporting by private credit funds[169] and through direct inquiries to specific funds.[170] And by focusing on the companies that obtain such credit, our would address one of the most direct vectors for the transmittal of systemic risk to the rest of the economy. The next Part describes our proposal in detail.

IV. Proposal: Mandatory Disclosure of Significant PE Companies

The private equity accountability crisis shows the need for regulation, and specifically, mandatory annual disclosure of financial statements for "significant" portfolio companies held by PE funds. Currently, the 1934 Act's disclosure requirements apply only to public companies (including companies with public debt);[171] private equity fund advisers with more than $150 million in AUM are required to disclose information about their fund—its size, organization, portfolio, and strategy—in a Form PF filing, with the goal of alerting the SEC and FSOC to any potential financial risk implications from the fund's activities.[172] However, Form PF disclosure does not encompass financial performance information about a fund's specific portfolio companies. For "large" PE advisers (AUM greater than $2 billion), disclosure includes fund-level debt and equity levels but does not include revenues, cash flows, or profitability. Moreover, Form PF filings are not made available to the public.

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[168] *See* Drechsler et al., *supra* note 30.

[169] *See Form PF; Reporting Requirements for All Filers, supra* note 31, at 100–02, 108; *see also* PAUL WEISS, *2025 Private Credit Market Outlook—Part I, Private Credit Market Trends: From Originations to Bank Partnerships and Insurance* 3 (Mar. 10, 2025), https://www.paulweiss.com/media/oejpsdor/part-i-private-credit-market-trends_-from-originations-to-bank-partnerships-and-insurance.pdf ("Private credit is a rapidly expanding sector that has grown nearly tenfold to reach $1.5 trillion in 2024 and this remarkable growth trajectory is expected to continue, reaching an estimated US$3.5 trillion by 2028."). *See also* MORGAN STANLEY, *Understanding Private Credit's Rapid Growth* (Oct. 3, 2025), https://www.morganstanley.com/ideas/private-credit-outlook-considerations ("The size of private credit at the start of 2025 was $3 trillion, compared to about $2 trillion in 2020, and it is estimated to grow to approximately $5 trillion by 2029."). For a survey of the experts' views of the current systemic risks of private credit, *see* PROJECT SYNDICATE, *Is A Private-Credit Crisis Imminent?* (Apr. 22, 2026), https://www.project-syndicate.org/onpoint/is-a-private-credit-crisis-imminent.

[170] *See* Dave Michaels, Dylan Tokar & Gina Heeb, *U.S. Officials Try to Get a Grip on Risks Bubbling Inside Private Credit*, WALL ST. J. (Apr. 22, 2026), https://www.wsj.com/finance/regulation/u-s-officials-try-to-get-a-grip-on-risks-bubbling-inside-private-credit-31d0e199.

[171] Note that although other jurisdictions have different rules (Europe, for example, requires disclosure based on the size of the business, rather than the presence of publicly traded equity). *See* Dee Gill, *Should Private Companies Be Required to Report Their Financials?*, CHI. BOOTH REV. (June 22, 2017), https://www.chicagobooth.edu/review/should-private-companies-be-required-report-their-financials.

[172] *See infra* note 204 and accompanying test.

Instead, the SEC aggregates and discloses information in broad categories (and we have relied on these reports throughout the paper).

The rationale for the disconnect between private and public company disclosure, however, is dissipating. Many of the same justifications that support public company financial disclosure also support the provision of private company disclosure. Specifically, two of the most prominent supporting rationales—that mandatory disclosure rules promote accountability by giving investors the information they need to monitor firm management,[173] as well as the efficient allocation of resources in the economy[174]—are directly responsive to the accountability crisis we have identified. Moreover, as private markets represent a greater share of economic activity, the idea that certain firms can shield their activities from public scrutiny poses greater risks for investors and the broader economy.[175]

The Sections that follow describe the need for mandatory disclosure, as well as two regulatory paths that could bring it about. We first describe our proposal for mandatory disclosure in detail and describe why private ordering is unlikely to entail the right level of disclosure. The next Section describes how the SEC has authority to mandate disclosure under the Investment Company Act of 1940 and the Dodd Frank Act of 2010. The third Section offers a regulatory avenue linked to the recent push to "democratize" private equity and the fiduciary obligations of ERISA trustees. The final Section argues that if mandatory disclosure is not feasible, the SEC should study and release anonymized information from the Form PF data that it collects.

A. Proposal Details

We propose that significant private equity portfolio companies be subject to mandatory disclosure of operating and financial results. By limiting the requirement to "significant" companies, we aim to exclude smaller companies that are unlikely to significantly contribute to allocative efficiency issues and systemic risk. Provisionally, we propose a particular threshold of "significance" and thus the threshold required disclosure: either annual revenues of $600 million or a reported value of $1 billion by sponsor, based on the median market cap and revenues of companies in the Russell 2000.[176] This would elicit disclosure relating to the middle-market companies that are a critical element of PE activity and comparable to public mid-cap companies.[177]

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[173] *See, e.g.*, Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 U. CHI. L. REV. 1047, 1051 (1995); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999).

[174] *See, e.g.*, Sugata Roychowdhury, Nemit Shroff & Rodrigo S. Verdi, *The Effects of Financial Reporting and Disclosure on Corporate Investment: A Review*, 68 J. ACCT. & ECON. 101246 (2019).

[175] Some view the costs of disclosure as a key reason for the contraction of the number of public issuers. It appears that the reduction in the number of public companies is because of consolidation and concentration rather than regulation. *See* Mark J. Roe & Charles C.Y. Wang, *Half the Firms, Double the Profits: Public Firms' Transformation, 1996-2022*, 8 J. L. FIN. & ACCT. 211 (2025); Gerard Hoberg & Gordon M. Phillips, *Scope, Scale, and Concentration: The 2st-Century Firm*, 80 J. FIN. 415 (2025). But if disclosure is a reason for public market contraction, then equalizing the disclosure burden by requiring more from PE portfolio companies could actually help encourage large private companies to go public.

[176] The median market capitalization of a Russell 2000 company is approximately $1 billion; the median revenues of a company in the 40th-60th percentile range by market capitalization of the Russell 2000 is $600 million. The Russell 2000 excludes the top 1000 companies (by market cap) of the Russell 3000. *See supra* note 22.

[177] *See* Ludovic Phalippou, *Apples and Oranges: Benchmarking Games and the Illusion of Private Equity Outperformance*, supra note 23.

Regarding the scope and frequency of disclosure, we envision much less than what is required of public companies. Specifically, we expect that significant PE-owned companies would file an annual report containing audited financial statements comparable to a 1934 Act filing, as well as the auditor's attestation. In addition, an 8-K updating investors on material events would also be required as needed. The "annual" disclosure cadence is proposed to minimize potential costs and to minimize concerns that disclosure might lead to short-termist pressure.[178]

At first blush, such a regime appears to impose significant costs on PE companies, but a closer look reveals that these disclosures are already being provided for a subset of investors. Beginning after the Global Financial Crisis, financing for PE buyouts began to come from a new financial intermediary, the private credit fund, as well as from leveraged loans that were syndicated.[179] Here's the critical fact: unlike an investor in a securitization like a collateralized loan obligation (or "CLO"), the private credit fund is a direct counterparty to a specific portfolio company and will insist on audited financials for that specific borrower. As a result, PE sponsors are already producing these financial statements for counterparty use and major accounting firms are already auditing these financial statements. Sponsors also obtain audited financials for portfolio companies for their importance in substantiating the sponsor's NAV reporting at the fund level, pursuant to SEC-level reporting requirements.[180] Simply put, the financials that are key to disclosure already exist, and so our proposal would entail very little expense.[181]

Moreover, disclosure requirements are not an impediment to robust private equity activity, as demonstrated by the UK PE model. In the UK, the largest private companies are generally subject to a periodic disclosure regime under part 15 of the 2006 Companies Act that is similar to that required by the 1934 Securities Exchange Act. In 2007, as controversy about PE was heating up in the UK, the "Walker Commission" promulgated a voluntary public reporting framework that sits on top of the general reporting obligation and extends beyond financial results to include reporting on matters of concern to stakeholders. The portfolio company reporting targets are sized to compare with firms listed in the FTSE 250.[182] This reporting is overseen by an industry association, the Private Equity Reporting Group (PERG), which monitors compliance.[183] In 2025, 98 portfolio companies were identified; 77 provided complying disclosure. Moreover, the annual disclosures in the UK include an EY-Pantheon summary that evaluates overall PE performance compared to public companies.

This extensive reporting regime has not dampened PE activity in the UK, which is comparable to the U.S. as a percentage of GDP, although the relative size means there are many more PE

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[178] The view that quarterly reporting leads to short-term pressure is contested. *Compare* Arthur G. Kraft, Rahul Vashishtha & Mohan Venkatachalam, *Frequent Financial Reporting and Managerial Myopia*, 93 ACCT. REV. 249 (2018) (finding evidence that more frequent financial reporting can induce managerial short-sightedness), *with* Robert Pozen, Suresh Nallareddy & Shivaram Rajgopal, *Impact of Reporting Frequency on UK Public Companies*, CFA Inst. Rsch. Found. (Mar. 2017) (finding that reporting frequency had no material impact on UK companies' investment levels).

[179] For a discussion of the evolution in PE financing, *see infra* note 188.

[180] *See* SEC Form ADV, Part 1A, Schedule D, § 7.B.(1), Questions 11, 23(a).

[181] If private credit providers commonly require more frequent financial reporting for large portfolio companies, that reporting could intensify our proposed disclosure cadence.

[182] *See* Walker Commission, GUIDELINES FOR DISCLOSURE AND TRANSPARENCY IN PRIVATE EQUITY (Nov. 2007, updated Dec. 2024).

[183] *See generally* UK PRIVATE CAPITAL, *The Walker Guidelines and Private Equity Reporting Group*, https://www.ukprivatecapital.co.uk/our-industry/the-walker-guidelines-and-perg.html.

transactions, and much larger transactions, in the U.S. Major U.S. private equity firms operate in the UK, comply with the disclosure regime, and apparently do not regard such disclosure as damaging their prospects. KKR, for example, reports that it "supports" the Walker Report and complies with its disclosure prescriptions, including 2024 enhancements, "[s]ince we believe in the importance of enhancing disclosure and transparency within the private equity industry."[184] Blackstone, also reporting Walker Guidelines compliance, said that "[a]s a public company subject to extensive disclosure requirements, Blackstone is supportive of improved understanding of the private equity industry."[185] TPG, similarly reporting compliance, said "TPG is supportive of greater transparency and improved understanding of the private equity industry."[186]

Mandating disclosure for PE portfolio companies in the U.S. is also grounded in U.S. history. In the first wave of private equity transactions—the LBO wave of the 1980s and early 1990s—leveraged transactions were famously financed (at least in part) with "junk bonds" – publicly issued high yield debt that found its way into mutual funds and onto some savings and loans balance sheets. The issuance of public debt brought with it the disclosure requirements of 1934 Securities Exchange Act. Indeed, the early scholarship that brought credibility to the PE governance story drew from such public disclosure to show that operating results substantially improved and that capital was deployed more efficiently.[187]

A series of events brought the first PE wave to an end in early 1990s, including an "overheating" of the buyout market[188] and a recession that led to defaults in many junk-bond fueled transactions. When PE picked up later in the decade, debt finance was provided through a mixture of public debt subject to issuer disclosure obligations and "leveraged loans" that were then pooled and securitized as CLOs, which used ratings agencies to assess creditworthiness rather than issuer-specific disclosure. There was, however, sufficient representation of public debt financed transactions (or subsequent IPOs) to permit evaluation of whether buyouts still created value in the 1990-2006 period, that is, the before the Global Financial Crisis.[189]

The revival of private equity post-financial crisis took advantage of the evolution in capital markets to come up with a different financing paradigm. In all but the largest transactions, debt

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[184] KKR, 2024 WALKER REPORT 2 (Aug. 2025), https://www.kkr.com/content/dam/kkr/disclosures/walker-report-2024.pdf.

[185] BLACKSTONE EUROPE LLP, 2024 WALKER REPORT 2 (Dec. 2025), https://www.blackstone.com/wp-content/uploads/sites/2/2025/12/Blackstone-Europe-LLP-Walker-Guidelines-Report-2024.pdf

[186] TPG, WALKER GUIDELINES: DISCLOSURES 1 (Sept. 2024), https://cms.tpg.com/wp-content/uploads/2024/11/TPG-Walker-Guidelines-Disclosure-Statement-Final-Sept-2024.pdf. Additional U.S. PE firms that operate in the U.K. include Apollo Global Management, Bain Capital, Leonard Green & Partners, Lone Star Funds, Silver Lake, and Warburg Pincus.

[187] *See, e.g.*, Steven Kaplan, *The Effects of Management Buyouts on Operating Performance and Value*, 24 J. FIN. ECON. 217 (1989); Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 127, 127-28, & n. 4 (2001) (citing literature).

[188] Steven N. Kaplan & Jeremy C. Stein, *The Evolution of Buyout Pricing and Financial Structure in the 1980s*, 108 Q.J. ECON. 313 (1993).

[189] Shourun Guo, Edith S. Hotchkiss & Weihong Song, *Do Buyouts (Still) Create Value?*, *supra* note 61 (finding that of 192 candidate public to private leveraged buyout transactions, "94 firms in this subsample either have widely held public debt outstanding or provide historical financial statements at the time of a subsequent IPO, acquisition, or public debt financing. Comparing the subsample of 94 firms to the full sample of 192 buyouts allows us to address the impact of sample selection on observed post-buyout performance").

financing was provided by private credit funds, either through purchase of participations in leveraged loans or through direct loans, but not through the public issuance of "securities." Because of the use of loans rather than securities and because of the falloff of IPOs as an exit strategy, the performance of PE portfolio companies fell into a black hole of non-disclosure.

Simply put, the absence of disclosure by significant PE portfolio companies is the fortuitous consequence of capital market evolution rather than a defensible part of the PE investment thesis. Particularly as PE grows in overall economic importance, why facilitate a regulatory arbitrage that results in diminution of the common pool of information about strategies and performance? Private equity's strongest claim is that the governance of enterprise that flows from its ownership and governance model produces superior economic results; hiding its strategy is not a part of that story. Moreover, many of the serious concerns about the reliability of valuations in secondary transactions, especially continuation funds, could be assuaged through public disclosure of the underlying financials. This sunlight would go a long way to addressing the "back-scratching" and "money-burning" risks, as well as the asymmetries between sponsors and limited partners that particularly arise in the case of continuation funds.[190]

Disclosure, then, is a critical element of accountability. It is not just that the PE sponsor's measure of portfolio company's value might be wrong and self-serving (and could be improved by third party verification). Rather, disclosure can illuminate the facts and sources of PE's value creation. In other words, a disclosure requirement that separates the ownership/governance gains from the non-disclosure/competitive advantage gains enhances both *private* accountability and *public* accountability. [191]

If disclosure of financial information about PE portfolio companies is so beneficial, wouldn't private market actors have insisted on it already?[192] There are several reasons why not. The first is that

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[190] *See* Kastiel & Nili, *The Rise of Private Equity Continuation Funds*, *supra* note 3, at 1636-41, 1655-58. Why would portfolio company disclosure alone, without regulatory consequences, make a difference? This question frequently comes from those familiar with the European regulatory pattern under the Alternative Investment Fund Manager Directive. *See* Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, 2011 O.J. (L 174) 1, https://eur-lex.europa.eu/eli/dir/2011/61/oj/eng. Our view is that a large community of securities and other investment analysts would evaluate the performance of significant portfolio companies against various public and private comparators and that these assessments would become generally known in the sophisticated investment universe. This knowledge would, in turn, have feedback effects on performance reporting by PE sponsors and investors' assessment of relative skill. For detail on the European pattern, *see* THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE: EUROPEAN REGULATION OF ALTERNATIVE INVESTMENT FUNDS (Dirk A. Zetzsche ed., 3d ed. 2020).

[191] Once again, an analogy to the conglomerate era is useful. That era ended only after disclosure of inefficiencies from conglomerate mergers made the problem particularly visible. *See supra* 131. But for such disclosure, the conglomerate era would have continued for much longer, increasing the extent of the resource misallocation. PE creates something like large conglomerates without the disclosure.

Note, further, that we believe our proposal is particularly well-suited for large PE owned private companies, but need not encompass all private companies. The large "private" U.S. companies like Cargill, Koch Industries, Mars, or Publix Supermarkets are fundamentally different in their origins, sources of growth, financing, and ownership from the PE complexes and thus do not present the same systemic threat of resource misallocation.

[192] The Institutional Limited Partners Association produced a "Portfolio Company Metrics Template" in 2019. *See* INST. LTD. PARTNERS ASS'N, *Portfolio Company Metrics Template* (Mar. 19, 2019), https://ilpa.org/resources-tools/resource-library/portfolio-company-metrics-template/. The template focuses on the fund's "position" in each portfolio company rather than operating and financial results and a balance sheet. *See id.* ILPA's 2025 revision of reporting "templates" focuses on standardizing reporting at the fund level and in particular on distributions, fees, and, at the portfolio level, cash flows. INST. LTD. PARTNERS ASS'N, *ILPA Performance Template (v. 2.0)* (Jan. 21, 2025), https://ilpa.org/resources-

disclosure is a classic public good,[193] with benefits that extend beyond the LP investors. Therefore, LPs might fail to secure a socially optimal level of disclosure that promotes efficient resource allocation. Such failure is more likely given the need for standardized and uniform disclosure, which is especially hard to obtain in a multi-party setting.[194] Moreover, the weaponization of antitrust laws against investor activity in the service of public goods creation may make it harder for investors to band together and demand disclosure.[195]

Second, the private benefits of non-disclosure may outweigh the private costs along two dimensions. First, LPs may benefit from the competitive advantage of non-disclosure—namely the free-riding on public company disclosure, which provides valuable information about the strategies of competitors and helps sponsors benchmark the performance of portfolio company managers.[196] This benefit is strongest for limited partners that skew their investments in favor of private markets rather than public markets. Indeed, many of the most sophisticated investors, university endowments for example, have abandoned public equities in favor of PE. So those investors may favor a (non)disclosure policy that preserves the competitive advantage to PE via asymmetric disclosure.

The second private benefit of non-disclosure is fostering a kind of "shrouded pricing."[197] Sophisticated limited partners benefit from the expansion of the PE funding base, which facilitates exit and liquidity. Their sophistication means they have superior access to private measures of performance and thus can better read the signals of sponsor quality and the investment cycle. The non-sophisticated investors pay the extra price of non-disclosure reflected in ill-timed ongoing PE allocations. In short, strategic opacity may foster the expansion of the PE funding base, which facilitates exit and liquidity for the most sophisticated investors in the ecosystem. The more general point is that disclosure will in expectation lead to more efficient resource allocation across the economy, since investors in both public and private companies will benefit.

Third and finally, given the pronounced agency cost issues in the industry, not all LPs can bargain for disclosure even when it would benefit them.[198] LPs are in stiff competition for the best funds, and if they cannot overcome fee opacity, side letters and other information asymmetries that

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tools/resource-library/ilpa-reporting-template-v-2-0/; INST. LTD. PARTNERS ASS'N, *ILPA Performance Template—Gross Up Methodology (v. 1.1)* (Apr. 28, 2025) https://ilpa.org/resources-tools/resource-library/ilpa-performance-template-gross-up-methodology-v-1-1/.

[193] John C. Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); Gary Gensler, Chair, Sec. & Exch. Comm'n, *I'm with Roosevelt and Jack: Benefits of Mandatory Disclosure* (Mar. 22, 2024), https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-columbia-law-school-032224.

[194] William W. Clayton, *The Private Equity Negotiation Myth*, 37 YALE J. REG. 67 (2020); Magnuson, The Public Cost of Private Equity, *supra* note 56. In its most recent revision of performance templates, ILPA is campaigning for "endorsements." *See* INST. LTD. PARTNERS ASS'N, *ILPA Performance Template*, https://ilpa.org/industry-guidance/templates-standards-model-documents/ilpa-templates-hub/ilpa-performance-template/.

[195] *See, e.g.*, H. Comm. on the Judiciary, 118th Cong., CLIMATE CONTROL: EXPOSING THE DECARBONIZATION COLLUSION IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING (June 11, 2024); Texas v. Blackrock, Inc., 2025 WL 2201071 (E.D. Tex. Aug. 1, 2025). This fear is reflected in a recent limited partner survey conducted by ILPA. *See* INST. LTD. PARTNERS ASS'N, *The Future of Private Equity Regulation*, *supra* note 10, at 4, 11 (2023) ("LPs are routinely threatened with claims of collusion if they consult with other LPs negotiating with the same fund….").

[196] *See* de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, *supra* note 52.

[197] Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505 (2006); Peter Morris & Ludovic Phalippou, *A New Approach to Regulating Private Equity*, 12 J. CORP. L. STUD. 59 (2012) ("The second private benefit of non-disclosure is fostering a kind of 'shrouded pricing.'").

[198] William Clayton, *High-End Bargaining Problems*, 75 VAND. L. REV. 703 (2022).

directly affect investor payoffs, it is difficult to imagine they will also secure the right level of disclosure.[199] For this reason, the only hope for a sensible disclosure regime is regulation. And luckily, the SEC has the authority to adopt a proposal like ours. [200]

B. SEC Authority

How might our disclosure proposal come to be? Obviously, a legislative initiative could grant the SEC specific mandatory disclosure authority, but the SEC need not rely on Congressional action—instead, it already has the authority to require disclosure in connection with the private fund advisor registration and disclosure requirements of the Dodd Frank Act.

Section 404 of the Dodd Frank Act specifies that investment advisors shall keep and disseminate reports about its funds "as necessary and appropriate in the public interest and for the protection of investors *or* for the assessment of systemic risk by the Financial Stability Oversight Council."[201] This language, "as necessary or appropriate in the public interest," is used throughout the federal securities laws to invest the Securities Exchange Commission with plenary authority to mandate disclosure by various parties subject to its regulation.[202] In the context of Section 404, the SEC has previously stated that the mandated disclosure "is available to assist the Commission in the their regulatory programs for the protection of investors" in addition to aiding FSOC in its mission.[203]

Section 404 provides the authority for mandatory Form PF disclosure of fund AUM, investment strategies, use of leverage, counterparty exposures, investor composition, and performance. As discussed, this information is not made available to the public, but to a host of financial regulators on a confidential basis.[204] Expansion of information collection and public disclosure regarding significant PE portfolio companies would be controversial and would surely face legal challenge, but the SEC ought to prevail since this disclosure manifestly serves the "public interest and the protection of investors." Such disclosure is all the more important as the industry prepares to take investments from retail investors.[205] Perhaps more important, our proposed mandatory disclosure would directly address systemic risk deriving from the PE industry, as the previous Part addressed in detail.

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[199] William Clayton, *High-End Securities Regulation: Reflections on the SEC's 2022-23 Private Funds Rulemaking,* 14 HARV. BUS. L. REV. 71 (2024) ("Investors say that they shy away from demanding high-quality terms primarily because they are afraid that if they do so, their investment allocations will be given to more accommodating investors that are not raising such concerns"); INST. LTD. PARTNERS ASS'N, *The Future of Private Equity Regulation*, *supra* note 10 (detailing LPs' reports of limited bargaining power).

[200] Portfolio companies in the UK are subject to a voluntary disclosure regime as established by the Walker Commission in Nov. 2007 (updated in Dec. 2024). *See supra* notes 182-183. The number of large covered companies in 2025 was 98; 77 provided complying disclosure. EY-Parthenon provided a summary covering disclosures of portfolio companies since 2005, including companies that have been owned and exited. *See supra* note **Error! Bookmark not defined.**.

[201] Dodd-Frank Wall Street Reform and Consumer Protection Act § 404, Pub. L. No. 111-203, 124 Stat. 1376, 1571-73 (2010) (amending § 204 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-4(b) (emphasis added).

[202] This language is found in the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisors Act of 1940, and the Sarbanes-Oxley Act of 2022.

[203] *See Form PF; Reporting Requirements for All Filers, supra* note 31, at 108.

[204] Although Section 404 gives the agency the ability to mandate confidentiality, such confidentiality is not required of future rulemaking.

[205] In *National Ass'n of Private Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024), the Fifth Circuit vacated the SEC's "Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews" rules, which would have required GPs to disclose quarterly reports and annual audits to LPs, relying on Section 211(h) of the Dodd-Frank Act. The court found that there was an insufficient connection to "retail investors," which the statute explicitly contemplated

In addition to the straightforward textualist analysis, the legislative history surrounding the enactment of Section 404 makes clear that Congress had a broad conception of systemic risk and the protection of investors when it adopted the provision. The general impetus for most of the Dodd-Frank Act was to address the origins of the financial crisis, in particular the unappreciated risks to financial stability that might accumulate in various parts of the financial system. Yet in various provisions, Dodd Frank more broadly addressed corporate governance questions "in the public interest and for the protection of investors," including executive compensation, pay ratios, and policies on the clawback of incentive-based pay following an accounting restatement.

In its accompanying report, Congress indicated that Section 404 helped to close a "regulatory gap" by providing the SEC with "information that is sufficient to assess whether the funds . . . pose a threat to financial stability."[206] Comments in a hearing before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises indicate that the focus on monitoring systemic risk was largely for the protection of both institutional investors and individual investors.[207] Likewise, a contemporaneous FSOC report offers a broad definition of "systemic risk": beyond financial risk, the term encompasses externalities created by market activities as well as "fallacies of composition…[or] what is true for each individual firm in isolation may not be true when all firms follow similar strategies."[208] Practices in the PE industry that could lead to an escalating misallocation of investment resources on a macroeconomic scale or the threat of runs on private credit funds represent clear contributors to systemic risk.[209] It follows that the SEC has authority pursuant to Section 404 to fashion a mandatory disclosure regime that would not just protect investors but also serve the public interest by securing efficient capital allocation and mitigating systemic risk.

C. ERISA Trustee Fiduciary Duties

As noted previously, the private equity industry is seeking to promote its products to retail investors who were previously excluded. Historically, only institutions and high-net-worth "accredited investors" could access private equity products, but in recent years, asset managers have begun to offer hybrid vehicles that are open to retail investors.[210] These products include semi-liquid '40 Act Funds, listed closed-end funds, and collective investment trusts ("CITs"), among other specialty products.[211] But even with these developments, the promised land of retail investment—mutual funds, ETFs, and target date funds in 401(k) plans—remained elusive. The main impediment is ERISA

protecting. If, however, private equity opens up to retail investors, Section 211(h) should provide additional legal authority for a rule mandating disclosure.

[206] *See* H.R. Rep. No. 111-686, pt. 1, at 7 (2010).

[207] *Perspectives on Hedge Fund Registration: Hearing Before the Subcomm. on Cap. Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 1 (2009) (statement of Paul E. Kanjorski, Chairman).

[208] *Id.*

[209] A separate issue is whether our disclosure proposal runs counter to the confidentiality provisions of Section 404. Section 404(8) gives the SEC the power to set confidentiality terms on the information that it obtains pursuant to Section 404 but it does not require that such information, or all of such information, be held as confidential. Our disclosure proposal is tailored to provide information on a small fraction, by number, of the portfolio companies owned by PE funds.

[210] William W. Clayton & Elizabeth de Fontenay, *Private Equity for All: The Paradoxical Push to Democratize Private Markets* (forthcoming 2026 DUKE L. J.), https://ssrn.com/abstract=6157128.

[211] *Id.*

trustee fiduciary requirements that have caused retirement plans to focus on low fee indexed products rather than complex and higher fee alternatives that might subject the trustee to litigation risk.[212]

However, the Trump administration aims to remove these barriers and open private equity to the $10 trillion retirement account market. Specifically, on August 7, 2025, President Trump issued an executive order directing the Department of Labor to revise "past and present guidance regarding a fiduciary's duties under the [ERISA] in connection with making available to participants an asset allocation fund that includes investments in alternative assets."[213] The order also directed the SEC to "consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans" by revising SEC guidelines, among other things. In response, the U.S. Department of Labor has recent proposed a rule that provides a process-based "safe harbor" for the addition of "alternative assets" to an ERISA-governed portfolio.[214]

If such "democratization" occurs,[215] ERISA fiduciaries will be facing new terrain of private equity investments without the necessary information to navigate it.[216] It is hard to imagine that a trustee could discharge their duty of prudence—part of the parcel of duties that bind ERISA trustees—without detailed knowledge about the performance of portfolio companies and funds.[217] But paradoxically, the increasing availability of funds will further decrease the leverage of these intermediaries to demand disclosure that benefits them. Moreover, to open the way for a trustee to permit investment in a private equity product, the DOL has attempted to limit the ability of plaintiffs' attorneys to sue on behalf of that decision, in spite of the accountability deficit that we have described (not to mention the higher fees that such investments typically garner for the fiduciaries).[218] This further increases the risk that ERISA trustees will be allocating assets without the necessary information.

More broadly, from an economy-wide perspective, the allocative inefficiencies and prospect for system risk that is possible when ERISA trustees blindly allocate assets on behalf of millions of retirees are significant. As a result, public disclosure of "significant" portfolio company (and fund level) performance ought to be a minimum requirement for the expansion of private equity to retirement accounts. Indeed, the DOL could achieve this result simply by adding an additional process element to the safe harbor provision for ERISA Trustees that specifies the importance of an

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[212] *Id.*

[213] Exec. Order No. 14,330, *Democratizing Access to Alternative Assets for 401(K) Investors*, 90 FED. REG. 38,995 (Aug. 12, 2025).

[214] *See Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 FED. REG. 16,088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. § 2550.404a-6).

[215] For a critical take on the structural fit between PE and defined contribution plans, *see* James An, *Private Equity in Retirement Savings* (Apr. 26, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5549704.

[216] *Id.* (arguing that ERISA fiduciaries will be fearful of being sued without more government encouragement).

[217] See ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); *Fiduciary Duties in Selecting Designated Investment Alternatives*, *supra* note 214 (explaining that ERISA fiduciaries must engage in an objective, thorough, and analytical process, and identifying performance, valuation, benchmarking, and complexity as relevant fiduciary considerations when selecting designated investment alternatives); *Tibble v. Edison International*, 575 U.S. 523 (2015) (recognizing ERISA fiduciaries' continuing duty to monitor plan investments).

[218] *Fiduciary Duties in Selecting Designated Investment Alternatives*, *supra* note 214; *see also supra* note 215, at 4. ("[F]iduciary liability under ERISA is not a simple on–off switch; it is a multifaceted litigation risk that resists easy fixes…. [And] the complex structure of this risk discourages DC plan administrators from offering any investment option that deviates meaningfully from a narrow set of highly standardized, litigation-tested funds. History also suggests that fiduciary relief is an unreliable method for inducing uptake of new investment products.").

investment fund's public disclosure of the financial results of "significant" portfolio companies as a minimum "suitability" criterion for possible inclusion. Competition among sponsors to assure that their funds would be "ERISA eligible" could establish a new general standard for disclosure since the failure to disclose could be taken as a negative signal of quality that could be observed by all investors.

D. Regulatory Disclosure of Anonymized Form PF Data

We regard our mandatory disclosure proposal as modest in light of the importance of the question: whether the wave of private equity acquisitions without accountability is leading to resource misallocation and producing a self-inflating bubble. This question gains in urgency if PE obtains access to the investment flood of retirement savings, and seen in that light, our proposal is exceedingly modest. But we also recognize that the feasibility of this proposal depends on a favorable political climate, as well as the ability to survive judicial review in circuit courts with a deregulatory bent. And in the face of hostile regulatory winds, another approach is possible that would help, but not fully address, the accountability crisis: the publication of data on an anonymized basis.

This approach has historical precedent. In particular, in 1985, two economists published a study of the conglomerate era of M&A, from 1950-1977.[219] For part of that period, the FTC required companies to report to the FTC on a confidential basis detailed operating and financial results on various "lines of business."[220] With this extensive detailed data, and with other evidence they gathered about company performance, Ravenscraft and Scherer were able to make general (and often quite negative) statements about the efficiency of conglomerate acquisitions that helped shape the takeover wave that followed.[221]

Similarly, the SEC could produce a detailed study of the private equity sector using confidential data collected through the Form PF process that could shed light on key efficiency questions. As in the Ravenscraft and Scherer study, PE fund names would be omitted and data would be presented in the aggregate. Such disclosure could enable parties to adjust their investments and other expectations based on overall measures of PE efficiency. And beyond providing a picture for investors, the study could help provide an assessment of the effect of PE on various economic variables, such as productivity and employment. Such data is obviously very hard to obtain given that the leading work on the broader impact of PE relies on stale data that is more than 10 years old.[222] But while data of this kind would have beneficial uses, it is plainly inferior to mandatory disclosure by significant PE portfolio companies; the latter would directly respond to the allocative inefficiencies and potential for systemic risk that are created by a world of PE without accountability, by making clear whether and where the problems lie.

V. Conclusion

The private equity organizational experiment has transformed the American economy, and yet its ongoing benefits are uncertain. For many capital market innovations, the pioneers generate strongly

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[219] David J. Ravenscraft & F.M. Scherer, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY (1987).

[220] *Id.* (explaining that the FTC required companies to report disaggregated financial information by line of business on a confidential basis).

[221] For a useful summary, *see* Gilson & Black, The LAW AND FINANCE OF CORPORATE ACQUISITIONS, *supra* note 118, at 339-43; David J. Ravenscraft & F.M. Scherer, *Life After Takeover*, 36 J. INDUS. ECON. 147 (1987).

[222] *See* Davis et al., *The (Heterogenous) Economic Effects of Private Equity Buyouts*, *supra* note 46.

positive returns. This feature draws in imitators and competitors, and over time, rents may be competed away and returns may turn negative. In earlier decades, the private equity fund sponsor would be forced to show their work when they exited their investment, but today, exit in a verifiably arms-length transaction is hardly guaranteed. And without such exit, there is no way to test the private equity fund's narrative about value creation.

Worse, a constant stream of easy money into private equity means that even poor performing funds can reliably show returns even without value creation. Moreover, this influx of capital will continue and even pick up its pace if trillions of dollars of retirement assets are pushed into the industry. This influx would heighten the economic risks for investors, employees, and the broader economy.

Mandating disclosure of portfolio company performance would be a relatively simple and inexpensive way to provide accountability. Such a regulatory change could be adopted without an act of Congress, pursuant to the SEC's regulatory authority, and augmented by Department of Labor's standard setting for ERISA investment. Such disclosure is essential to ensure that the growth of the PE industry benefits not only investors and sponsors but also the U.S. economy.

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