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Funds and Investment Management Risk Radar

Financial Institutions | February 2025

Funds and Investment Management Risk Radar

Overview of trends and recent developments

- Funds, investment managers and other financial sponsors operate in a dynamic and changing market environment. This world of alternative finance to traditional banks has grown exponentially since the financial crisis of 2008, gathering pace over the last decade. Major global financial trends are shaping this sector. Whether it be digitalization, sustainable finance, increasing regulatory scrutiny or heightened corporate indebtedness, these challenges must be navigated, and the opportunities embraced. The sector is a diverse one, ranging from managers of a variety of wholesale and retail funds to private equity and credit, all of which are naturally affected in different ways.
- Although as much as USD 100 trillion of assets are now under management, the asset management industry is under pressure with cost and fee income pressure as investors demand ever more value for money. With the rise of tracker and other low-cost products, such as exchange-traded funds threatening traditional fee structures, many firms are looking to leverage technology to win efficiencies and differentiate themselves in the market. Others, especially mid-tier managers, are looking to consolidate with other players.
- Private equity now operates in an environment where the cost of capital is significantly higher than over the last decade. The recent slowdown saw investor exits trending lower; although "carve-outs" and middle-market "buy and build" strategies remained active. Deal flow is now improving due to slowing inflation and the beginning of interest rate cuts with more expected to follow. Alongside private equity, private credit has grown exponentially to USD 1.5 trillion in value (Preqin), serving smaller and mid-size corporates as an alternative to leveraged finance and public bonds. In the GP-led solutions space, it is providing liquidity to both sponsors and general investors. However, a lack of transparency and leverage is a cause of concern among regulators around conflicts of interest and systemic risk. The authorities are looking to address transparency, reporting and liquidity issues with new regulation.
- As is the case across the economy, the sector is broadening its use of technology, such as with tokenization. Most prominently, artificial intelligence is moving from back-office functions to more strategic uses, such as due diligence, research and reporting. By leveraging data, generative AI has the potential to improve financial sponsors' investment decision making, and thus their "alpha" in markets.
- Sustainability goals, together with associated reporting and disclosure, represent both key opportunities and risks for the sector. Thematic investing, impact funds and adaptation finance, as examples, are growing in importance in the market. At the same time, what were voluntary standards are becoming regulatory requirements, and while there is greater interoperability internationally, they can still constitute barriers to cross-border finance. Other dangers include a lack of data to support due diligence, perceived greenwashing through misstatements and mislabeling and, especially in the US, political push-back against environmental, social and governance goals.
- This "Risk Radar" looks at some the trends and risks faced by the sector. We look forward to engaging with you on these topics.

Whether it be digitalization, sustainable finance, increasing regulatory scrutiny or heightened corporate indebtedness, these challenges must be navigated, and the opportunities embraced by asset managers and other financial sponsors.

Funds and Investment Management

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Geopolitical

Risk profile

Recent trends and developments

- Geopolitical risk impacts funds and private equity by increasing market volatility and uncertainty. It can lead to lower investment, higher costs and disruption to transactions. While it's possible to overstate the market impact on equities, the fall out on local markets (e.g., specific assets) can be significant.
- Investors must navigate these risks carefully, considering factors like regional instability, regulatory changes, human rights considerations and economic sanctions. Having the right tools in place to identify and effectively manage risk is essential. While geopolitical risk can negatively impact investments, returns may be boosted from assets in other perceived safe havens. Therefore, geopolitical risk is another (albeit increasingly) important factor to consider when constructing investment portfolios. 2024 is witnessing elections in numerous economies.

Risk Rating: **Moderate**

Associated risks

Global instability

Since the end of the "US-led" world order, the last 20 years have seen increasing global instability characterized by high-risk geopolitical events. This is having far-reaching and long-lasting effects on the investment climate and risk exposures. Investors also face reputational risks for being on the "wrong" side of a conflict. Given changing threat profiles, managers must identify vulnerabilities and assess the likely effects on investment values and their liquidity, developing contingency plans in response. The UK withdrawal from the EU has reduced the ease of access between these markets and increasing divergence in their regulation is leading to higher compliance costs.

Sanctions

Recent financial and trade sanctions pose complex challenges for financial sponsors. The quickly changing sanctions landscape, especially in the wake of geopolitical events such as the war in Ukraine, means that financial sponsors must be vigilant about their investors and investments. Fund managers and PE general partners must ensure that their investors or investments have not become the subject of newly imposed sanctions. This requires thorough due diligence and the implementation of sanction-specific risk-mitigation strategies. It is important to have in place appropriate systems and controls, and contractual provisions allowing proactive steps where investments may contravene sanctions law.

Foreign Investment Review (FIR)

Over the last decade, increasing numbers of jurisdictions have adopted FIR-type legislation, such as the EU, UK, Japan and the US, significantly impacting funds and private equity transactions. In the US, the Foreign Investment Risk Review Modernization Act, implemented by the Committee on Foreign Investment (CFIUS), expands the review of foreign direct investment transactions. It especially affects non-controlling investments in US businesses involved in critical technologies.

Consequently, there are increased timing delays and uncertainty over transactions involving non-US investors that might raise US national security issues.

Baker McKenzie solutions – key issues we advise on

- Regulatory compliance and risk management: anti-bribery, corruption, sanctions and AML
- Customer and institutional relationship due diligence
- Disclosures, filing and reporting requirements; regulator questions, audits and investigations
- Cross-border commercial arrangements and agreements
- Sanctions and export controls, and foreign investment reviews
- Product offerings and new market due diligence
- Third-party supplier compliance

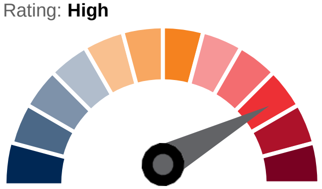
Technology

Risk profile

Recent trends and developments

- The asset management sector is under pressure to cut costs, scale up and provide greater value, which is exemplified by the trend towards low cost, passive funds. Moreover, generally, for financial sponsors to pursue ESG-friendly investments, large amounts of unstructured and incompatible data must be analyzed.
- Technology can help. Artificial intelligence can efficiently and quickly process huge amounts of data to apply to ESG investing. It also has the potential to be used for client outreach and to make front and back offices more efficient, as well as identifying investment opportunities, reporting to clients and responding to the regulatory imperative of better monitoring employee conduct risks.
- Cloud technology poses potential systematic risks, as major providers could become a single point of failure.

Risk Rating: **High**



Associated risks

Artificial intelligence

Both AI and machine learning are increasing in use across a range of applications, e.g., portfolio optimization and to automating client interactions commonly with chatbots. The advent of generative AI has raised their profile even further. This is proving capable of summarizing research and due diligence, as well as writing technical documents such as financial analysis, and ESG reports. AI requires proper management of its inherent risks. Transparency and explainability remain major legal risks that are exacerbated by weak AI governance. Regulation is increasing in this area, especially in the European Union.

Cybersecurity

Increasing digitalization and heightened geopolitical tensions mean that the risk of a cyberattack with systemic consequences has risen. The financial sector is particularly exposed due to the large amounts of sensitive data and transactions it handles. According to the IMF, the sector has suffered more than 20,000 cyberattacks, giving rise to USD 12 billion in losses over a 20-year period. That leaves aside regulatory penalties. A further risk factor is increasing reliance on third-party IT services providers, which is further accentuated by the adoption of AI products. Regulators expect businesses to take steps to improve the resilience of their IT systems and thereby to reduce the risk of attack.

Technology & talent management

The impact of digital transformation means that businesses in the sector must ensure that their workforce adapts to the new market environment re-skilling existing employees and recruiting new talent. Financial sponsors need to recruit more digitally and IT-trained staff (e.g., in AI), and, in doing so, they must compete against a range of businesses including technology companies and fintechs to secure and keep the best talent. Additionally, existing staff must adapt and upskill to work with new technologies or see themselves become redundant.

Baker McKenzie solutions – key issues we advise on

- Integrated global cyber and data security response
- Cloud computing
- 5G
- AI and ML
- Evolving/increasing regulation of smart tech
- Contracting for new and improving tech
- IP protection for smart tech
- Tech trade wars
- External tech investments/financing
- Blockchain and tokenization
- Smart contracting
- ESG data
- Robotics

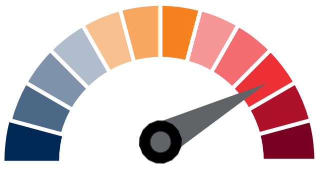
Sustainability

Risk profile

Recent trends and developments

- Financial institutions are critical players in the transition to a carbon-neutral economy because of their role in allocating capital. Until recently, voluntary standards and frameworks have predominated, but this is changing quickly with new regulations in many jurisdictions. The EU remains in the vanguard with its Sustainable Finance Plan, which centers around rules on taxonomies, corporate reporting, disclosures and due diligence. In the US, the new administration is expected to significantly roll back sustainability regulation.
- As more jurisdictions introduce regulation, such rules may not always be compatible, creating obstacles for cross-border financial services, for example, to the marketing of funds. The replacement of the TCFD recommendations with global minimum standards from the ISSB should bring greater interoperability.

Risk Rating: **High**



Associated risks

Disclosure & regulation

Sustainability-related disclosures to investors, whether mandatory under the EU's Sustainable Finance Disclosure Regulation (SFDR), or under voluntary standards, are quickly becoming the norm in most jurisdictions. These requirements apply at entity and product level, and distinguish between all financial products and those targeting or promoting environmental and/or social objectives. The challenges in implementation range from the availability of underlying ESG data to uncertainty over the interpretation of regulations. What qualifies as Article 9-labeled funds under the SFDR, for instance, was subject to confusion and saw downgrading of funds to "less green" Article 8 labels.

Due diligence

Performing quality due diligence is always important. For ESG-driven investments, the stakes are particularly high. ESG rating products can spot risks not identified with conventional financial analysis that nonetheless could affect financial performance because of additional operational costs or litigation liabilities. The dilemma is that ESG ratings are still open to interpretation, being only as good as the methodology and the data employed, potentially lacking independent verification. Ratings also rely on public information, so their outputs will necessarily be subject to data gaps. Some jurisdictions have now introduced regulations on ESG ratings, while others are actively contemplating this step.

Greenwashing

There is no general authoritative definition of greenwashing, but in the EU, the European Supervisory Authorities refer to it as "a practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial service." As a consequence, consumers, investors and other market participants may be misled. Examples include cherry-picking, omission, ambiguity, exaggeration and misleading terms. Financial sponsors will be at risk of regulatory action and potential litigation. While to date there have been few cases brought, for example, in the US and Australia, the topic is high up in supervisors' priorities.

Baker McKenzie solutions – key issues we advise on

- Compliance with sustainable finance regulatory reforms, including pre-contract and public disclosures and reporting
- Cross-border marketing of funds requirements and compatibility of ESG standards
- ESG regulatory considerations for transactional product offerings (e.g., green bonds, sustainable financings, etc.)
- Due diligence requirements including the EU CSDDD, internal governance, taxonomy compliance and definitional issues
- Mitigating the risk of exposure to greenwashing allegations
- Disclosure, reporting and due diligence obligations of
- PE portfolio companies

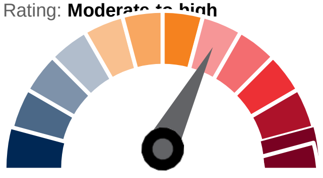
Specialized finance

Risk profile

Recent trends and developments

- Demand for private credit (of which there are various forms) has risen significantly, filling a gap left by traditional bank lending after the 2008 financial crisis. The market is now approximately USD 1.5 trillion and is expected to nearly double within the next few years. Direct lending, for instance, has offered higher returns compared to leveraged loans and high-yield bonds. Most recently, however, in the syndicated loans market, banks are winning back market share, and direct lenders are under pressure to stay competitive.
- Private fund sponsors have had to manage a slowdown in M&A activity due to higher interest rates, making exits from investments more challenging. Private equity firms are sitting on record amounts of unsold assets, making it harder to return cash to investors. GP-led liquidity solutions (e.g., preferred equity(have become increasingly popular, also involving private credit.

Risk Rating: **Moderate to high**



Associated risks

Private credit

Private credit is competing with banks to fund corporate acquisitions. It has grown exponentially to USD 1.5 trillion in value, serving smaller and mid-size corporates as an alternative to leveraged finance and public bonds. It is diversifying into a wide range of assets from direct lending to commercial real estate and asset-based financing structures. However, private credit can be more exposed to borrowers than banks, which are more constrained in their lending by regulation. Funding and liquidity pressures may also see a reduction in the availability of wholesale financing and/or a mismatch between asset maturities and liabilities

Funds finance

In recent years, the private funds sector has developed various tools and strategies to help sponsors access further capital at the fund level during the life of the fund, when the fund sponsor's capacity to draw capital from its existing investors may be constrained. These are commonly referred to as "GP-led liquidity solutions" or "GP-leds." The challenge for any sponsor is to determine which liquidity solution is most appropriate for the requirements of its funds, portfolio companies and investors. Here, among other matters, it is crucial to manage the conflicts of interest that often arise with GP-leds and to provide sufficient disclosures to limited partners.

Adaptation finance

There is a very significant financing gap to speed up adaptation to the demands of climate change. The LSE and Grantham Institute explain that there is an opportunity for an exponential increase in private finance that will require ongoing collaboration between public and private actors. Adaptation investments, however, are often considered high risk due to their perceived and, at times, actual low returns, as well as the challenges associated with monetizing their benefits. A lack of information regarding climate risks makes it challenging to price risks accurately. There is also a lack of common market language, standard definitions and classification framework.

Baker McKenzie solutions – key issues we advise on

- Blended, impact, adaptation and transition finance, etc.
- Structuring and issuing ESG-related offerings and instruments
- Performing due diligence on issues, accounts and auditors, including the sustainability attributes of contemplated transactions
- Liaising with third-party ESG reviews
- Preparing and managing transactional and regulatory documentation and notifications, such as the prospectus and content of specific ESG reports and annual filings
- Reviewing conditions precedent (e.g., legal opinions and auditor comfort letters) and drafting own opinions
- All taxation aspects of transactions

Workforce redesign

Risk profile

Recent trends and developments

- Inclusion, diversity and equity (ID&E or DEI in the US) are key social factors within environmental, social and governance concerns that require careful navigation by firms. Research suggests that misconduct is often linked to governance failures. Greater diversity and a "speak up" environment improve the risk management culture, and studies show a decrease in the frequency of fines for misconduct.
- In the US, executive orders are targeting what are described as illegal DEI: ending DEI efforts in the federal government, including diversity programs and eliminating all related offices and positions; a new policy that the US will recognize only two sexes, male and female — signaling a rollback of transgender protections – and directing federal agencies to clamp down on so-called illegal discrimination from federal contractors and publicly traded corporations.

Risk Rating: **Moderate**

Associated risks

Inclusive workplaces

Businesses of all types should ensure that all staff are treated equally and protected from bullying and discrimination. Whistleblowing processes should be effective, and employers have duties to address the well-being and health and safety of their employees — mental health especially being brought to the fore during the pandemic, with individuals working from home and less of a distinction between office work and home life. The focus on ID&E is also relevant for non-financial misconduct in the regulatory sector. Financial institutions and their senior managers may be held responsible for cultures that tolerate serious personal misconduct, bullying, racism, discrimination or misconduct.

With Gen Z entering the workforce, businesses that embrace responsible business practices and ID&E may gain a competitive advantage.

Diversity data & targets

A key tool to drive forward ID&E is the collection of data on diversity and its reporting. An increasing number of businesses are being encouraged and even mandated by law or regulators to collect and disclose employee and board data. While building trust between employers and employees is vital (frequently their consent is required), the collection and processing of personal data must comply with local data privacy laws, which vary considerably. In some jurisdictions, targets to address underrepresentation are unlawful and can be no more than aspirational goals. Moreover, failure to achieve a goal can open up a business to scrutiny.

Executive exits

Senior staff often possess extensive knowledge and experience including over investment strategy. Their departure can lead to a significant loss of expertise and potentially affect a fund's performance, as well as attracting regulatory scrutiny. It's important to protect confidential information, negotiate enforceable non-compete clauses and have a robust succession plan in place. A well drafted employment contract and, when necessary, a suitably negotiated settlement agreement can help reduce the risks.

Baker McKenzie solutions – key issues we advise on

- Transforming the Traditional Employment Model (e.g.; New Staffing Models)
- Remote Working (e.g.; legal and regulatory issues, data privacy, trade secrets, tax, real estate)
- Digital Progress and its Impact on the Workforce (e.g.; rise of automation, use of AI, employee surveillance)
- Managing Business Change and Disruption e.g., carve-outs, post-transaction integration and outsourcing
- Providing the policies and best practices necessary to achieve effective whistleblowing, inclusion and diversity program objectives
- Strategic senior executive recruitment, termination and remuneration

Mergers & Acquisitions

Risk profile

Recent trends and developments

- After the slowdown in private equity M&A in 2023 due to inflation and higher interest rates, the outlook has been more positive in 2024. Deal flow is now improving due to slowing inflation and the beginning of interest rate cuts with more expected to follow. What's more, it now looks as if the US will achieve a soft landing and avoid a long-predicted recession. PE's task of picking winners and losers must, however, still be done against an uncertain economic and political environment.
- Carve-out transactions are increasingly popular among businesses to release "trapped value." This trend which originated during the market slowdown sees businesses review non-core assets to streamline their operations in the light of acquisitive interest from financial buyers. To maximise the benefits, it's vital to manage the "carve-out trilemma" between deal certainty, timing and cost.

Risk Rating: **Moderate**

Associated risks

Regulatory hurdles

In recent years, M&A transactions have faced heightened regulatory scrutiny. Antitrust authorities have tightened the grip of merger control, foreign investment control has been expanded and in the EU a new regulatory regime on foreign subsidies has been introduced. Having a well thought-through and detailed "roadmap" for navigating the regulatory challenges is therefore becoming essential for M&A success. To pick merger control, as an example, its focus has broadened from traditional horizontal market-share analysis to new perceived threats for competition in different forms. PE buyers usually do not raise competition concerns, but given the growth in the size and importance of the sector this beginning to change. Of course, antitrust-triggered divestment remains an opportunity for PE.

Due diligence

In private equity M&A, due diligence involves extensive analysis of the target company and its environment to mitigate risks. In this respect, unlike publicly listed companies, private firms often lack comprehensive information, such as US SEC filings. Acquisitions are also typically investment-driven rather than strategic. This necessitates thorough research of the business and industry sector. Given that the acquisition will often envisage potential workforce reductions, asset sales, and business reorganizations, deep legal due diligence is desirable, for example, labour law, contractual agreements with vendors and any regulatory obligations to which the target is subject.

Post-acquisition integration

Any large post-acquisition integration project requires a strong mix of business strategy, process management, technical expertise and ongoing communication. Once a plan is developed, practical issues will be decisive in determining how quickly it can be implemented and how soon the benefits of the integration can be realized. HR considerations, corporate and tax law issues, and regulatory approval and filing requirements should all be factored in, rather than leaving them to the implementation phase. It's important for the project team to focus early on navigating roadblocks that might otherwise delay or frustrate the realization of integration goals.

Baker McKenzie solutions – key issues we advise on

- Guiding you through the complexities of carve-out transactions to maximise deal value
- Designing the deal structure and project managing the internal and external advisors
- Conducting due diligence including ESG matters
- Regulatory issues such as merger control, foreign investment control and EU foreign subsidies
- Adopting a cost-effective and smooth transaction process, thus managing costs and ensuring advice is delivered in a swift and pragmatic manner.
- ESG considerations including disclosures and publication filings
- Anticipating issues and proactively offering solutions in a manner than can be presented to the Steering Committee / PMO for the project and the Board.
- Maintaining momentum throughout the entire duration of the project.

Litigation and enforcement

Risk profile

Recent trends and developments

- Litigation and enforcement represent a key risk for financial sponsors. Whether disputes are climate-related, antitrust or transaction-based (a slowdown in the economy might cause this latter category to rise, as deals done during the M&A boom start to underperform, and parties look for redress), they require time and resource, including senior management involvement.
- For climate-related claims, NGOs and claimant law firms typically take advantage of a client media ecosystem to promote reporting on litigation, attract regulatory scrutiny and exert reputational pressure on defendants. These tactics can be met with a coordinated and proactive media and regulatory engagement strategy to ensure a consistent response and avoid traps that could prejudice defense strategy.

Risk Rating: **Moderate to high**

Associated risks

Climate-related

Climate-related claims have emerged as the predominant disputes concern for financial sponsors. There is now such a plethora of ESG-related legal and regulatory requirements around the world that many businesses struggle to keep up with them, although the current patchwork of voluntary standards and fragmented regulation is coalescing toward more consistent global obligations. The risk of such litigation will continue to arise through misleading or incomplete statements, or when products and marketing do not meet expectations. Regulators are focusing on this area, especially on issues such as greenwashing. Regulators as far apart as the US and Australia have brought enforcement action for greenwashing, and more will likely do so. This will also lead to more civil-related claims.

Transactional disputes

Financial sponsors face a variety of litigation risks. Some are inherent to the financing and acquisition of investments, although they can be mitigated through due diligence and contractual protections. The incidence of litigation can grow in situations of increased risk taking, where sponsors act outside of their core markets, often driven by competitive lending. In situations of distress, sponsors and counterparties may more readily find themselves engaging in litigation. Finally, as legal requirements grow (e.g., foreign investment review regimes) and regulatory scrutiny becomes more intensive generally, the potential for disputes is heightened.

Antitrust action

As the footprint of private equity across economies grows, so do concerns over its competitive impact. This includes the potential abuse of dominant position in the market through "roll-up" strategies, where private equity buys up multiple smaller companies in one industry sector. The US Federal Trade Commission is paying close attention on antitrust grounds to such strategies that consolidate previously unconcentrated industry sectors through multiple acquisitions to the detriment of competition. Follow-on class actions are a risk both in the US and in other jurisdictions. Other jurisdictions are likely to follow suite on antitrust.

Baker McKenzie solutions – key issues we advise on

- Developing a strategy to minimize regulatory enforcement and litigation risk
- Disputes arising out of financing and M&A transactions with counterparties
- Engaging with regulators over possible enforcement action to resolve any contraventions, and settling any consequent enforcement action or guiding you through the regulatory processes advocating your case
- Undertaking litigation where necessary, whether defending an individual or class actions
- ESG-related claims arising from investments, including greenwashing, and claims for breach of stewardship and fiduciary standards

Taxation

Risk profile

Recent trends and developments

- Shifts in the global tax landscape have increased uncertainty and risks associated with contentious tax matters. As tax authorities become more aggressive, proper planning is critical, as is the need to anticipate and defend against audits.
- The OECD's Two-Pillar Solution is intended to address the tax challenges arising from the digitalization of the economy. In particular, the implementation and application of the Pillar Two rules - which are aimed at ensuring large multinational enterprises pay a 15% global minimum Effective Tax Rate (ETR) on the income arising in each of the jurisdictions where they operate - are complex and present challenges but also opportunities to financial sponsors in the efficient management of their tax liabilities.

Risk Rating: **Moderate**

Associated risks

International tax and transfer pricing

Businesses are facing an ever-changing international tax landscape combined with increased audit activity and tax authorities being proactive in challenging international tax and transfer pricing structures, with demands for even more data to substantiate their calculations. While regulated financial institutions are exempt from Pillar One (although not necessarily any portfolio companies), Pillar Two brings unprecedented changes to the international tax system by introducing a 15% global minimum Effective Tax Rate (ETR) for large multinational enterprises. Further, multinational portfolio companies may need to adapt to the OECD proposals on taxing rights made under Pillar One, which currently remains under negotiation at the OECD level.

Sustainability and transparency

Tax is increasingly becoming a key part of the sustainability agenda. The tax transparency landscape has, in recent years, evolved from the adoption of voluntary standards, such as GRI-207, to legislative regimes, notably including the adoption of the EU Directive on public country-by-country reporting (which will require multinational groups to report specified tax information in relation to financial years commencing on or after 22 June 2024 at the latest). The focus on increased tax transparency puts pressure on the use of tax havens and tax avoidance initiatives, which is an issue not only for financial entities and, where relevant, their portfolio companies, but also for their investors.

Carried interest

Limited partners in private equity funds have, for many years, benefited from an advantageous treatment of "carried interest" where it is taxed not as income, but as capital gain. This provision is under scrutiny in the UK, where the government has committed to reforming the existing rules (and has recently published a call for evidence from stakeholders), while being clear that it wants to protect the UK's position as a "world-leading asset management hub." Should the existing tax treatment end or be curtailed (e.g., limited to co-investment) in one major financial center, others may be tempted to follow, and this may lead to key individuals seeking to relocate to other more favorable jurisdictions.

Baker McKenzie solutions – key issues we advise on

- Strategic tax issues relating to group structures, investments and senior executive rewards
- Global tax developments, e.g., Pillar Two, and the implications for your business
- Keeping track of new developments in the jurisdictions key to your business, and advising on the implications, e.g., carried interest
- Tax aspects of mergers and acquisitions
- Managing the transfer pricing implications of a fast-changing global landscape
- Ensuring tax audit readiness and resolving disputes with tax authorities
- Navigating indirect tax development and impacts, including in relation to VAT, customs, and state and local taxes

Helping you to get the best results

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