# M&A Report

2023

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# 2023 M&A Report – What's Inside

Slowing economic growth, equity market volatility, stubborn inflation, rising interest rates and geopolitical tensions combined to create a hostile environment for M&A activity in 2022, with deal volumes down across the board and average deal prices declining in all sectors except energy. While deal activity in 2022 was unlikely to match the lofty levels of 2021, the market was more sluggish than anticipated, producing its fourth-lowest deal volume since 2010.

The number of reported M&A transactions worldwide decreased by 14%, from 57,114 deals in 2021 to 49,058 in 2022. Global reported M&A deal value contracted 32%, from a record annual high of $4.62 trillion to $3.15 trillion. The average deal size in 2022 was $64.1 million, down 21% from the $80.9 million average in 2021.

## GEOGRAPHIC RESULTS

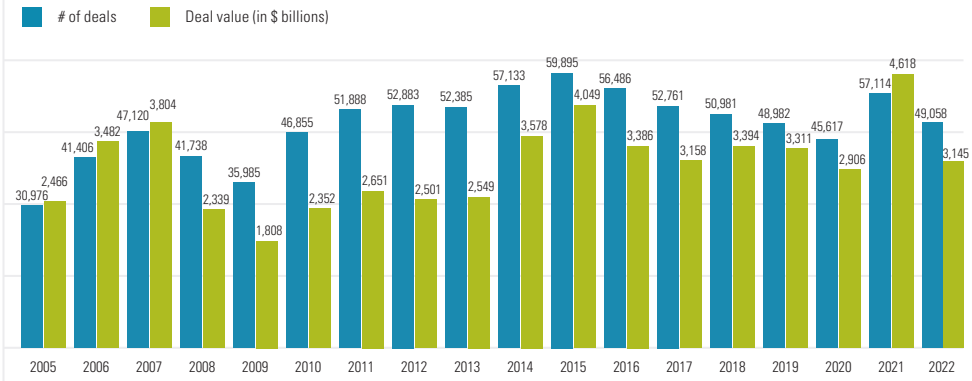
Deal volume and value was down across all major geographic regions in 2022.

— ***United States:*** Deal volume slumped by 16%, from 24,899 transactions in 2021 to 20,921 in 2022. US deal value shrank by 41%, from $3.05 trillion to $1.81 trillion. Average deal size decreased by 29%, from $122.4 million to $86.4 million. The number of billion-dollar transactions involving US companies fell by 52%, from 594 in 2021 to 288 in 2022, while their total value decreased by 43%, from $2.26 trillion to $1.29 trillion.

— ***Europe:*** The number of transactions in Europe declined by 12%, from 21,282 in 2021 to 18,808 in 2022. Total deal value dropped by 43%, from $1.66 trillion to $949.9 billion. Average deal size decreased by 35%, from $77.8 million to $50.5 million. The number of billion-dollar transactions involving European companies slid by almost half, from 340 in 2021 to 171 in 2022, while their total value declined by 49%, from $1.16 trillion to $594.9 billion.

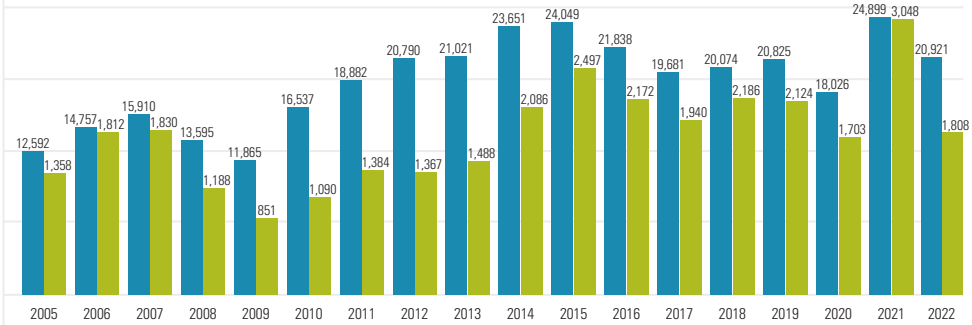
— ***Asia-Pacific:*** In the Asia-Pacific region, deal volume slid by 13%, from 12,436 transactions in 2021 to 10,779 in 2022. Total deal value in the region decreased by 11%, from $1.10 trillion to $972.7 billion, resulting in an average deal size that edged up 2%, from $88.1 million to $90.2 million. The number of billion-dollar transactions involving Asia-Pacific companies declined by 21%, from 182 in 2021 to 144 in 2022, while their total value dipped by 4%, from $648.1 billion to $624.1 billion.

### Global M&A Activity – 2005 to 2022



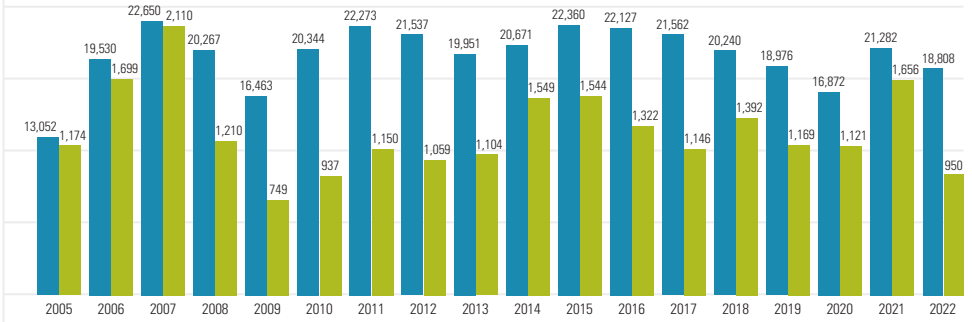

*Source: S&P Global Market Intelligence*

### US M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

### European M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

## SECTOR RESULTS

M&A transaction volume and value decreased across all primary industry sectors in 2022.

— ***Technology:*** Global transaction volume in the technology sector decreased by 13%,

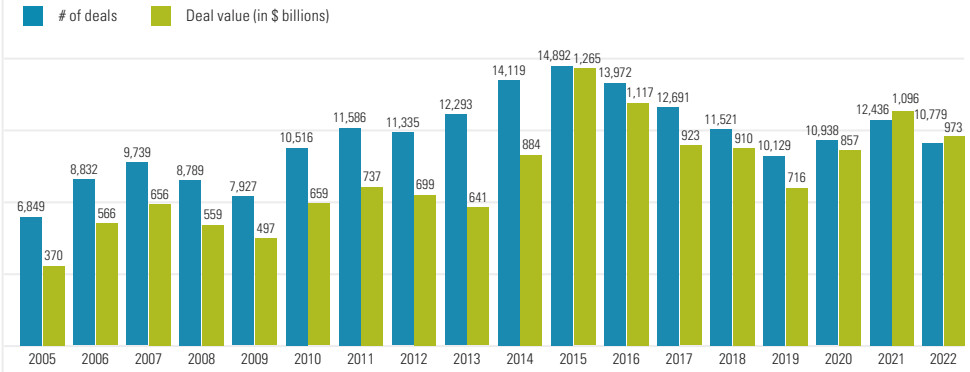
from 10,445 deals in 2021 to 9,058 deals in 2022. Global deal value fell by 16%, from $709.5 billion to $595.3 billion. Average deal size edged down 3%, from $67.9 million to $65.7 million. US technology deal volume decreased by 19%, from 4,784 to 3,862 transactions, while total US technology deal value declined 16%, from $559.9 billion to $471.8 billion, resulting in a 4% increase in average deal size, from $117.0 million to $122.2 million.

- ***Life Sciences:*** Global transaction volume in the life sciences sector decreased by 25%, from 1,879 deals in 2021 to 1,418 deals in 2022, while global deal value dropped 34%, from $267.4 billion to $176.3 billion. Average deal size decreased by 13%, from $142.3 million to $124.3 million. In the United States, deal volume declined by 28%, from 965 to 691 transactions, while deal value fell by 31%, from $222.1 billion to $153.9 billion, resulting in a 3% decrease in average deal size, from $230.2 million to $222.7 million.

- ***Financial Services:*** Global M&A activity in the financial services sector decreased by 15%, from 3,115 deals in 2021 to 2,643 deals in 2022. Global deal value was down 21%, from $413.1 billion to $326.9 billion, resulting in a 7% decrease in average deal size, from $132.6 million to $123.7 million. In the United States, financial services sector deal volume contracted by 20%, from 1,677 to 1,349 transactions, while total deal value dropped 60%, from $243.8 billion to $98.0 billion. Average US deal size fell by half, from $145.4 million to $72.7 million.

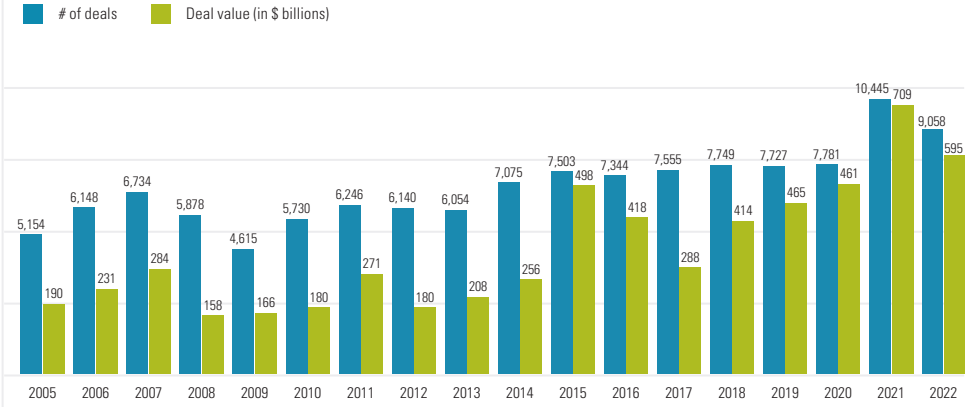
- ***Telecommunications:*** Global transaction volume in the telecommunications sector fell by 20%, from 815 deals in 2021 to 653 deals in 2022. Deal value dropped 68%, from $263.9 billion to $84.4 billion, resulting in a 60% decrease in average deal size, from $323.8 million to $129.2 million. US telecommunications deal volume decreased 14%, from 229 to 197 transactions, while deal value plunged from $179.8 billion to $29.2 billion. The average US telecommunications deal size plummeted by 81%, from $785.2 million to $148.1 million.

### Asia-Pacific M&A Activity – 2005 to 2022



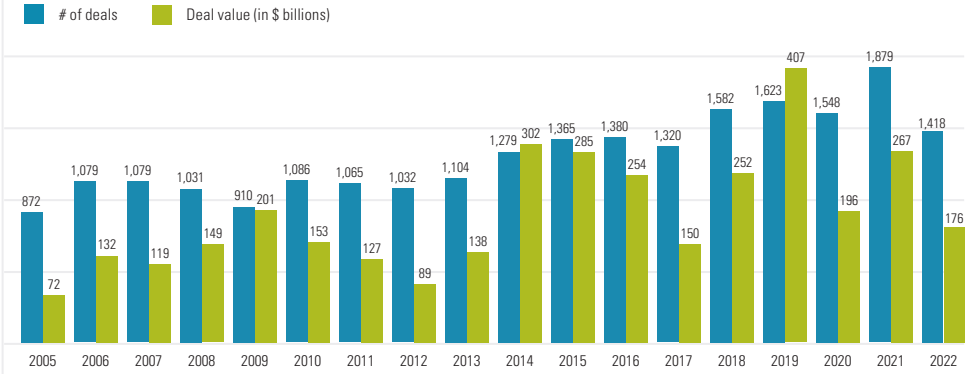

*Source: S&P Global Market Intelligence*

### Technology M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

### Life Sciences M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

## OUTLOOK

Given the headwinds of 2022, the year's M&A deal volume is a testament to dealmakers' ability to see the potential to create value even in unfavorable conditions. The quarterly deal counts, however, suggest that deal activity is trending down. The fourth quarter of 2022 saw 11,747 deals, compared to 13,574 in the first quarter and 15,151 in the fourth quarter of 2021.

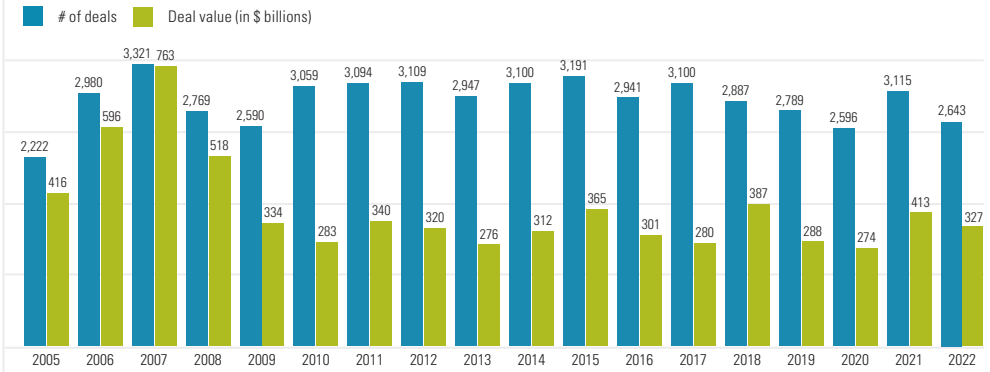
Important factors that will affect M&A activity over the coming year include the following:

— ***Macroeconomic Conditions:*** Global GDP growth slowed from 6.0% in 2021—the strongest growth rate in almost 50 years—to 3.4% in 2022 and is expected to slow further in 2023. US GDP growth is expected to see a more pronounced slowdown in 2023, following growth of 5.9% in 2021 and 2.1% in 2022. Inflation remains stubbornly high, with energy and food prices under particular inflationary pressure, and China's recent pivot away from its zero-COVID policy has the potential to cause further disruption to supply chains. US monetary policymakers face a difficult balancing act as interest rate increases intended to tamp down inflation risk pushing the economy into recession and straining banks. The stunning collapse of Silicon Valley Bank in early March raises the specter of tighter credit conditions dampening debt-financed acquisition activity, among other potential implications.

— ***Valuations:*** Rising interest rates have pressured company valuations that were boosted by the immense infusion of liquidity into the financial system during the COVID-19 pandemic. The retrenchment in valuations for publicly traded companies has in turn suppressed private-company valuations—many of which were detached from fundamentals. VC-backed companies that are seeking exits in the coming year are likely to encounter an M&A market that is less hospitable than in 2022, or to face the prospect of down rounds if new capital is needed. From an acquirer's perspective, depressed valuations create attractive buying opportunities. The net effect of these competing tensions on M&A deal flow in 2023 could be positive or negative.

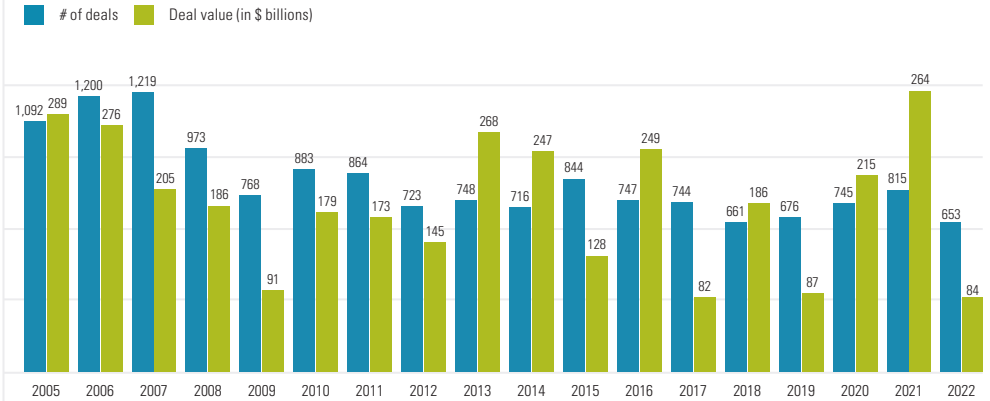
— ***Private Equity Activity:*** On the buy side, private equity firms, which were buoyed by the $727.6 billion in global fundraising in 2022—down 12% from 2021 but still the third-highest annual figure in history—continue to hold record levels of "dry powder." On the sell side, PE firms face pressure to exit investments and return capital to investors, even if returns are dampened by increased levels of equity investment in acquisitions and higher deal financing costs due to interest rate increases.

## Financial Services M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

## Telecommunications M&A Activity – 2005 to 2022




*Source: S&P Global Market Intelligence*

— ***Strategic Buyers:*** Challenging macroeconomic fundamentals and global recessionary concerns are likely to make business leaders more cautious. However, strategic acquisitions remain a compelling way to transform businesses and fuel growth and are likely to continue to play an important role in the M&A market in the coming year.

— ***VC-Backed Exits:*** The number of reported US acquisitions of VC-backed companies decreased by 26%, from 1,594 in 2021 to 1,174 in 2022, while reported proceeds declined 44%, from $112.51 billion to $63.15 billion. VC-backed companies and their investors often prefer the relative ease and certainty of a company acquisition to the lengthier and more uncertain IPO process. In the coming year, the volume of VC-backed company sales will depend in part on whether founders and investors perceive their lower valuations as transitory, and on factors such as market receptivity to VC-backed IPOs and the availability of capital for those companies that seek to stay private.

— ***SPAC Mergers:*** Regulatory uncertainty and poor returns for SPACs that have completed business combinations weighed heavily on the SPAC market in 2022. There were 100 mergers involving SPACs in 2022, compared to 199 in 2021. Despite the precipitous decline in SPAC IPOs in 2022, there were 386 SPACs searching for business combination targets at the end of 2022, compared to 574 at the end of 2021. Many SPACs that completed IPOs at the apex of the market now face deadlines to complete a business combination or return funds to investors. Whether this results in a flurry of announced deals or SPAC liquidations remains to be seen. ■

Established public companies typically maintain at least some takeover defenses, although the prevalence of several defenses previously considered to be standard has declined over the past decade in response to pressure from institutional investors.

Despite the decline in takeover defenses among established public companies, most IPO companies continue to implement anti-takeover provisions (understanding that such measures may in the future need to be dismantled). In 2022, however, adoption rates by IPO companies for many takeover defenses declined markedly from historical norms, likely due in part to the unusual characteristics of the IPO market that year—deal flow fell by more than two-thirds compared to the preceding three years; offering sizes were much smaller, and IPO companies had far less annual revenue.

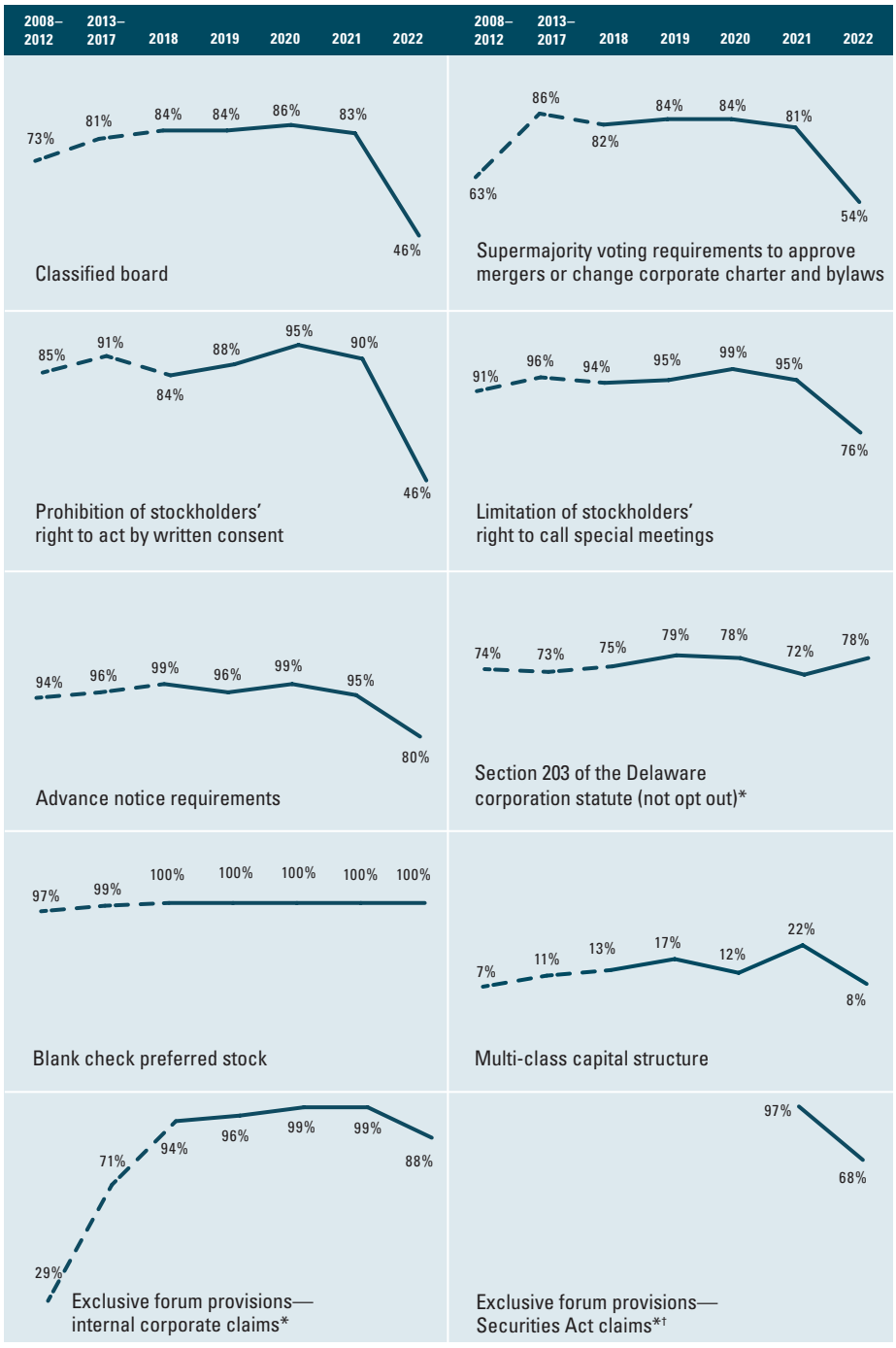
## CLASSIFIED BOARDS

Supporters of classified boards—in which directors serve staggered three-year terms—believe that this structure enhances the knowledge, experience and expertise of boards by helping ensure that, at any given time, a majority of the directors will have experience and familiarity with the company's business. These supporters believe classified boards promote continuity and stability, which in turn allow companies to focus on long-term strategic planning, ultimately leading to a better competitive position and maximizing stockholder value. Opponents of classified boards argue that annual elections for all directors increase director accountability to stockholders, which in turn improves director performance, and that classified boards entrench directors, foster insularity and impede efforts to expand board diversity.

## SUPERMAJORITY VOTING REQUIREMENTS

Advocates for supermajority vote requirements to approve mergers or amend the corporate charter or bylaws claim that these provisions help preserve and maximize the value of the company by ensuring that important corporate actions are taken only when it is the clear will of the stockholders. By contrast, proponents of a majority-vote standard believe it makes the company more accountable to stockholders and that improved accountability leads to better company performance. Supermajority requirements are also viewed by their detractors as entrenchment devices used to block initiatives that are supported by holders of a majority of the company's stock but opposed by management and the board. In practice, supermajority requirements can be almost impossible to satisfy, especially for a company with a meaningful number of non-institutional stockholders.

## TRENDS IN TAKEOVER DEFENSES AMONG IPO COMPANIES




*Delaware corporations only
†2021–2022 only

*Source: WilmerHale analysis of SEC filings from 2008 to 2022 for US issuers.*

## PROHIBITION OF STOCKHOLDERS' RIGHT TO ACT BY WRITTEN CONSENT

Written consents of stockholders can be an efficient means to obtain stockholder approvals but can result in a single stockholder or small number of stockholders being able to take action without prior notice or any opportunity for other stockholders to be heard. If stockholders are not permitted to act by written consent, all stockholder action must be taken at a duly called stockholders' meeting for which stockholders have been provided information about the matters to be voted on and given an opportunity to ask questions.

## LIMITATION OF STOCKHOLDERS' RIGHT TO CALL SPECIAL MEETINGS

If stockholders have the right to call special meetings of stockholders—rather than waiting until the next annual meeting to propose matters for stockholder action—one or a few stockholders may be able to call a special meeting, which can result in abrupt changes in board composition, interfere with the board's ability to maximize stockholder value, or result in significant expense and disruption. A requirement that only the board or specified officers or directors are authorized to call special meetings of stockholders could, however, have the effect of delaying until the next annual meeting actions that are favored by the holders of a majority of the company's stock.

### REASONS TO ADOPT TAKEOVER DEFENSES

Companies adopt takeover defenses to help:

- ensure stability and continuity in decision-making and leadership that will enable the company to focus on long-term value creation;
- provide the board with adequate time to evaluate and react in an informed manner to unsolicited acquisition proposals;
- provide negotiating leverage for the board; and
- maximize overall stockholder value by providing economic disincentives against inadequate, unfair or coercive bids.

## PREVALENCE OF TAKEOVER DEFENSES

| | IPO COMPANIES, 2018–2022 | ESTABLISHED PUBLIC COMPANIES, YEAR-END 2022 | |
|---|---|---|---|
| | | S&P 500 | RUSSELL 3000 |
| Classified board | 81% | 11% | 43% |
| Supermajority voting requirements to approve mergers or change corporate charter and bylaws | 80% | 17% to 33%, depending on type of action | 15% to 54%, depending on type of action |
| Prohibition of stockholders' right to act by written consent | 87% | 67% | 73% |
| Limitation of stockholders' right to call special meetings | 94% | 31% | 52% |
| Advance notice requirements | 96% | 99% | 96% |
| Section 203 of the Delaware corporation statute (not opt out)* | 75% | 90% | N/A |
| Blank check preferred stock | 100% | 95% | 96% |
| Multi-class capital structure | 16% | 7% | 11% |
| Exclusive forum provisions—internal corporate claims | 97%* | 52%** | 63%** |
| Exclusive forum provisions—Securities Act claims† | 94%* | N/A | N/A |

*Delaware corporations only
**Not limited to Delaware corporations
†2021–2022 only

*Source: IPO company data is based on WilmerHale analysis of SEC filings from 2018 to 2022 for US issuers. Established public company data is from FactSet's SharkRepellent database at year-end 2022.*

## ADVANCE NOTICE REQUIREMENTS

Advance notice requirements provide that, at a stockholders' meeting, stockholders may only consider and act upon director nominations or other proposals that have been specified in the meeting notice and brought before the meeting by or at the direction of the board, or by a stockholder who has delivered timely written notice to the company. Advance notice requirements afford the board ample time to consider the desirability of stockholder proposals, ensure that they are consistent with the company's objectives and, in the case of director nominations, provide important information about the experience and suitability of board candidates. These provisions could also have the effect of delaying until the next stockholder meeting actions that are favored by the holders of a majority of the company's stock. Investors generally do not object to advance notice requirements as long as the advance notice period is not unduly long.

## SECTION 203 OF THE DELAWARE CORPORATION STATUTE

Unless it opts out of Section 203, a public company incorporated in Delaware is prevented from engaging in a "business combination" with any "interested stockholder" for three years following the time that the person became an interested stockholder without board approval. In general, an interested stockholder is any stockholder that, together with its affiliates, beneficially owns 15% or more of the company's stock. A public company incorporated in Delaware is automatically subject to Section 203, unless it opts out in its original corporate charter or pursuant to a subsequent charter or bylaw amendment approved by stockholders. Remaining subject to Section 203 helps eliminate the ability of an insurgent to accumulate and/or exercise control without paying a control premium but could prevent stockholders from accepting an attractive acquisition offer that is opposed by an entrenched board.

## DIFFERENCES IN ANTI-TAKEOVER PRACTICES AMONG TYPES OF IPO COMPANIES

| | ALL IPO COMPANIES | VC-BACKED COMPANIES | PE-BACKED COMPANIES | OTHER IPO COMPANIES |
|---|---|---|---|---|
| Classified board | 81% | 89% | 88% | 49% |
| Supermajority voting requirements to approve mergers or change corporate charter and bylaws | 80% | 91% | 82% | 44% |
| Prohibition of stockholders' right to act by written consent | 87% | 94% | 94% | 55% |
| Limitation of stockholders' right to call special meetings | 94% | 98% | 98% | 79% |
| Advance notice requirements | 96% | 98% | 99% | 85% |
| Section 203 of the Delaware corporation statute (not opt out)* | 75% | 93% | 31% | 64% |
| Blank check preferred stock | 100% | 100% | 100% | 99% |
| Multi-class capital structure | 16% | 16% | 21% | 13% |
| Exclusive forum provisions—internal corporate claims* | 97% | 98% | 99% | 87% |
| Exclusive forum provisions—Securities Act claims*† | 94% | 98% | 100% | 65% |

*Delaware corporations only
†2021–2022 only

*Source: WilmerHale analysis of SEC filings from 2018 to 2022 for US issuers.*

### BLANK CHECK PREFERRED STOCK

When blank check preferred stock is authorized, the board has the right to issue preferred stock in one or more series without stockholder approval under state corporate law (but subject to stock exchange rules) and has the discretion to determine the voting, dividend, conversion and redemption rights and liquidation preferences of each such series. The availability of blank check preferred stock can eliminate delays associated with a stockholder vote on specific issuances, thereby facilitating financings and strategic alliances. The board's ability, without further stockholder action, to issue preferred stock or rights to purchase preferred stock can also be used as an anti-takeover device.

### MULTI-CLASS CAPITAL STRUCTURES

While the majority of companies go public with a single class of common stock that provides the same voting and economic rights to every stockholder, some companies employ a multi-class capital structure under which the company's founders or other pre-IPO stockholders hold shares of common stock that are entitled to multiple votes per share, while the public is issued a separate class of common stock that is entitled to only one vote per share or no voting rights at all. Use of a multi-class capital structure facilitates the ability of the holders of the high-vote stock to retain voting control of the company and to pursue strategies to maximize long-term stockholder value. Critics believe that a multi-class structure entrenches the holders of the high-vote stock, insulating them from takeover attempts and the will of public stockholders, and that the mismatch between voting power and economic interest may increase the possibility that the holders of the high-vote stock will pursue a riskier business strategy.

### EXCLUSIVE FORUM PROVISIONS FOR INTERNAL CORPORATE CLAIMS

Exclusive forum provisions stipulate that the Court of Chancery of the State of Delaware is the exclusive forum in which internal corporate claims arising under Delaware state law may be brought by stockholders against the company. Proponents of these provisions are motivated by a desire to adjudicate such claims in a single jurisdiction that has a well-developed and predictable body of corporate case law and an experienced judiciary. Opponents argue that these provisions—which have been expressly authorized by the Delaware corporation statute since 2015—deny aggrieved stockholders the ability to bring litigation in a court or jurisdiction of their choosing.

### EXCLUSIVE FORUM PROVISIONS FOR SECURITIES ACT CLAIMS

Prior to 2020, in response to the growing trend of plaintiffs bringing federal securities law class-action lawsuits in state courts, a handful of IPO companies incorporated in Delaware adopted "federal forum" provisions requiring stockholders to sue in federal court, rather than state court, over alleged violations of the Securities Act of 1933. Adoption of federal forum provisions has soared on the heels of a 2020 Delaware Supreme Court decision confirming the validity of the technique. Federal forum provisions are intended to help a company avoid duplicative litigation filings and steer cases to federal courts more accustomed to hearing federal securities claims, while opponents argue that the provisions prevent stockholders from seeking recourse in state courts they may view as more receptive to their claims. ■

### STOCKHOLDER RIGHTS PLANS

A traditional stockholder rights plan (often referred to as a "poison pill") is a defensive measure designed to deter any acquisition of shares exceeding a specified ownership threshold without board approval. The rights plan gives all stockholders (other than a stockholder acquiring shares of common stock in excess of the specified threshold) a contractual right to purchase additional securities of the company at a substantial discount, thereby significantly diluting the acquiring stockholder's economic and voting power. When combined with a classified board, a rights plan makes an unfriendly takeover particularly difficult. Poison pills are almost unheard of among US IPO companies and are quite uncommon among established public companies.

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|---|---|---|---|---|---|---|---|---|---|
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| *Acquisition by* Veritas Capital **$2,800,000,000** **April 2022** | *Sale of EYSUVIS® and INVELTYS® to* Alcon **$385,000,000** (including contingent payments) **July 2022** | *Sale of Applied, Food and Enterprise Services businesses to* New Mountain Capital **$2,450,000,000** **March 2023** | *Acquisition of* Linode **$900,000,000** **March 2022** | *Acquisition of* Paramit **$1,000,000,000** **August 2021** | *Acquisition by* Eli Lilly **$610,000,000** (including contingent payments) **December 2022** | *Acquisition of* Atotech **$4,400,000,000** (financing counsel) **August 2022** | *Acquisition by* LG Chem **$566,000,000** (implied equity value) **January 2023** | *Acquisition by* Cisco Systems **$4,500,000,000** **March 2021** | *Acquisition of* PPD **$20,900,000,000** (debt financing counsel) **December 2021** |
| carisma THERAPEUTICS | DANAHER | ADORE ME | DRIVEWEALTH | Eaton Vance | BENU NETWORKS | Epizyme | FORTIVE | gemini | |
| *Merger with* Sesen Bio **$300,000,000** (implied equity value) **March 2023** | *Acquisition of* CEVEC Pharmaceuticals **Undisclosed** **October 2022** | *Acquisition by* Victoria's Secret **$400,000,000** (plus up to $300,000,000 in post-closing payments) **December 2022** | *Acquisition of* Crypto-Systems **Undisclosed** **January 2022** | *Acquisition by* Morgan Stanley **$7,000,000,000** **March 2021** | *Acquisition by* Ciena **Undisclosed** **November 2022** | *Acquisition by* Ipsen **$247,000,000** (plus contingent payments) **August 2022** | *Acquisition of* ServiceChannel **$1,200,000,000** **August 2021** | *Merger with* Disc Medicine **$410,000,000** (implied equity value) **December 2022** | |
| Merchants FLEET | SOLID BIOSCIENCES | wex | jebbit | spectris | LevelL Alternative Trading System | Bottomline Technologies | MIRACLE MILE ADVISORS | | |
| *Acquisition by* Bain Capital and Abu Dhabi Investment Authority **Undisclosed** **October 2022** | *Merger with* AavantiBio **$150,000,000** (implied equity value) **December 2022** | *Acquisition of* benefitexpress **$275,000,000** **June 2021** | *Strategic investment by* Vista Equity Partners **$70,000,000** **January 2022** | *Sale of Omega Engineering to* Arcline Investment Management **$525,000,000** **July 2022** | *Merger with* Luminex Trading & Analytics **Undisclosed** **March 2022** | *Acquisition by* Thoma Bravo **$2,600,000,000** (co-counsel) **May 2022** | *Combination with* Karp Capital Management (and concurrent investment in combined company by Corsair Capital) **Undisclosed** **November 2022** | | |
| Progress® | rosie | DEPT | TMX | Grab | Barton Associates | XLFleet™ | | | |
| *Acquisition of* Kemp **$258,000,000** **October 2021** | *Acquisition by* Instacart **Undisclosed** **September 2022** | *Acquisition of* 3Q Digital **Undisclosed** **May 2022** | *Strategic investment in* VettaFi Holdings **$175,000,000** **January 2023** | *Merger with* Altimeter Growth **$39,600,000,000** (pro forma equity value) (counsel to Altimeter Capital Management) **December 2021** | *Acquisition by* H.I.G. Capital **Undisclosed** **August 2022** | *Acquisition of* Spruce Power **$600,000,000** **September 2022** | | | |

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# Containing the Scope of Shareholder Books and Records Demands

Under Section 220 of the Delaware General Corporation Law, shareholders who have a "proper purpose" (such as investigating corporate wrongdoing) and who satisfy other statutory requirements can inspect company books and records that are "necessary and essential" to their investigation. The vast majority of all public companies are incorporated in Delaware.

Two Delaware Court of Chancery decisions from last summer should be useful in preventing unwarranted, intrusive scrutiny of informal corporate records under Section 220. The cases, *Oklahoma Firefighters Pension & Retirement System v. Amazon.com, Inc.* and *Frank v. National Holdings Corporation*, both rejected broad shareholder demands to access informal communications such as board- and officer-level emails and text messages.

## THE STANDARD FOR OBTAINING BOOKS AND RECORDS

The scope of inspection is governed by the "necessary and essential" standard. Once sufficient documents for the shareholder's investigation have been produced, production should stop. Courts start with ordering the production of formal board materials, but if these materials are insufficient, courts may also allow inspection of informal board materials. If those are still not sufficient, courts may extend inspection to officer-level documents.

As the Delaware courts have generally made it easier for shareholders to demonstrate a proper purpose, corporations increasingly must defend these actions by challenging the scope of shareholder demands. But this has become more difficult since the Delaware Supreme Court held in *KT4 Partners LLC v. Palantir Technologies Inc.* that a shareholder was entitled to email communications because the company had a history of not complying with corporate formalities and conducted corporate business informally in connection with alleged wrongdoing. Many subsequent cases have required the production of informal communications, such as emails.

## *AMAZON* AND *NATIONAL* BUCK THE TREND

In June 2022, the Court of Chancery issued a welcome decision in *Amazon*. A shareholder sought to investigate possible mismanagement by Amazon's directors and officers. Amazon produced minutes, agendas and other board materials, but the shareholder sought additional categories of documents spanning multiple years and including informal communications.

Calling the shareholder's requests a "fishing expedition," Vice Chancellor Will refused to require additional production from Amazon because formal board-level documents were sufficient. The case lacked "atypical circumstances necessitating a broader inspection," such as a failure to "honor traditional corporate formalities" or that "'traditional materials, such as board resolutions or minutes' were wanting." There was also no "wide-ranging mismanagement providing grounds for an inspection of investigation-related documents not reviewed by the board."

Soon after, Vice Chancellor Zurn applied similar principles to deny demands for informal communications in *National*. The shareholder in *National* sought to investigate whether management improperly interfered with merger negotiations for their own benefit. Similar to Amazon, the company first attempted to resolve the demand with voluntary production of formal board-level materials and a small number of emails that had been specifically identified in the company's public filings. The shareholder was not satisfied and sought several additional categories of informal communications, arguing that unanswered questions remained and that he could not trust the completeness of the produced documents.

Analogizing to *Amazon*, the Court of Chancery in *National* found that the shareholder failed to show that the detailed public records and "extensive and sufficient formal materials and minutes" regarding the merger were deficient or incomplete or that the company's board communicated informally in ways that were not documented in those minutes. Further, like in *Amazon*, the facts were "commonplace," not "extreme," and no "vast wrongdoing tainting the entire enterprise" necessitated a broader production.

## SCOPE OF SECTION 220 GOING FORWARD

Other cases from the past year make clear that shareholders will not be foreclosed from obtaining informal communications in every case. In *Hightower v. SharpSpring, Inc.*, the Court of Chancery allowed limited inspection of corporate emails because the company's public filings and board minutes contradicted each other. And, in *NVIDIA Corporation v. City of Westland Police and Fire Retirement System*, the Delaware Supreme Court upheld inspection of certain informal communications that were specifically identified by confidential witness accounts, were directly related to the shareholder's well-supported proper purpose, and were unavailable from any other source.

In breaking the other way, however, *National* and *Amazon* show that formal board materials can still be sufficient for a shareholder's purpose under the right circumstances. *National* suggests that, in the M&A context in particular, the production of broad informal communications should not be ordered absent atypical circumstances. In this context, detailed formal documentation is likely to exist in the form of both board minutes and public filings, like proxy statements. Barring abnormalities in these formal documents, or the company's failure to follow traditional formal corporate processes in the first place, these materials should typically be sufficient.

*National* and *Amazon* also provide lessons to corporations on how best to respond to demands when shareholders have complied with Section 220 and have stated a proper purpose, suggesting that the Delaware courts appreciate when corporations make an effort to satisfy demands with detailed formal materials when they exist, rather than rejecting demands outright. In fact, the court commended the company for doing so in *Amazon*, and, in *National*, Vice Chancellor Zurn distinguished her own precedent on this ground.

Ultimately, while requests for informal materials certainly are not going away, Delaware corporations are now in a stronger position to beat them back in negotiations and, if necessary, in the courtroom. ■

# A Comparison of Deal Terms in Public and Private Acquisitions

Public and private company M&A transactions share many characteristics but also involve different rules and conventions. (Business combinations involving special purpose acquisition companies (SPACs) are subject to additional considerations that are not discussed below.)

## GENERAL CONSIDERATIONS

Public and private company acquisitions differ in various fundamental respects:

- ***Structure:*** An acquisition of a private company may be structured as an asset purchase, a stock purchase or a merger. A public company acquisition is generally structured as a merger, often in combination with a tender offer for all-cash acquisitions.
- ***Letter of Intent:*** If a public company is the target in an acquisition, there is usually no letter of intent. The parties typically go straight to a definitive agreement, due in part to concerns over creating a premature disclosure obligation. Sometimes an unsigned term sheet is also prepared.
- ***Timetable:*** The timetable before signing the definitive agreement is often more compressed in an acquisition of a public company. However, more time may be required between signing and closing to prepare and circulate a proxy statement for stockholder approval (unless a tender offer structure is used), to comply with notice and timing requirements, and to obtain antitrust clearances that may be unnecessary (or easier to obtain) in smaller, private company acquisitions.
- ***Confidentiality:*** The potential damage from a leak is much greater in an M&A transaction involving a public company, and rigorous confidentiality precautions are taken accordingly.
- ***Litigation Risk:*** Litigation against the target, its board of directors and/or the acquirer is much more common in acquisitions of public targets than private targets. The board of a public target almost always (and the board of the acquirer sometimes) obtains a fairness opinion from an investment banking firm.

## DUE DILIGENCE

When a public company is acquired, the due diligence process differs from the process followed in a private company acquisition:

- ***Availability of SEC Filings:*** Due diligence typically starts with the target's SEC filings, enabling a potential acquirer to investigate in stealth mode until it wishes to engage the target in discussions.
- ***Speed:*** The due diligence process is often quicker in an acquisition of a public company because of the availability of SEC filings, thereby allowing the parties to focus quickly on the key transaction points.

## MERGER AGREEMENT

The merger agreement for an acquisition of a public company reflects a number of differences from its private company counterpart:

- ***Representations:*** In general, the representations and warranties from a public company are less extensive than those from a private company, are tied in some respects to the public company's SEC filings, may have higher materiality thresholds, and do not survive the closing.
- ***Exclusivity:*** The exclusivity provisions are subject to a "fiduciary exception" permitting the target to negotiate with a third party making an offer that may be deemed superior and, in certain circumstances, to change the target board's recommendation to stockholders.
- ***Closing Conditions:*** The "no material adverse change" and other closing conditions are generally drafted so as to limit the target's closing risk and give the acquirer little room to refuse to complete the transaction if regulatory and stockholder approvals are obtained.
- ***Post-Closing Obligations:*** Post-closing escrow or indemnification arrangements are extremely rare.
- ***Earnouts:*** Earnouts are unusual, although a form of earnout arrangement called a "contingent value right" is not uncommon in the life sciences sector.

### TIPS TO MINIMIZE LITIGATION RISK

Although a public target's board may not be able to avoid litigation entirely, a sound process will allow the target to anticipate and deflect many common challenges to proposed acquisitions:

- Hire qualified (and unconflicted) advisors to steer the process and lead the negotiations with potential buyers.
- If potential conflicts exist, establish a committee of disinterested directors and task them with active oversight of the process.
- Give due consideration to the array of financial and/or strategic parties that should be solicited and share information with bidders on equal terms.
- Keep bidding competitive, and instruct management not to discuss the terms of their future employment or compensation with potential buyers until authorized by the board (typically after the price and other major terms are in place).
- Negotiate hard over the price and deal terms, which should be sufficiently flexible to permit the board to comply with its fiduciary duties.
- Contemporaneously prepare minutes of board and committee meetings in order to help demonstrate the robustness of the process.
- Make fulsome disclosures in the proxy statement, and involve litigation counsel to review the disclosures in advance.

- ***Deal Certainty and Protection:*** The negotiation battlegrounds are the provisions addressing deal certainty (principally the closing conditions) and deal protection (exclusivity, voting agreement, termination and breakup fees).

## SEC INVOLVEMENT

The SEC plays a significant role in acquisitions involving a public company:

- ***Form S-4:*** In a public acquisition, if the acquirer is issuing stock to the target's stockholders, the acquirer must register the issuance on a Form S-4 registration statement that is filed with (and possibly reviewed by) the SEC.
- ***Proxy Statement:*** Absent a tender offer, the target's stockholders, and sometimes the acquirer's stockholders, must approve the transaction. Stockholder approval is sought pursuant to a proxy statement

that is filed with (and often reviewed by) the SEC. Public targets generally must provide for a separate, non-binding stockholder vote with respect to all compensation each named executive officer will receive in the transaction.

— ***Tender Offer Filings:*** In a tender offer for a public target, the acquirer must file a Schedule TO and the target must file a Schedule 14D-9. The SEC staff reviews and often comments on these filings.

— ***Other SEC Filings:*** Many Form 8-Ks and other SEC filings are often required by public companies engaged in M&A transactions.

— ***Public Communications:*** Elaborate SEC regulations govern public communications in the period between the first public announcement of the transaction and the closing of the transaction. Most written communications in connection with a business combination transaction must be filed with the SEC.

## IMPACT OF R&W INSURANCE

Representation and warranty insurance (R&W insurance) provides coverage for indemnification claims arising from misrepresentations by the seller in the sale of a company. The use of R&W insurance continues to grow, particularly in sales of privately held companies backed by venture capital or private equity investors.

The presence of R&W insurance in private company acquisitions influences the negotiated outcomes of various deal terms. Below is a brief summary of the principal effects of buy-side R&W insurance, based on studies conducted by SRS Acquiom (a provider of post-closing transaction management services).

— ***Financial Terms:***

- Indemnification escrows are significantly smaller (or eliminated entirely).
- Among deals with earnouts, the buyer is much less likely to be entitled to offset indemnification claims against future earnout payments and such offsets are much more likely to be expressly prohibited.
- Among deals with purchase price adjustments, a separate escrow to secure the purchase price adjustment is much more likely.

— ***Representations and Warranties:***

- The seller typically does not provide a "10b-5" representation.
- "Pro-sandbagging" provisions allowing the buyer to seek indemnification for the seller's misrepresentations even if the buyer knew of the misrepresentations prior to closing are much less likely.
- Deals are much more likely to provide that materiality qualifications in representations and warranties are disregarded for purposes of determining both breaches and damages.
- The seller is much less likely to be required to notify the buyer of pre-closing breaches of representations and warranties.

— ***Liability Provisions:***

- The acquisition agreement is much more likely to require the buyer to mitigate losses.
- The seller's indemnification obligations are much more likely to be structured as a "deductible basket" (in which the seller is liable only for damages in excess of a specified threshold amount) than as a "tipping basket" (in which the seller is liable for all damages once the threshold amount has been reached).

## COMPARISON OF SELECTED DEAL TERMS

*Set forth below is a comparison of selected deal terms in public target and private target acquisitions based on data from the MarketStandard database of SRS Acquiom and the most recent deal points studies available from the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section.*

| "10b-5" Representation | |
|---|---|
| PUBLIC (ABA) | Not reported |
| PRIVATE (ABA) | 7% |
| PRIVATE (SRS ACQUIOM) | 30% |

| Standard for Accuracy of Target Representations at Closing | |
|---|---|
| **PUBLIC (ABA)** | |
| "MAC/MAE" | 95% |
| "In all material respects" | 2% |
| Other standard | 2% |
| **PRIVATE (ABA)** | |
| "MAC/MAE" | 77% |
| "In all material respects" | 21% |
| "In all respects" | 2% |
| **PRIVATE (SRS ACQUIOM)** | |
| "MAC/MAE" | 41% |
| "In all material respects" | 57% |
| "In all respects" | 2% |

| Inclusion of "Prospects" in MAC/MAE Definition | |
|---|---|
| PUBLIC (ABA) | 2% |
| PRIVATE (ABA) | 7% |
| PRIVATE (SRS ACQUIOM) | 11% |

| Fiduciary Exception to "No-Shop/No-Talk" Covenant | |
|---|---|
| PUBLIC (ABA) | 100% |
| PRIVATE (ABA) | 13% |
| PRIVATE (SRS ACQUIOM) | 3% |

| Opinion (Non-Tax) of Target's Counsel as Closing Condition | |
|---|---|
| PUBLIC (ABA) | Not reported |
| PRIVATE (ABA) | 1% |
| PRIVATE (SRS ACQUIOM) | 8% |

| Appraisal Rights Closing Condition | |
|---|---|
| PUBLIC (ABA) | 3% |
| PRIVATE (ABA) | 70% |
| PRIVATE (SRS ACQUIOM) | 66% |

| Acquirer MAC/MAE Closing Condition | |
|---|---|
| PUBLIC (ABA) | 100% |
| PRIVATE (ABA) | 96% |
| PRIVATE (SRS ACQUIOM) | 100% |

# A Comparison of Deal Terms in Public and Private Acquisitions

*The SRS Acquiom data is for acquisitions of private targets by US public companies with purchase prices ranging from $25–$750 million in which SRS Acquiom served as shareholder representative and that closed between mid-2020 and early 2022. The ABA private target study is based on publicly available agreements for acquisitions of private targets by public companies with purchase prices ranging from $30–$750 million that were completed (or for which definitive agreements were executed) in 2020 and the first quarter of 2021. The ABA public target study is based on public target merger agreements for transactions with total deal consideration in excess of $200 million that were completed in 2021 (excluding acquisitions by private equity buyers).*

The chart on page 12 compares the following deal terms in acquisitions of public and private targets:

— ***"10b-5" Representation:*** A representation to the effect that no representation or warranty by the target contained in the acquisition agreement, and no statement contained in any document, certificate or instrument delivered by the target pursuant to the acquisition agreement, contains any untrue statement of a material fact or fails to state any material fact necessary, in light of the circumstances, to make the statements in the acquisition agreement not misleading.

— ***Standard for Accuracy of Target Representations at Closing:*** The general standard that will be applied to assess the accuracy of the target's representations and warranties set forth in the acquisition agreement for purposes of the acquirer's closing conditions:

- A "MAC/MAE" standard provides that each of the representations and warranties of the target must be true and correct in all respects as of the closing, except where the failure of such representations and warranties to be true and correct will not have or result in a *material adverse change/effect on the target*.
- An "in all material respects" standard provides that the representations and warranties of the target must be true and correct *in all material respects* as of the closing.
- An "in all respects" standard provides that each of the representations and warranties of the target must be true and correct *in all respects* as of the closing.

— ***Inclusion of "Prospects" in MAC/MAE Definition:*** Whether the "material adverse change/effect" definition in the acquisition agreement includes "prospects" along with other target metrics, such as the business, assets, properties, financial condition and results of operations of the target.

— ***Fiduciary Exception to "No-Shop/No-Talk" Covenant:*** Whether the "no-shop/no-talk" covenant prohibiting the target from seeking an alternative acquirer includes an exception permitting the target to consider an unsolicited superior proposal if required to do so by its fiduciary duties.

— ***Opinion of Target's Counsel as Closing Condition:*** Whether the acquisition agreement contains a closing condition requiring the target to provide an opinion of counsel (excluding opinions regarding the tax consequences of the transaction).

— ***Appraisal Rights Closing Condition:*** Whether the acquisition agreement contains a closing condition providing that appraisal rights must not have been sought by target stockholders holding more than a specified percentage of the target's outstanding capital stock. (Under Delaware law, appraisal rights generally are not available to stockholders of a public target when the merger consideration consists solely of publicly traded stock.)

— ***Acquirer MAC/MAE Closing Condition:*** Whether the acquisition agreement contains a closing condition excusing the acquirer from closing if an event or development has occurred that has had, or could reasonably be expected to have, a "material adverse change/effect" on the target. Requiring the target's representations to be "brought down" to closing has the same effect. ■

## POST-CLOSING INDEMNIFICATION CLAIMS

Based on an SRS Acquiom study analyzing post-closing indemnification claims in more than 700 private target acquisitions with fully released escrows during the period from the fourth quarter of 2020 through the second quarter of 2022:

— *Frequency of Claims:* 30% of all transactions had at least one post-closing indemnification claim (excluding purchase price adjustments) against the escrow. Claim frequency was lowest (16%) in deals valued at more than $500 million and highest (37%) in deals valued between $50 million and $100 million. At 31% to 32%, claim rates were very similar among US public buyers, US private buyers and US private equity buyers.

— *Size of Claims:* Median claim size as a percentage of the escrow ranged from a high of 13% for regulatory compliance claims to less than 1% for transaction fees/costs and capitalization claims. On average, claim size as a percentage of the escrow was highest on deals valued at more than $500 million (89%) and on deals with US private buyers (68%), and lowest on deals valued between $100 million and $200 million (23%) and on deals with US private equity buyers (29%).

— *Subject Matter of Claims:* Overall, the overwhelming majority of claims were for breaches of representations and warranties (71%) and transaction fees/costs (27%).

— *Bases for Misrepresentation Claims:* Most frequently claimed misrepresentations involved tax (45%), employee-related (12%), undisclosed liabilities (11%), capitalization (9%), intellectual property (6%) and financial statements (4%).

— *Resolution of Claims:* Contested claims were resolved in a median of 4.4 months. Fraud claims (median of 20 months) and breach of fiduciary duty claims (median of 18.6 months) took the most time to be resolved, while claims for purchase price adjustments were resolved the quickest (median of 0.7 month).

— *Purchase Price Adjustments:* 92% of all transactions had mechanisms for purchase price adjustments. Of these, 88% had a post-closing adjustment (favorable to the buyer in 48% of transactions and favorable to target stockholders in 40% of transactions).

— *Expense Fund:* 96% of all deals had expense funds. The average size was $348,000 (0.58% of transaction value) in deals with earnouts and $203,000 (0.33% of transaction value) in other deals.

We reviewed all merger transactions between 2018 and 2022 involving VC-backed targets (as reported in PitchBook after 2019, in Dow Jones VentureSource or PitchBook for 2019, and in Dow Jones VentureSource prior to 2018) in which the merger documentation was publicly available and the deal value was $25 million or more. Based on this review, we have compiled the following deal data:[1]

| Characteristics of Deals Reviewed | | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| The number of deals we reviewed and the type of consideration paid in each | Sample Size | 37 | 20 | 25 | 45 | 22 |
| | Cash | 84% | 60% | 60% | 24% | 41% |
| | Stock | 3% | 0% | 8% | 18% | 5% |
| | Cash and Stock | 13% | 40% | 32% | 58% | 54% |
| **Deals With Earnout** | | **2018** | **2019** | **2020** | **2021** | **2022** |
| Deals that provided contingent consideration based upon post-closing performance of the target (other than balance sheet adjustments) | With Earnout | 32% | 40% | 28% | 42% | 41% |
| | Without Earnout | 68% | 60% | 72% | 58% | 59% |
| **Deals With Indemnification** | | **2018** | **2019** | **2020** | **2021** | **2022** |
| Deals where the target's shareholders or the buyer indemnified the other post-closing for breaches of representations, warranties and covenants | With Indemnification | | | | | |
| | By Target's Shareholders | 84% | 80% | 88% | 76%[2] | 86% |
| | By Buyer | 39% | 45% | 32% | 29% | 68% |
| **Deals With Representation and Warranty Insurance** | | **2018** | **2019** | **2020** | **2021** | **2022** |
| Deals that expressly contemplate representation and warranty insurance | With Representation and Warranty Insurance | 41% | 25% | 68% | 47% | 50% |
| **Survival of Representations and Warranties** | | **2018** | **2019** | **2020** | **2021** | **2022** |
| Length of time that representations and warranties survived the closing for indemnification purposes (subset: deals where representations and warranties survived the closing for indemnification purposes)[3] | Shortest | 12 Mos. | 12 Mos. | 12 Mos. | 12 Mos. | 12 Mos. |
| | Longest | 24 Mos. | 24 Mos. | 18 Mos. | 24 Mos. | 24 Mos. |
| | Most Frequent | 18 Mos. | 18 Mos. | 12 Mos. | 12 Mos. | 12 Mos. |
| **Caps on Indemnification Obligations** | | **2018** | **2019** | **2020** | **2021** | **2022** |
| Upper limits on indemnification obligations where representations and warranties survived the closing for indemnification purposes | With Cap | 100% | 100% | 100% | 100% | 100% |
| | Limited to Escrow | 79% | 86% | 81% | 90%[5] | 78% |
| | Limited to Purchase Price | 0% | 0% | 0% | 0% | 0% |
| | Exceptions to Limits[4] | 100% | 100% | 95% | 100% | 89% |
| | Without Cap | 0% | 0% | 0% | 0% | 0% |

[1] For certain transactions, certain deal terms have been redacted from the publicly available documentation and are not reflected in the data compiled below.

[2] Excludes two transactions that do not provide for idemnification but permit setoff against contingent consideration.

[3] Measured for representations and warranties generally; specified representations and warranties may survive longer.

[4] Generally, exceptions were for fraud, willful misrepresentation and certain "fundamental" representations commonly including capitalization, authority and validity. In a limited number of transactions, exceptions also included intellectual property representations.

[5] Includes two transactions where the limit was below the escrow amount.

| Escrows | | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| Deals having escrows securing indemnification obligations of the target's shareholders (subset: deals with indemnification obligations of the target shareholders) | With Escrow | 90%[6] | 94% | 90% | 91% | 89% |
| | % of Deal Value | | | | | |
| | Lowest[7] | 3% | 10% | 8% | 5% | 7% |
| | Highest | 15% | 13% | 15% | 18% | 15% |
| | Most Frequent | 10% | 12% | 15% | 10% | 8% |
| | Length of Time[8] | | | | | |
| | Shortest | 12 Mos. | 12 Mos. | 12 Mos. | 12 Mos. | 12 Mos. |
| | Longest | 36 Mos. | 36 Mos. | 24 Mos. | 36 Mos. | 30 Mos. |
| | Most Frequent | 18 Mos. | 12 Mos. | 12 Mos. | 12 Mos. | 12 Mos. |
| | Exclusive Remedy | 72% | 64% | 68% | 53% | 73% |
| | Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[5] | 100% | 100% | 92% | 100% | 91% |

| Baskets for Indemnification | | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| Deals with indemnification only for amounts above a specified "deductible" or only after a specified "threshold" amount is reached | Deductible | 47% | 56% | 52%[9] | 71%[10] | 53%[9] |
| | Threshold | 53% | 44% | 29%[9] | 26%[10] | 32%[9] |

| MAE Closing Condition | | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| Deals with closing condition for the absence of a "material adverse effect" with respect to the other party, either explicitly or through representation brought down to closing | Condition in Favor of Buyer | 100% | 100% | 100% | 97% | 100% |
| | Condition in Favor of Target | 12% | 35% | 24% | 37% | 29% |

| Exceptions to MAE | | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| Deals where the definition of "material adverse effect" for the target contained specified exceptions | With Exception[11] | 97%[12] | 100% | 100% | 95%[12] | 100% |

[6] One transaction not including an escrow at closing did require funding of escrow with proceeds of earnout payments.

[7] Excludes transactions which also specifically referred to representation and warranty insurance as recourse for the buyer.

[8] Length of time does not include transactions where such time period cannot be ascertained from publicly available documentation.

[9] A "hybrid" approach with both a deductible and a threshold was used in another 10% of these transactions in 2020 and 11% of these transactions in 2022.

[10] A 50/50 cost sharing approach was used in another 3% of these transactions in 2021.

[11] Generally, exceptions were for general economic and industry conditions.

[12] The only transaction(s) not including such exceptions provided for a closing on the same day the definitive agreement was signed.

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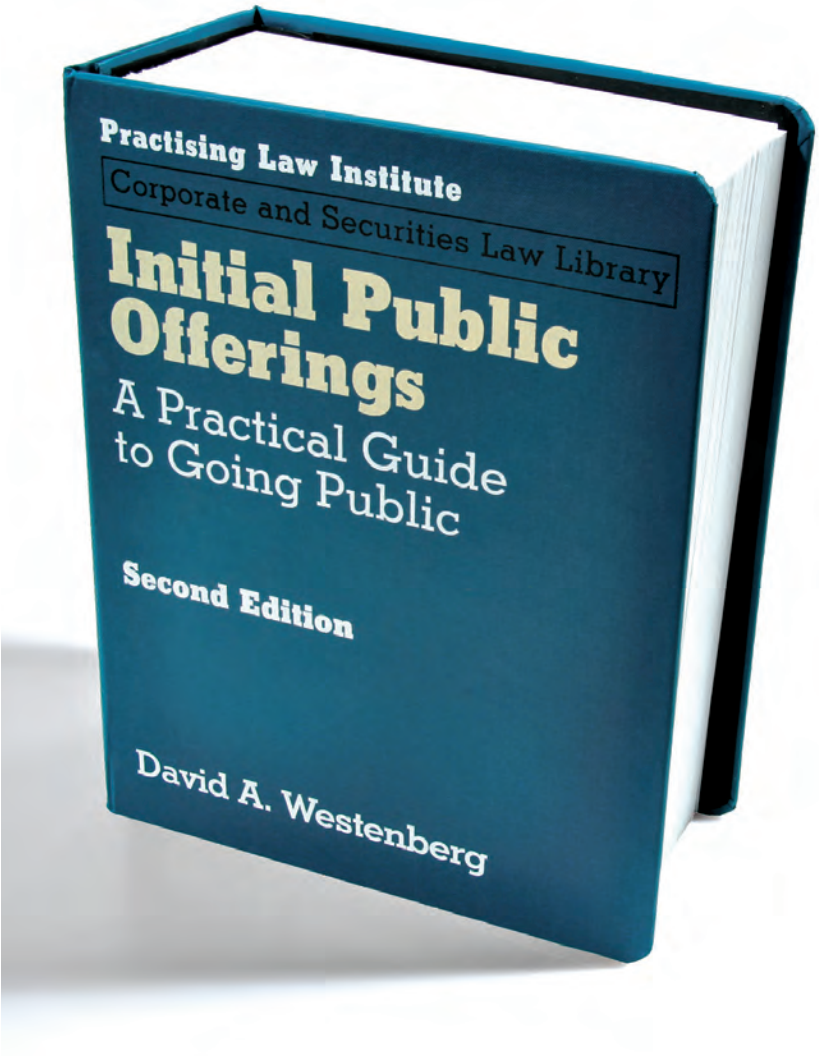


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Data Sources: M&A data is sourced from S&P Global Market Intelligence. WilmerHale compiled the data for sales of VC-backed companies from PitchBook.

*Special note on data: The M&A data discussed in this report is based on announced transactions excluding transactions that are subsequently terminated. As a result, reported M&A data for a given year may be adjusted over time to reflect the removal of terminated transactions and the inclusion of previously unannounced transactions.*

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