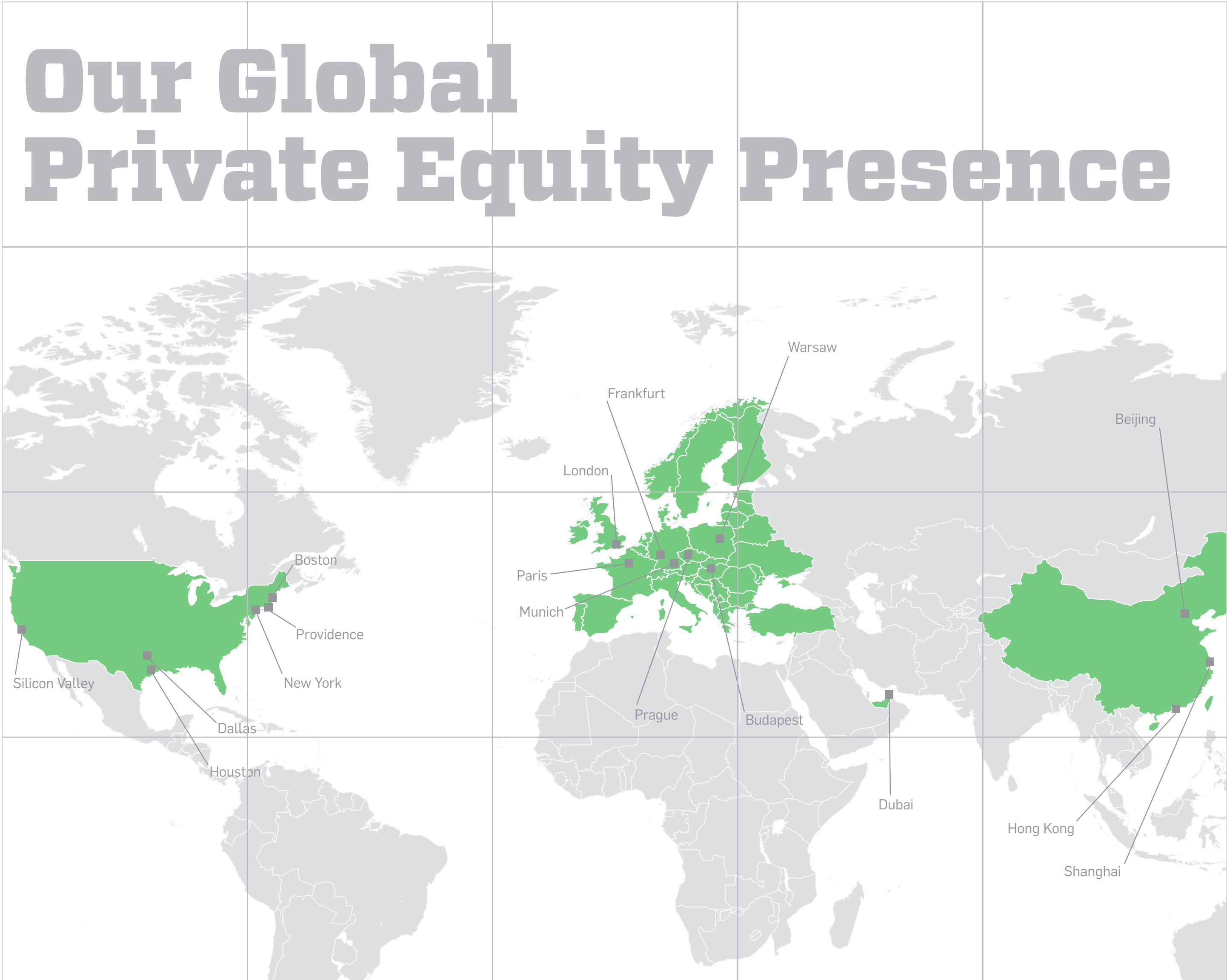
Weil

# A Look At

## Sponsor-Backed Going Private Transactions




July 2015

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# Introduction

Welcome to the eighth survey of sponsor-backed going private transactions prepared by Weil, Gotshal & Manges LLP. We hope that you will find this information thought-provoking and useful. We believe this survey is unique in that it analyzes and summarizes for the reader the material transaction terms of going private transactions involving a private equity sponsor in the United States, Europe, and the Asia-Pacific region. We believe that Weil is uniquely positioned to perform this survey given our international private equity platform and network of offices across these regions. We are happy to discuss with clients and friends the detailed findings and analyses underlying this survey.

We want to offer special thanks to the many attorneys at Weil who contributed to this survey, including Luke Ashworth, Jean Beauchataud, Trina Bose, Jonathan Calka, Sean Devaney, Adam Dickson, Gautier Elies, Ginger Ellison, Chris Fung, Pierre-Alexandre Kahn, Kevin Kitson, U-Hyeon Kwon, Dianna Lee, Jenna McBain, Vladislava Rebeiz, Emma Robinson, Michelle Anne Sargent, Verena Schwarz, Ariel Simon, Megan Spelman, William Welty and Josephine Yung.

We would also like to thank the following law firms who contributed to this survey: Schjødt in Norway, Roschier in Sweden, Garrigues in Spain and Mourant Ozannes in Jersey.

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# Research Methodology

We surveyed 34 sponsor-backed going private transactions announced from January 1, 2014 through December 31, 2014 with a transaction value of at least $100 million (excluding target companies that were real estate investment trusts).

16 of the surveyed transactions in 2014 involved a target company in the United States, 12 involved a target company in Europe, and six involved a target company in the Asia-Pacific region. The United States transactions that are included in the survey are only transactions that have closed or that are pending.

The publicly available information for certain surveyed transactions did not disclose all data points covered by our survey; therefore, the charts and graphs in this survey may not reflect information from all surveyed transactions.

The 34 surveyed transactions include the following target companies:

### United States

American Pacific Corporation
CEC Entertainment, Inc.
Chindex International, Inc.
ChyronHego Corporation
Cleco Corporation
Compuware Corporation
DFC Global Corp.
Digital River, Inc.
Material Sciences Corporation
PetSmart, Inc.
Pike Corporation, Inc.
Riverbed Technology, Inc.
Safeway, Inc.
Symmetry Medical Inc.
TIBCO Software Inc.
Vocus, Inc.

### Europe

AGR Petroleum Services Holdings (Norway)
Allocate Software PLC (UK)
Brightside Group PLC (UK)
Cision AB (Sweden)
Daisy PLC (UK)
DIBS Payment Services AB (Sweden)
Homair Vacances SA (France)
Hurtigruten ASA (Norway)
Max Property Group PLC (Jersey)
Solvtrans ASA (Norway)
Sotogrande SA (Spain)
WMF AG (Germany)

### Asia

Asia Satellite Telecommunications Limited (Hong Kong)
Crowe Horwath Australasia Ltd (Australia)
Goodman Fielder Limited (Australia)
Goodpack Limited (Singapore)
Roland Corporation (Japan)
SBI Mortgage Co., Ltd (Japan)

# United States

## Key Conclusions

Key trends for going private transactions in the United States in 2014 include:

- The number and size of sponsor-backed going private transactions decreased as compared to 2013. The average deal size in 2014 was $2.1 billion ($1.3 billion excluding the two transactions with the largest transaction values), compared with $2.5 billion ($903 million excluding the two transactions with the largest transaction values) in 2013. The total number of going private transactions decreased by 40.7%, from 27 transactions in 2013 to 16 in 2014. Sponsor-backed deal activity was fairly consistent during each quarter of 2014. The decline in going private activity is likely due to relatively high public company valuations in 2014 and increased competition from strategic buyers.
- Reverse termination fees appeared in all but one of the debt-financed going private transactions in 2014. The average single-tier reverse termination fee was equal to 6.4% of the equity value of the transaction (5.7% of the enterprise value) and the average company termination fee was equal to 3.6% of the equity value of the transaction (3.1% of the enterprise value), relatively consistent with the average values of 6.8% of equity value for reverse termination fees in 2013 and 3.3% of the equity value for company termination fees in 2013.
- The use of go-shop provisions increased in 2014, appearing in 37.5% of going private transactions compared to 26% in 2013. Go-shop provisions have proven to be a useful tool that have appeared in a significant minority of deals over the last several years.
- The tender offer construct was used significantly less than in 2013, dropping to 13% of going private transactions in 2014 from 30% in 2013. The decrease of the tender offer construct in 2014 is likely a statistical anomaly due to the relatively small sample size of 16 surveyed transactions.
- As was the case in 2013, no sponsor-backed going private transaction in 2014 contained a financing out (i.e., a provision that allows the buyer to get out of the deal without the payment of a fee or other recourse in the event that debt financing is unavailable).
- Specific performance "lite" continues to be the predominant market remedy with respect to allocating financing failure and closing risk in sponsor-backed going private transactions. Specific performance lite means that the target is only entitled to specific performance to cause the sponsor to fund its equity commitment and close the transaction in the event that all of the closing conditions are satisfied, the target is ready, willing, and able to close the transaction, and the debt financing is available.
- We have continued to see a decrease in the use of some of the financial-crisis-driven provisions, such as the sponsors' express contractual requirement to sue their lenders upon a financing failure. Most of the acquisition agreements entered into in connection with the 2014 surveyed transactions are silent on the requirement that sponsors sue their lenders upon a financing failure; however, even when the agreements are silent, the sponsor may be required to use its reasonable best efforts to enforce its rights under its debt commitment letter, which could include suing the lender.

# Highlights of 2014

**Sponsor-backed going private deal activity decreased in 2014 both in terms of frequency and in terms of deal size.** In 2014, there were 16 announced and currently pending or completed sponsor-backed going private transactions with transaction values in excess of $100 million, down from 27, 24, 33 and 35 in 2013, 2012, 2011 and 2010, respectively. The 2014 sponsor-backed going private deal activity represents only slightly higher deal activity than in the depths of the financial crisis when in 2009 only 14 such transactions were entered into.

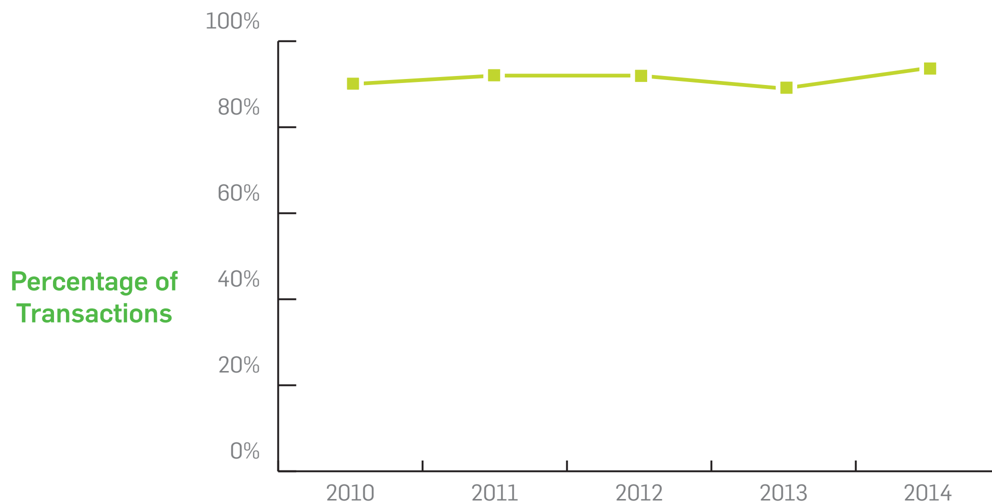
Transaction values in our 2014 study ranged from approximately $114 million to approximately $8.3 billion. The average deal size in 2014 was approximately $2.1 billion ($1.3 billion excluding the two transactions with the largest transaction values), compared with $2.5 billion, $714 million, $1.3 billion and $1.5 billion in 2013, 2012, 2011 and 2010, respectively. The two largest completed sponsor-backed going private transactions in 2014 had transaction values of approximately $8.3 and $7.5 billion, respectively. In comparison, the two largest completed sponsor-backed going private transactions in 2013 were just over $23 billion and just under $21 billion and the largest completed sponsor-backed going private transaction during the period between 2010 and 2012 was just over $5.6 billion. The 16 surveyed deals had an aggregate transaction value equal to approximately $24 billion, compared with aggregate transaction values of approximately $67 billion in 2013, $17 billion in 2012, $41 billion in 2011 and $55 billion in 2010.

Sponsor-backed going private deal activity was fairly consistent throughout 2014 with most activity in the fourth quarter and least activity in the second quarter.

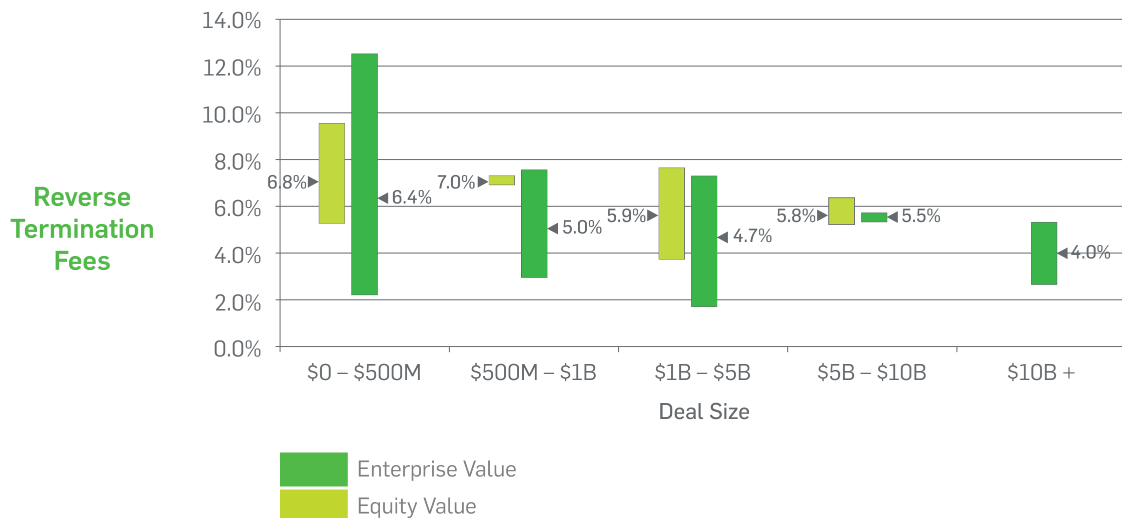
**Use of reverse termination fees in 2014 appeared in all but one of the debt-financed going private transactions in 2014.** Some form of reverse termination fee appeared in all but one of the surveyed transactions in 2014 that were debt-financed. The average single-tier termination fee in the surveyed transactions in 2014 that would have been payable by sponsors in certain termination scenarios (e.g., financing failure) was 5.7% as a percentage of the enterprise value of the target and 6.4% as a percentage of the equity value in the transaction, which is consistent with prior years.

The two-tier reverse termination fee construct, whereby the sponsor would pay a higher reverse termination fee for a willful breach and/or a refusal to close (other than in connection with a financing failure), has been rarely utilized in recent years and was not used in any of the surveyed transactions in 2014 or 2013 (it was only used in two surveyed deals in 2012).

## Reverse Termination Fees Continue to Be Widely Used

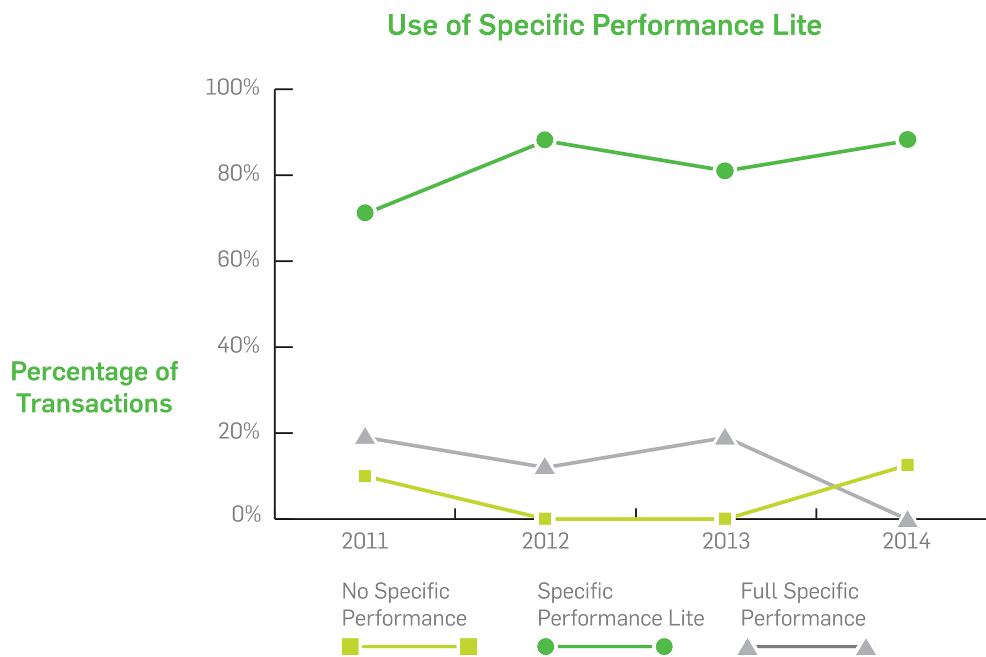



## Reverse Termination Fee by Equity Value and Enterprise Value



- In the surveyed transactions in 2014, the average termination fee as a percentage of equity value was 3.6%. This is the average termination fee that would have been payable by targets in certain termination scenarios (e.g., entering into an alternative acquisition agreement in connection with a superior proposal). It is consistent with, albeit slightly higher than, the average termination fees of 3.3% in the 2013 surveyed transactions, 3.3% in the 2012 surveyed transactions and 3.5% in the 2011 surveyed transactions.
- In four of the six 2014 surveyed deals with go-shop provisions, a superior proposal entered into as a result of the go-shop period would have triggered the payment of a reduced termination fee. Over a majority of the target boards therefore took the view that the traditional fee (which averaged at 3.6%) was inconsistent with the spirit of the go-shop as a true post-signing "test the market" process. On average, the reduced termination fee in the 2014 deals was just over 50% of the normal termination fee.

**Specific performance lite continues to be market.** Specific performance lite, whereby the target has the limited right to seek specific performance to force the closing only if all conditions to closing are satisfied and the debt financing is available and ready to be funded, was included in approximately 88% of the 2014 surveyed deals (compared with 81% in 2013, 88% in 2012, 74% in 2011 and 36% in 2010). One of the two 2014 surveyed deals that did not provide for specific performance lite did not contemplate debt financing. In the case of the other, the reason for why the specific performance lite construct was not used is not known.




Specific performance lite first emerged after the financial crisis as a compromise between targets, which sought to limit the optionality built into the reverse termination fee structure, and sponsors, which could not accept the risk of being forced to close transactions in the event their lenders failed to fund the debt proceeds. While specific performance lite was initially prevalent only in larger buyouts (i.e., those in excess of $1 billion), it became and continues to be the accepted norm with respect to allocating financing failure and closing risk in sponsor-backed transactions of all sizes.

**Use of go-shops has increased compared to 2013, bucking the trend of decreases since 2010.** Go-shop provisions that permit the target to canvas the market and solicit other potential bids after a deal is announced were more widely used in 2014 (38% of the surveyed transactions compared with 26% of the surveyed transactions in 2013, 33% of the surveyed transactions in 2012, 32% of the surveyed transactions in 2011 and 40% of the surveyed transactions in 2010). This demonstrates that go-shop provisions are a useful tool that appears in a significant minority of deals over the last several years

Go-shops are often included as a way to assist a target's board in maximizing shareholder value and are particularly prevalent in transactions where the target's board does not have the opportunity to commence a full sales process or otherwise perform a market check prior to the signing of the transaction.

The length of the go-shop periods in the surveyed transactions in 2014 ranged from 14 days to 50 days, with an average of 33 days (consistent with the 2013 average of 31 days). The average reduced go-shop termination fee was equal to 50% of the termination fee. Each of the six surveyed transactions containing a go-shop period in 2014 closed successfully without another bidder emerging.

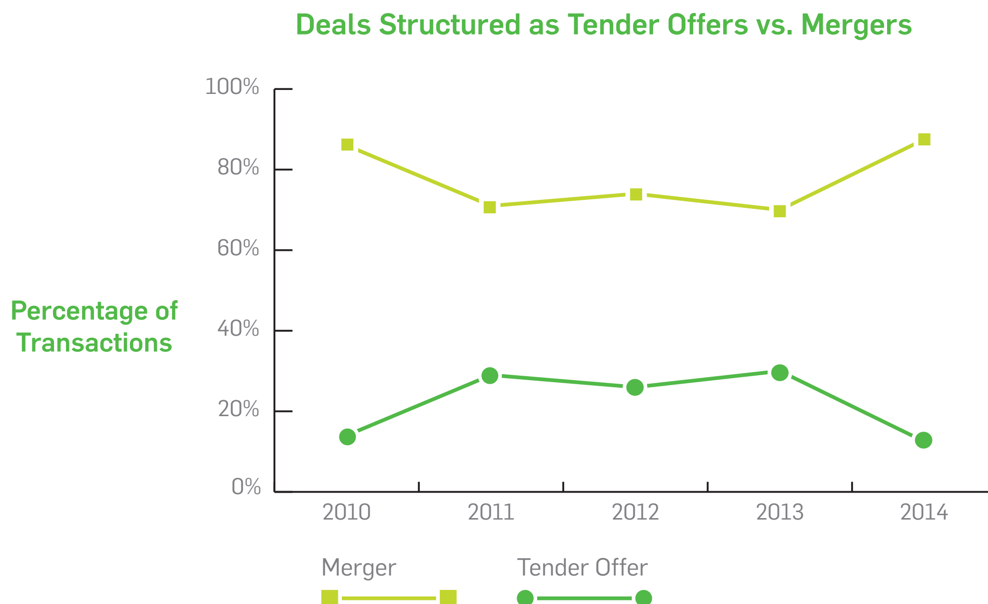
A hard-stop was utilized in 75% of the surveyed transactions in 2014 that contained a go-shop period. A hard-stop imposes a deadline (often an abbreviated period after the end of the go-shop period) on the target board to negotiate a definitive agreement with a competing bidder solicited during the go-shop period in order for the target to benefit from the reduced go-shop termination fee. Of the four transactions with reduced go-shop termination fees in 2014, three had hard-stop provisions. In these cases, the target was permitted to engage in negotiations with a competing bidder solicited during the go-shop period for time periods ranging from 5 days to 50 days in the case of the three transactions.

**Target termination fee scenarios.** Each of the 2014 surveyed going private transactions closed and therefore no target companies paid any termination fees. The typical trigger for the payment of the termination fee by the target is the entering into or consummation of an alternative transaction during a defined period of time beginning on the date of termination. Of the 2014 surveyed transactions, 11 had a 12-month tail period, while three had a 9-month tail period, one had a 6-month tail period, and one had a 15-month tail period.

**Ability of target board to change its recommendation.** All of the 2014 surveyed deals allowed the target board to change its recommendation in connection with a superior proposal or an “intervening event” (typically defined as an event or circumstance unknown or unforeseeable to the target board at signing that later occurring or known would require the target board to change its recommendation in order not to act in a manner inconsistent with its fiduciary duty). Even in the absence of a superior proposal or an “interveining event,” 37.5% of the deals also allowed the target board to change its recommendation if required to satisfy its fiduciary duties generally.

**Sponsors are not expressly being required to sue their lenders.** While initially popular following the financial crisis, provisions expressly requiring sponsors to sue their lenders in the event that these lenders fail to provide the committed debt financing have become less common. In fact, only 12.5% of the surveyed deals in 2014 expressly contained such a provision (compared to a majority of the deals surveyed in 2010). It is important to note, however, that a majority of the deals are silent on this and such agreements may require the sponsor to use its reasonable best efforts to enforce its rights under the debt commitment letter, which could include suing a lender.

**Tender offers appear to be becoming more popular.** In 2014, sponsors utilized the two-step tender offer/back-end merger structure in 13% of the surveyed deals (compared with 30% in 2013, 26% in 2012 and 29% in 2011). The brief decline in tender offers may be more attributable to the small number of going private transactions in 2014 rather than a broader market shift. Tender offers are generally popular particularly due to the speed with which an acquisition structured through a tender offer (followed by a short-form merger) can be completed (in as few as six weeks, if not less).



# Europe

## Key Conclusions

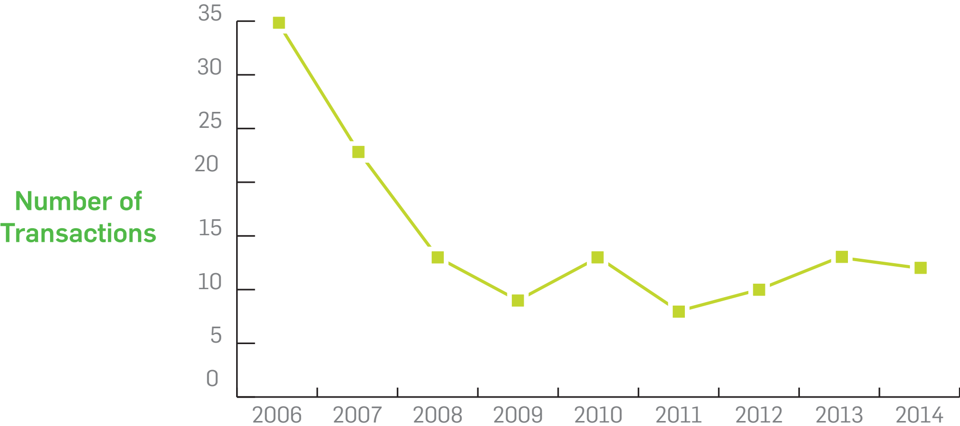
Key trends for going private transactions in Europe in 2014 include:

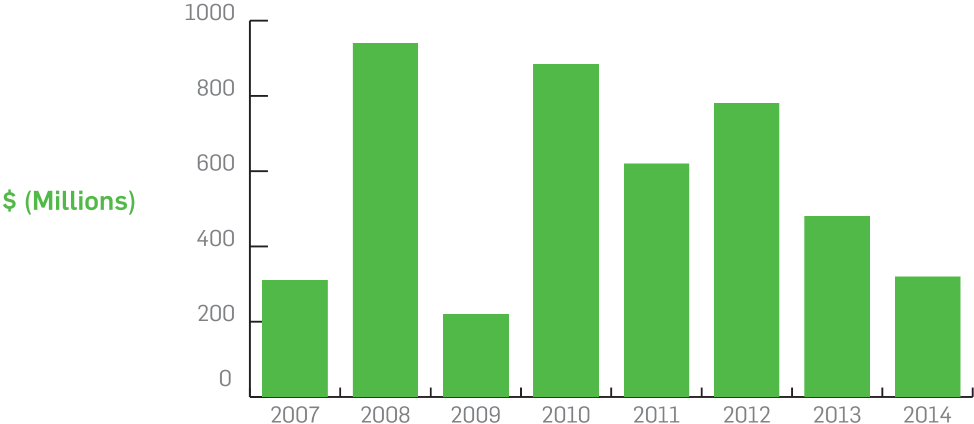
- After a particularly slow first half of the year, the European going private market struggled to keep pace with the deal volumes and values seen in previous years, with an 8% decrease by volume of sponsor-backed going private transactions in excess of $100 million compared with 2013. The total value of those transactions in 2014 fell by 37% as compared to 2013, and was just 50% of the total value of successful surveyed transactions in 2012. The average deal value during 2014 fell by 33% compared to 2013 and 59% compared to 2012.
- Q3 and Q4 of 2014 saw an increase in activity, continuing the recent trend of a slow start building to a flurry of transactions in the second half of the year.
- Continental Europe was a popular market once again, but a resurgence of deals in the UK and the Nordics suggests that these markets are still highly desirable to sponsors.
- Nearly half of the surveyed transactions during 2014 involved a sponsor co-investing alongside other sponsors or key members of the existing board of the target.
- In the UK, bidders continued to take advantage of the Panel on Takeovers and Mergers' dispensation from the requirement to publish details of market flex arrangements on a website immediately following an announcement of firm intention, provided that debt syndication is completed prior to publication of the offer document.
- NASDAQ Stockholm and Nordic Growth Market have recently revised their Takeover Rules with the aim of improving the pre-conditions for competing bids. Key changes include the prohibition of offer-related arrangements imposing obligations on a target (e.g., exclusivity commitments, break fees, no-shop provisions and matching rights) and the clarification that a bidder is bound by any unconditional statements made by that bidder to act or not act in a certain manner (e.g., a statement not to increase the offer price or extend the offer period). The changes took effect on February 1, 2015, and the Swedish Corporate Governance Board plans to issue corresponding updated takeover rules applicable to companies listed on multilateral trading platforms (NASDAQ, First North Stockholm, Nordic MTF and AktieTorget) in the near future.
- At the end of 2014, the legal process for challenging decisions of the French Stock Market Authority was changed to require a decision by the Court of Appeal of Paris within five months from the filing of the relevant claim. Previously, the Court was not subject to any deadline to render a decision after a challenge was filed, and the French Stock Market Authority typically extended the offer period until the Court's decision had been made, which led to lengthy litigation and offer periods during which additional bidders could come forward and market conditions (or the valuation of the target) could change. It is expected that this change in law will shorten the overall duration of tender offers in France.
- The Borse-Dusseldorf stock exchange amended its governance rules during 2014 to prevent publicly listed companies from voluntarily delisting their shares without a shareholders' resolution and takeover offer. At the end of 2013, the German Federal Court ruled that doing so was permissible. It is possible that other German stock exchanges will do the same, which may result in an increase in delistings by way of takeover offer in Germany in 2015.

# Highlights of 2014

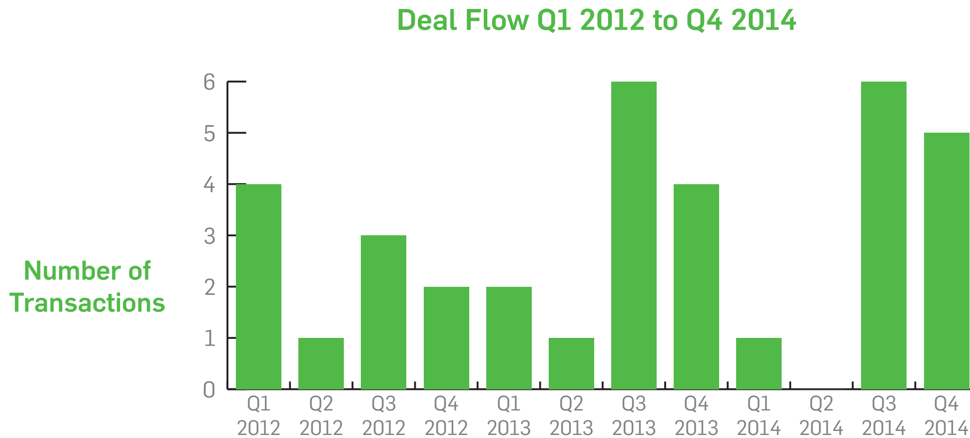
- **Volume of sponsor-backed going private activity remained relatively flat in 2014 compared to 2013 but deal values decreased significantly.** In 2014 there were 12 announced sponsor-backed going private transactions in excess of $100 million in Europe with a total value of $3.9 billion. This represents an 8% decrease from 2013 by volume (2013: 13 deals) but a 37% decrease by deal value (2013: $6.2 billion). Of the 12 transactions announced in 2014, the average deal size was $321 million, with a range from $100 million to $829 million. This is a significant reduction from the average value and range of transactions above the survey threshold from both 2013 (average: $480 million; range: $134 million to $1.6 billion) and 2012 (average: $780 million; range: $109 million to $2.3 billion).

  The reduction in both deal count and value could be due to inflated target valuations – caused by increased global liquidity and falling interest rates – that make large take-private transactions very challenging for sponsors. In addition, increased financial regulation in the US (including guidance advising limiting leverage to six times EBITDA) combined with an increasing preference for Yankee loans on European transactions, has capped both the number and size of potential targets for sponsors. These factors are unlikely to change significantly during 2015, which may lead to an increased number of transactions structured as co-investments (see discussion below), investments in convertible securities or sales of non-core assets.



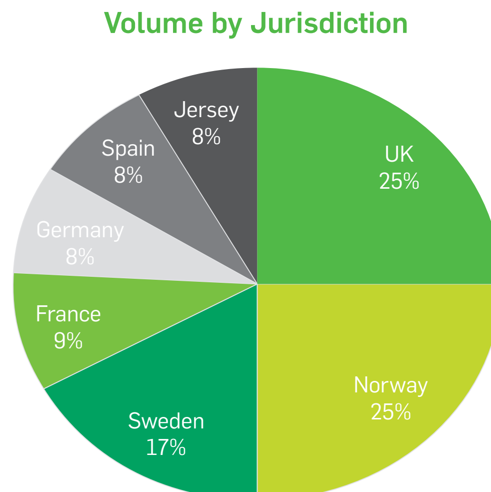



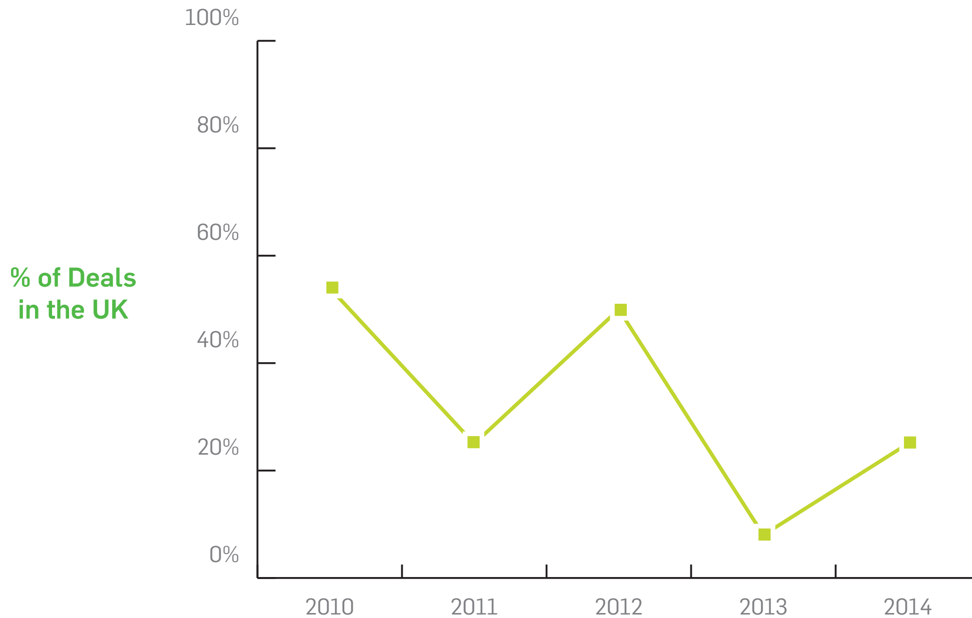
**Deal flow increased rapidly following Q2.** The first half of 2014 saw only one sponsor-backed going private transaction, valued at just $100 million. However, the second half of the year saw a significant increase in the number of transactions and transaction values, with Q3 and Q4 seeing six transactions and five transactions respectively, with total values of $2.1 billion and $1.6 billion respectively. This pattern of a slow start to the year for going private transactions has become a trend in recent years.




**Sector diversity.** Information technology and financial services continued to be areas of focus for sponsors, with five of the surveyed transactions falling into this bracket (including online payment methods, insurance brokering, workforce management solutions and internet and telecommunications services). Infrastructure (including energy), shipping and real estate investment also continued to attract bidders.

**Popular markets.** The transactions surveyed in 2014 include targets in France, Germany, Jersey, Norway, Spain, Sweden and the UK. The Nordic region continued to be a popular market, with 42% of the surveyed transactions involving a target in either Norway or Sweden. The UK also proved popular once again, with a 25% share of the surveyed transactions involving a target in the UK.






**Prevalence of co-investments by sponsors.** Due to the unfavourable market conditions outlined above, transactions that are structured as co-investments have become more attractive to sponsors who wish to acquire large public targets but no longer have the financial capacity to do so. Of the 12 surveyed transactions, five were structured as co-investments by a sponsor, alongside other sponsors (in the case of two of the transactions), key members of the existing board of the target (in the case of two of the transactions), or both (in the case of one transaction).

**Disclosure of details of market flex provisions in finance documents in the UK.** The UK Takeover Code requires a bidder to include a description of the bidder's proposed financing for the transaction in the offer document, including details of any debt facilities or other finance instruments and of any market flex provisions (and limitations to market flex) from those facilities. Documents relating to the financing of the offer are also required to be published on a website on the business day after the announcement of a firm's intention to make an offer. Public disclosure of such market flex provisions and their limits to potential syndicated debt finance providers may lead such finance providers to negotiate at the limits of the flex provisions, potentially increasing the bidder's cost of financing. In order to address this risk, the Panel on Takeovers and Mergers has allowed bidders to forego the publication of financing documents on a website and granted principal lenders a period of up to 28 days to syndicate the debt prior to publication of the offer document.

The year 2014 saw the use and failure of this dispensation in one surveyed transaction in the UK (Daisy), in which the bidder announced as part of its announcement of a firm intention to make an offer that its market flex provisions would not be published on a website following the announcement. The syndication was not completed prior to the publication of the offer document, and consequently the market flex provisions were described in the offer document.

**Revisions to Takeover Rules in Sweden.** NASDAQ Stockholm and Nordic Growth Market have recently revised their Takeover Rules with the aim of improving the conditions for competing bids. Key changes include:

- the prohibition of offer-related arrangements that impose obligations on a target (e.g., exclusivity commitments, break fees, no-shop provisions and matching rights) though confidentiality undertakings and restrictions on solicitation will continue to be acceptable (the Swedish Securities Council may also grant exemptions in certain cases where the target's obligations improve the conditions for competing bids);
- the clarification that a bidder is bound by any unconditional public statement made by that bidder to act or not act in a certain manner (e.g., a statement not to increase the offer price or extend the offer period) if the statement is likely to create reasonable reliance by the market on matters relevant to the offer;
- the extension of the period during which a shareholder can withdraw its acceptance of an offer if a bidder publishes an addendum to its offer document within two to five business days; and
- the elimination of the requirement for the target's auditor to review and issue a statement regarding the description of the target in the offer document.

The changes took effect on February 1, 2015, and the Swedish Corporate Governance Board plans to issue corresponding updated takeover rules applicable to companies listed on multilateral trading platforms (NASDAQ First North Stockholm, Nordic MTF and AktieTorget) in the near future.

**Shortened timeline for challenging decisions of the French Stock Market Authority in France.** On December 30, 2014, a new French law changed the legal regime for challenging decisions of the French Stock Market Authority in relation to tender offers. Previously, the Court of Appeal of Paris was not subject to any deadline to render a decision after a challenge was filed. The French Stock Market Authority typically extended the offer period until the Court had made its decision, which led to lengthy litigation and offer periods during which additional bidders could come forward or market conditions (or the valuation of the target) could change.

Under the new regime, the Court of Appeal now must render its decision within five months of the filing of a claim against a French Stock Market decision relating to a tender offer. It is expected that this change in law will shorten the overall duration of tender offers in France.

**Restrictions on regular delistings in Germany.** At the end of 2013, the German Federal Court ruled that a listed company could delist without a shareholders' resolution or a takeover offer – in other words, that a listed company could simply decide to delist its own shares. In the absence of a takeover offer, the existing shareholders of the company would remain as shareholders. However, they would be shareholders of a private, rather than a publicly traded, company. Several of these types of delistings took place in Germany in 2014, prompting the Borse-Dusseldorf stock exchange to change its governance rules to require a shareholders' resolution and a takeover offer in all delistings. It is possible that other German stock exchanges will do the same, which may result in an increase in delistings by way of takeover offer in Germany in 2015.

**Increased activity in Italy.** Although sponsor-backed going private activity in Italy was negligible during 2014, it is possible that 2015 will see more activity in Italy. General M&A activity in Italy has been increasing in recent years, and sponsors may start to view Italy as more systemically stable and thus as a more attractive potential market. In addition, the Italian government is pursuing a program of privatization and restructuring of its shareholder presence in various state-owned companies. It is anticipated that the Italian government will increase its focus on companies in the core industrial and consumer sectors.

# Key Conclusions

In 2014, total private equity activity in the Asia-Pacific region[1] increased by more than 40% from 2013 (from approximately $80 billion to $116 billion). There was a slight decrease in the number of surveyed sponsor-backed going private transactions in the region, but the aggregate value of these transactions more than doubled compared to 2013 (from approximately $1.9 billion to $4.3 billion). Six going private transactions form part of our survey this year, and constitute about 4% of total private equity deal activity, by deal value, in the region.

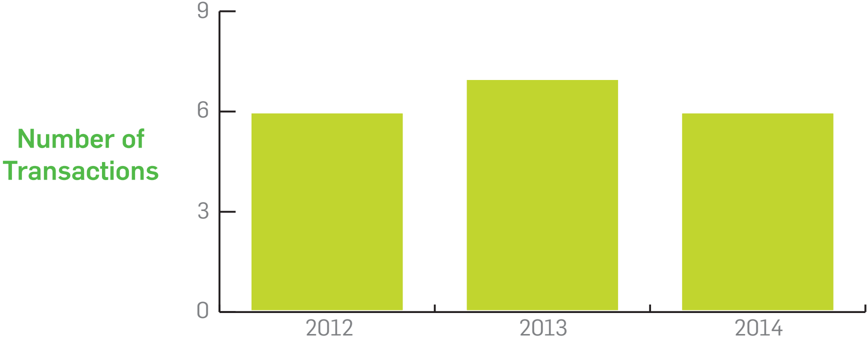
Some conclusions and trends for going private transactions in the region for 2014 include:

- The six sponsor-backed going private transactions surveyed in 2014 represented a slight decrease from seven transactions in 2013 but the same number of transactions as occurred in 2012.
- As in prior years, tender offers and schemes of arrangement continued to be the two principal forms used in takeover bids.
- The use of debt financing by sponsors in the region decreased slightly, with half of the six surveyed transactions utilizing debt financing. The remainder utilized only equity.
- Termination fee provisions were common in transactions effected through a scheme of arrangement, some of which also contained reverse termination fee provisions. If used, reverse termination fees in the region tend to be similar in size to termination fees.
- Fiduciary outs are treated very differently in different jurisdictions in the region. In some jurisdictions, a fiduciary out provision is common in a scheme of arrangement. In other jurisdictions, a fiduciary out provision is prohibited without shareholder approval.
- Go-shop provisions remained relatively unused in the region. None of the surveyed transactions in 2014, 2013 or 2012 contained a go-shop provision.
- Financing-out provisions were uncommon in acquisition agreements entered into in connection with transactions in the region.
- An MAE-out is common in many jurisdictions in this region, though it is typically not permitted in mandatory offers.
- As in previous years, a number of sponsor-backed going private “indicative proposals” in the region were either rejected by the target or withdrawn, or otherwise did not result in a definitive agreement. These “indicative proposals” are not reflected in the survey.

1 For the purposes of this survey, the Asia-Pacific region includes Australia, China (including Hong Kong), India, Indonesia, Japan, South Korea, Malaysia, New Zealand, the Philippines, Singapore, Taiwan, Thailand and Vietnam. Information regarding market activity is based on publicly available information and has not been independently verified.

# Highlights of 2014

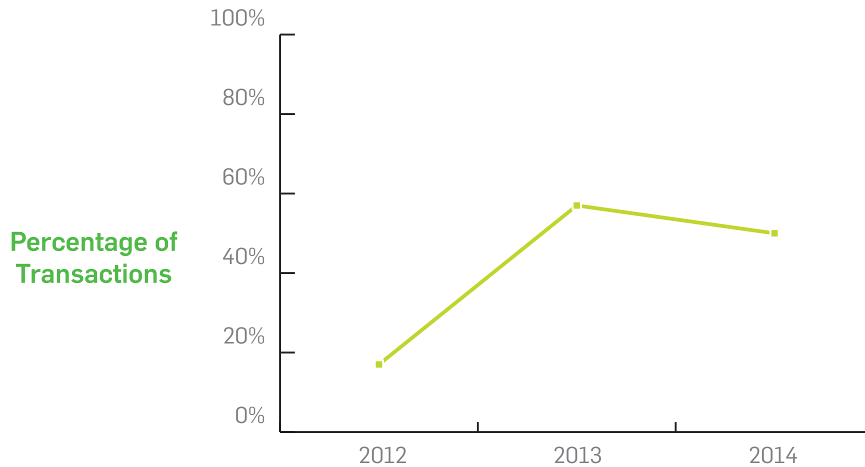
**Total private equity activity in the Asia-Pacific region increased by more than 40% from 2013, but sponsor-backed going private deal activity decreased slightly.** In 2014, there were six announced sponsor-backed going private transactions in excess of $100 million in the region, a slight decrease from seven such deals in 2013, but the same number as occurred in 2012. Transaction values of the six surveyed 2014 deals ranged from just above $100 million to approximately $1.3 billion (with three surveyed deals exceeding $1 billion in value). The six surveyed deals represent an aggregate transaction value equal to approximately $4.3 billion, compared with aggregate transaction values of approximately $1.9 billion in 2013 and $2.8 billion in 2012.




**Tender offers and schemes of arrangement were the most common takeover transaction structures in the region.** As would be expected, the legal regimes applicable to public takeovers in the jurisdiction of the target company determine the form of the transaction. As in previous years, the 2014 surveyed transactions were accomplished by either a cash offer for shares or a scheme of arrangement. Cash offers and schemes of arrangement were equally popular forms utilized in the 2014 surveyed transactions in this region with three transactions each. This reflects a change from prior years in which cash offers were more prevalent.

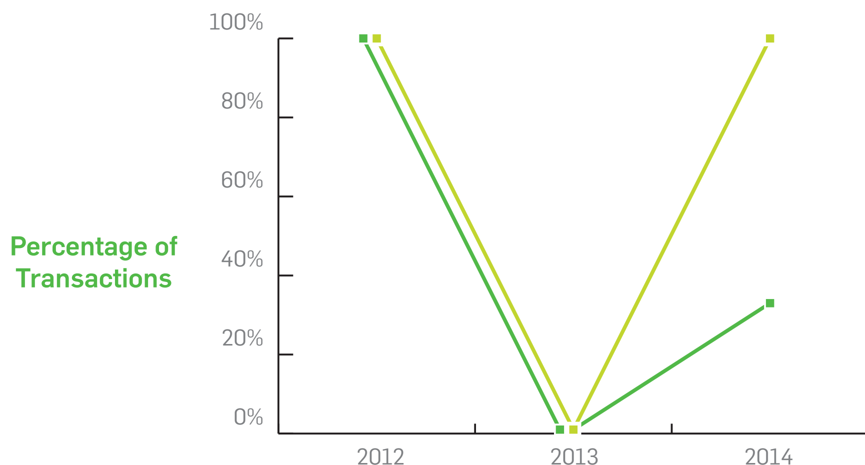
**Number of debt financed transactions decreased slightly.** In 2014, three of the six surveyed transactions utilized debt financing. This represents a slight decrease from 57% in 2013, but an increase from 17% in 2012. As could be expected, the use of debt financing was more common among sponsors in the more mature markets in the region.

### Transactions with Debt Financing




**Termination fees continued to appear in transactions effected through a scheme of arrangement.** All three of the surveyed transactions effected through a scheme of arrangement in 2014 included a termination fee. This is consistent with previous years — schemes have often included a termination fee payable by the target if the transaction was terminated as a result of a superior offer or certain material breaches by the target. Reverse termination fees are generally less common in Asia-Pacific markets than in the United States but, if used, they tend to be similar in size to termination fees. Of the three surveyed 2014 transactions effected through a scheme of arrangement, only one included a reverse termination fee and that fee was the same size as the termination fee. In some jurisdictions in this region, termination fees are normally at or below 1% of the transaction value.

### Scheme Deals with Termination Fee or Reverse Termination Fee



**Jurisdictions in this region continue to take different approaches toward fiduciary out provisions (the ability of the target board to change its recommendation).** There continue to be wide variations among jurisdictions in this region with respect to fiduciary out provisions. In a few jurisdictions, such as Australia, the target board usually negotiates a fiduciary out in a scheme of arrangement, while the buyer usually negotiates a notification right, a matching right, and a termination fee if the target accepts a competing bid. At the other end of the spectrum, other jurisdictions do not legally permit fiduciary out provisions without obtaining shareholder approval.

**Go-shop provisions remained relatively unused in the region.** Consistent with prior years, go-shop provisions were rare in all jurisdictions in the region, even in more mature markets such as Australia. None of the surveyed deals in 2014, 2013 or 2012 had go-shop provisions. In transactions effected through a scheme of arrangement (which typically involve direct agreements with the target company), targets usually agreed to a no-shop or similar provision.

**Financing-out provisions continue to be unusual in going private transactions in this region.** In most jurisdictions in the region, if the transaction proceeds by way of a cash offer, then, at the time the offer is launched, the buyer must have certainty of funding (sometimes the buyer must obtain an unconditional confirmation from its financial adviser or a bank). If the transaction proceeds by way of a scheme of arrangement, then a financing condition can sometimes be included in the scheme agreement and the buyer may be required to pay a reverse termination fee if it cannot successfully obtain financing. However, all conditions to closing must be satisfied before the scheme can be sanctioned by a court. In some jurisdictions, it is possible to structure the transaction as a pre-conditional offer, so that the offer is formally launched only after the financing condition is met. Sometimes such a pre-launch “financing out” requires pre-clearance from the relevant regulatory authority.

**MAE-out provisions continue to be common in transactions in this region.** It is common to have an MAE-out provision in transactions in many jurisdictions in this region, though the provision is typically not permitted in mandatory offers (which normally can be subject to only one condition: the shareholder voting threshold). In some jurisdictions, an MAE-out must be sufficiently objective and its fulfilment cannot depend on the subjective interpretation or judgment of a transacting party, while in other jurisdictions it is possible to have a broader, more subjective MAE-out. Sometimes an MAE-out requires pre-clearance from the relevant regulatory authority.

* * *

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