

A Look at Governance and
Liquidity Arrangements
in 2021 Sponsor-Backed
Initial Public Offerings

April 2022

2022
Private Equity
SURVEYS

INTRODUCTION & RESEARCH METHODOLOGY

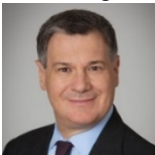
Welcome to Weil, Gotshal & Manges LLP's survey of governance and liquidity arrangements in Sponsor-backed initial public offerings ("IPOs") in the United States. In preparing this survey, we reviewed and analyzed the material terms of 15 IPOs consummated on United States listing exchanges in calendar year 2021 by companies that had one or more private equity sponsor owner(s) (each, a "Sponsor"). The 15 surveyed transactions consisted of 10 "club" deals (i.e., a deal that has more than one Sponsor with a material ownership position in the company) and 5 single-Sponsor deals. Specifically, the 15 surveyed transactions included the following Sponsor-backed companies:

- Agiliti, Inc.
- Clearwater Analytics Holdings, Inc.
- Definitive Healthcare Corp.
- EverCommerce Inc.
- First Watch Restaurant Group, Inc.
- Globalfoundries Inc.
- Informatica Inc.
- InnovAge Holding Corp.
- Life Time Group Holdings, Inc.
- LifeStance Health Group, Inc.
- Petco Health and Wellness Company, Inc.
- Portillo's Inc.
- PowerSchool Holdings, Inc.
- Sovos Brands, Inc.
- Traeger, Inc.

In this survey, we focus on the areas that we believe are of interest to Sponsors contemplating an IPO of a privately-held portfolio company. Given that Sponsors typically retain a majority of a company's equity following an IPO, Sponsors are uniquely focused on maintaining (i) control or influence over the public company while the Sponsor holds a meaningful (but decreasing) ownership interest in the public company and (ii) the ability to sell down the Sponsor's remaining stake in the public company at a time (and valuation) of its choosing (and without being "front run" by other major shareholders).

We hope that you will find this survey useful and informative. We are happy to discuss the detailed findings and analyses underlying this survey.

Doug Warner
Founding Editor



Alexander Lynch
Editor



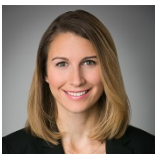
Lyuba Goltser
Editor



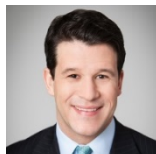
Barbra Broudy
Editor



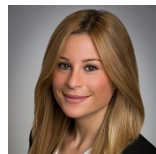
Ashley Butler
Editor



Ryan Taylor
Editor



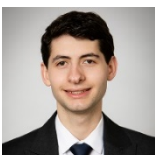
Brittany Butwin
Editor



Nicolas Lee
Contributor



Ali Habhab
Contributor



SUMMARY OF KEY FINDINGS

- **General Market Observations.** 2021 was a record year for IPOs both globally and in the U.S. While the U.S. market was dominated by SPAC IPOs (which is not the topic of this survey), there were almost 400 traditional IPOs, indicating a robust traditional IPO market. The IPO market in 2022 is likely to be much less active and is off to a slow start.
- **Governance Observations**
 - Consistent with previous years, in a significant majority of surveyed deals (87%), Sponsor-backed IPO companies availed themselves of at least some “controlled company” exemptions available under applicable listing requirements, which, among other things, exempt such companies from certain board and committee director independence requirements (other than with respect to the audit committee). Notably, even though companies are availing themselves of the controlled company exemptions, most Sponsor-backed companies are going public with a majority of independent directors.
 - Consistent with previous years, Sponsors in the surveyed deals typically (93%) adopted a classified board structure for the newly-public company in connection with an IPO. In one of the surveyed deals, the classified board structure established in connection with the IPO is subject to “sunset” (triggered upon the earlier of 5 years following the IPO or when Sponsor’s ownership drops below 50% of the voting power of the common stock necessary to elect directors) to address governance and proxy advisory firm concerns.
 - In a significant majority of surveyed deals (80%), Sponsors secured contractual rights to nominate or designate directors to serve on the public company’s board of directors (in some cases, including committees) following an IPO. Such director nomination rights were secured in all “club” deals and in 40% of single-Sponsor deals. In 70% of “club” deals where Sponsors secured contractual rights to nominate or designate directors and in 100% of such single-Sponsor deals, Sponsors secured the right to elect a majority of the directors constituting the board.
 - In 50% of surveyed “club” deals and 40% of surveyed single-Sponsor deals, Sponsors secured shareholder consent or veto rights over the public company taking certain post-IPO actions.
 - In previous years, a limited number of Sponsors in “club” deals secured the ability to assign their governance rights (e.g., board designation rights and shareholder veto rights) to a third party transferee. However, this year none of the surveyed deals included the ability of a Sponsor to assign governance rights to a third party transferee.
 - In a decrease from previous years, in only one of the surveyed deals (a single-Sponsor deal), the Sponsor secured special information rights or access to management.
 - Consistent with previous years, Sponsors in a majority of deals (67%) included requirements in the organizational documents of the company for supermajority approval of shareholders for the company to take certain post-IPO actions (excluding supermajority approval requirements for certain business combinations with interested shareholders, which all of the surveyed transactions included except for one).
 - In all of the surveyed deals, Sponsors secured the ability to act by written consent in lieu of a shareholder meeting so long as Sponsors hold a specified ownership threshold. In 70% of surveyed “club” deals and in 20% single-Sponsor deals, Sponsors negotiated the right to call special meetings of shareholders, a right which was typically tied to Sponsor owning a specified ownership threshold.
 - In all of the surveyed deals, Sponsors negotiated for a waiver (in favor of the Sponsor) of the corporate opportunity doctrine in the post-IPO company’s charter.

■ **Liquidity Observations**

- Share transfer restrictions (other than compliance with underwriters' lock-ups and compliance with securities laws) typically do not continue post-IPO, though these restrictions were more common in the surveyed "club" deals (60% of such deals) than in surveyed single-Sponsor deals (20% of such deals). These restrictions can include, among others, (a) transfer limitations based on the relative ownership of a shareholder as compared to other shareholders, (b) enhanced lock-up provisions, (c) a right of first offer in favor of the Sponsor or other shareholders on transfers, (d) tag-along rights, (e) drag-along rights and obligations and (f) agreements requiring coordination among multiple shareholders on sales of shares. In "club" deals, Sponsors entering into voting agreements (including, depending on their terms, registration rights agreements) or other arrangements with respect to the voting or disposition of the company's securities should be mindful of the possibility of forming a "group" under Section 13(d) of the Exchange Act.

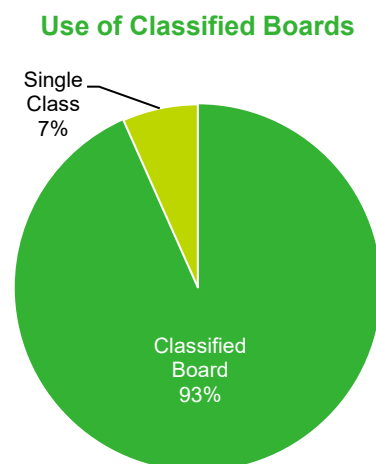
KEY FINDINGS

GOVERNANCE

“Controlled” Company. As was the case in 2020, in the vast majority (87%) of surveyed deals, Sponsor-backed IPO companies availed themselves of a “controlled company” exemption available under applicable listing requirements. A controlled company is a company in which more than 50% of the voting power for election of directors is held by an individual, a group or another company. Controlled companies are exempt from the applicable listing requirements requiring a majority of independent directors (though most Sponsor-backed companies are going public with a majority of independent directors nonetheless) and fully independent compensation and nominating committees. However, such companies must have a fully independent audit committee.

Board Structure. Sponsors continue to adopt classified board structures for post-IPO companies. A classified board structure was adopted in 93% of the surveyed deals, with only one deal (a single-Sponsor deal) not adopting a classified board. In one of the surveyed deals having a classified board, a sunset provision was included such that the board is to be completely de-classified following the third annual meeting after the sunset (the earlier of 5 years following the IPO or when Sponsor holds less than 50% of the voting power of the common stock necessary to elect directors), with all directors standing for election for one-year terms. In a classified board, directors are separated into a number of classes (typically three) that each serve “staggered,” multi-year terms (typically three years), rather than a single class of directors where each director is elected on an annual basis.

- A classified board serves a number of functions: where Sponsors have board designation or nomination rights, it helps ensure that Sponsors are represented on the board for at least three years following an IPO since the last class will not be subject to election until the third year (assuming a three-year term), and it allows Sponsors to retain some board representation following one or more offerings.
- Newly public companies adopting a classified board structure (especially when coupled with other defensive measures such as director removal for cause only, supermajority shareholder approval requirements and restrictions on the ability of shareholders to act by written consent and/or call special meetings) should understand that these practices are typically criticized by leading proxy advisory firms due to concerns that such a board structure limits the accountability of directors to shareholders. Note, however, that a classified board structure that includes a reasonable sunset is expected to be viewed more favorably by leading proxy advisory firms and other investors. As such, directors of a public company with a classified board structure, absent a reasonable sunset, should understand that they will receive a recommendation against their election at the annual meeting of shareholders as a result of adopting these practices. Moreover, once the Sponsor(s) fully or substantially exits, the portfolio company will come under increased pressure to eliminate the classified board structure (and other defensive measures viewed as adverse to shareholder rights).



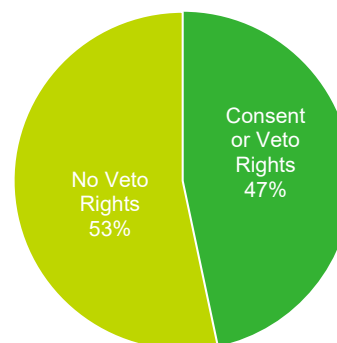
Sponsor Directors. Sponsors secured contractual rights to nominate or designate directors to serve on the public company's board of directors following an IPO in 100% of "club" deals and in 40% of single-Sponsor deals. In 70% of such "club" deals and in 100% of such single-Sponsor deals, Sponsors secured the right to elect a majority of the directors constituting the board.

- These director nomination rights were typically structured as (1) a right for the Sponsor to nominate a certain number of directors to the board, (2) an agreement among pre-IPO shareholders to vote their shares in favor of a certain number of Sponsor nominees (in "club" deals) or solely with the company (in single-Sponsor deals) or (3) a combination of both.
- Generally, the number of directors a Sponsor was entitled to nominate or designate was proportional to (or otherwise tied to) its ownership position in the company post-IPO and fell away completely once the Sponsor's ownership level fell below a specified percentage of the company's outstanding equity (often 5%-10%).
- In a majority of the deals surveyed in which Sponsors had contractual rights to nominate or designate directors, (i) compensating Sponsor-designated directors was permitted although typically not expressly required (in 53% of such deals) and (ii) Sponsor-designated directors were entitled to at least expense reimbursement (in 80% of such deals).
- In a significant majority (87%) of the surveyed deals (90% of "club" deals and 80% of single-Sponsor deals), directors could be removed for reasons other than for "cause" only. In a handful of the deals surveyed, "cause"-only removal applied once the Sponsor(s) held less than a specified minimum ownership percentage of the company (often 40-50%).

Board Committees; Observers. In an increase from last year, in a majority (53%) of the surveyed deals, Sponsors secured contractual rights to nominate or designate directors to serve on committees of the public company's board of directors. Such contractual board nomination rights were much more common in "club" deals (70%) than in single-Sponsor deals (20%). In a minority (33%) of the surveyed deals, Sponsors secured contractual rights to designate board observers (40% in "club" deals and 20% in single-Sponsor deals).

Sponsor Shareholder Consent Rights. Sponsors secured shareholder consent or veto rights over the public company taking certain actions following an IPO in almost half (47%) of the surveyed deals. In 50% of "club" deals and 40% of single-Sponsor deals, Sponsors had shareholder consent or veto rights with respect to the company taking certain actions following an IPO. Shareholder consent and veto rights provide an additional layer of protection for Sponsors and permit Sponsors to make decisions directly in their capacities as shareholders, which can allow such persons to make decisions without the same fiduciary considerations that apply to determinations made by directors.

Sponsor Veto Rights



- In some cases, these consent and/or veto rights applied to a limited set of fundamental protections (e.g., amendments to important sections of the company's certificate of incorporation or bylaws, altering the size and/or composition of the board, effecting certain issuances of equity securities or effecting a voluntary liquidation).
- However, in other cases, a Sponsor's consent or veto rights extended to other more operational matters, including with respect to:
 - Consummating acquisitions or dispositions in excess of a specified threshold and change of control transactions;

- Incurring indebtedness in excess of a specified threshold;
- Appointing or removing certain senior executive officers;
- Adopting a new equity incentive plan or modifying existing plans; and
- Effecting certain dividends, distributions, repurchases or redemptions of company shares.

These veto rights often terminate when Sponsor's equity ownership drops below a specified ownership threshold (sometimes as low as 5% of the company's outstanding shares).

Assignment of Sponsor Governance Rights. In all of the surveyed deals, Sponsors failed to secure the ability to assign governance rights (e.g., board designation rights and shareholder veto rights) to a third party transferee. In previous years, in some cases Sponsors in "club" deals secured such assignment rights. The ability to assign governance rights to a third party transferee could increase the value of a minority stake sold in a private transaction.

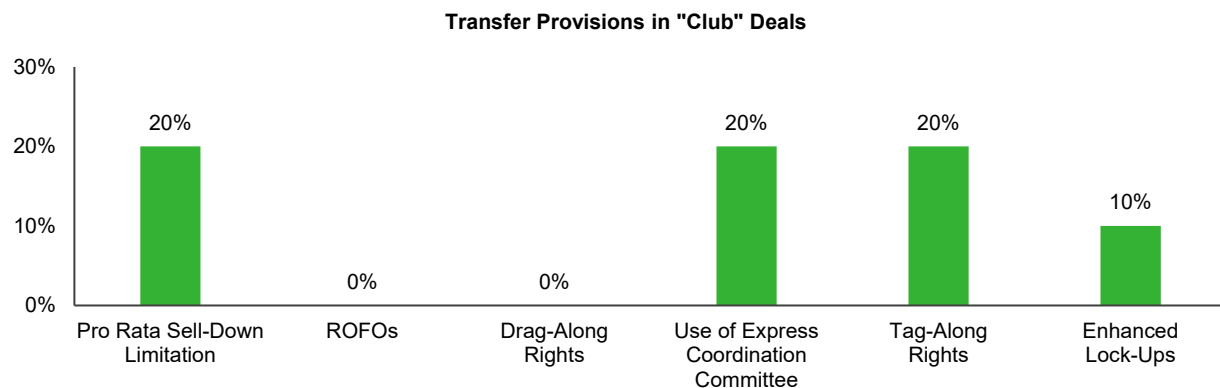
Other Sponsor Protections.

- **Sponsors continue to include supermajority-voting requirements for shareholders to take certain post-IPO actions in the organizational documents of post-IPO companies.** In 67% of the surveyed deals (80% of "club" deals and 40% of single-Sponsor deals), the organizational documents of the public company had supermajority-voting provisions that required a supermajority vote of the shareholders (66 2/3%) with respect to the company taking certain actions following an IPO (other than certain business combinations with interested shareholders, for which all of the surveyed deals with the exception of one included supermajority voting requirements). In many cases, the supermajority voting provisions apply to a limited number of fundamental actions (including amending the bylaws) and sometimes fall away once Sponsor no longer (x) controls voting power of or exceeding 50% or (y) beneficially owns less than 50% of the Company's outstanding common stock.
- **In all of the surveyed deals, Sponsors secured the ability to act by written consent in lieu of a shareholder meeting so long as Sponsors hold a specified ownership threshold.** Acting by written consent often allows Sponsor shareholders to take certain corporate shareholder actions more expeditiously. In addition, shareholder voting restrictions such as restricting the ability of shareholders to act by written consent (and/or by calling special meetings, as discussed further below) limit shareholders from acting without board involvement and so often serve as a defensive measure.
- **Sponsors in "club" deals typically obtained rights to call special meetings.** In 70% of surveyed "club" deals and in 20% single-Sponsor deals, Sponsors negotiated the right to call special meetings of shareholders, a right which was typically tied to Sponsors owning a specified ownership threshold. With the ability to call special meetings, Sponsors can take certain actions without the need to wait for the next annual stockholder meeting. In addition, as noted above, restricting the ability of shareholders to call special meetings can serve as a defensive measure.
- **In all of the surveyed deals, Sponsors negotiated for a waiver in favor of the Sponsor of the corporate opportunity doctrine in the post-IPO company's charter.** In previous years, Sponsors in a substantial majority of surveyed deals negotiated such a provision. Delaware General Corporation Law permits a corporation to waive its expectancy in "specified business opportunities" in its organizational documents. By putting such waivers in place, Sponsors can mitigate some of the restrictions that would otherwise be imposed on their other businesses associated with holding one or more directorships on portfolio company boards.
- **Sponsors rarely obtained enhanced shareholder information or access rights.** In a decrease from last year, in only one of the surveyed deals (a single-Sponsor deal) the Sponsor secured special information rights or access to management.

LIQUIDITY

Share Transfer Restrictions. While share transfer restrictions on pre-IPO shareholders (other than compliance with underwriters' lock-ups and compliance with securities laws) typically do not continue post-IPO in single-Sponsor deals, such restrictions were more common in "club" deals. Of the surveyed transactions where we observed such share transfer restrictions (47% of all surveyed transactions), such restrictions were in a majority (60%) of "club" deals but only in one single-Sponsor deal (representing 20% of the surveyed single-Sponsor deals). As in 2020 and other recent years, such restrictions tend to be more common in "club" deals as Sponsor shareholders, who usually hold substantial stakes in the public company, wish to control the timing and volume of any sales of shares by other Sponsors to reduce the risk of "front running."

- In the surveyed "club" deals where such share transfer restrictions continued post-IPO, Sponsors included in post-IPO shareholder agreements some of the legal mechanisms that are typically included in private company shareholder agreements with respect to transfer restrictions, rights and obligations (including, for example, lock-ups, tag-along rights, pro rata sell-down limitations and express coordination committees). The breakdown of these provisions is highlighted in the chart below.



¹A coordination committee is designed to prevent "front-running" or uncoordinated selling by co-investors, each of which may adversely affect the market price of the public company's stock. While only two of the surveyed transactions had such express committees, in two of the surveyed transactions the Sponsors agreed to coordinate sales within a certain period of time (i.e., 18 months) following the closing of the IPO and in one surveyed transaction Sponsors agreed to notify the other Sponsors in advance of any sell-down and with respect to Rule 144 sales, coordinate the timing and process for transferring shares.




- With respect to underwriters' lock-ups, in 27% of all of the surveyed deals there was a pro rata release provision requiring pro rata waiver/release from the lock-up for all signatories to the lock-up agreement to the extent the lock-up was waived/released with respect to securities held by any signatory to the lock-up agreement. While we would expect these provisions to be more prevalent in "club" deals, that was not the case (such pro rata release provisions were only in 20% of "club" deals).

Registration Rights. In 100% of the surveyed transactions, Sponsors secured demand registration rights following an IPO. As in 2020, in all of the surveyed transactions Sponsors had the right to demand registration of their company shares on at least one occasion following an IPO (and in the vast majority of cases for both single-Sponsor deals and "club" deals, Sponsors had a right to unlimited demand registrations or shelf registration rights). In addition, in all of the surveyed transactions Sponsors (and other shareholders) had customary piggyback registration rights on the registration of company shares by the company or another major shareholder.

UP-C STRUCTURES

In 27% of the surveyed transactions, companies adopted an “Umbrella partnership-C corporation” or “Up-C” structure (i.e., the publicly traded corporation is a holding company that holds an interest in another entity, typically an LLC, that is taxed as a partnership for United States federal income purposes and holds all of the business’ operating assets and liabilities). In such a structure, Sponsors typically would retain their economic ownership in the business through ownership of equity in the holding company LLC, which is a flow-through entity for tax purposes. At the time that the Sponsor wishes to dispose of all or a portion of their interest in the business, the Sponsor would exchange the equity interests in the LLC holding company for shares of the publicly-traded corporate parent, which would then be transferred. While the Up-C structure introduces additional complexity, it allows Sponsors to achieve significant economic benefits through a tax receivable agreement, in which the post-IPO company agrees to pay to the Sponsor a percentage (typically, 85%) of the tax benefits that result from a step-up in tax basis created when equity interests in the LLC holding company are exchanged for shares of the publicly-traded corporate parent. While the ability to utilize an Up-C structure will depend significantly on the particular structure of a given portfolio company, it can, in the right circumstances, be a very attractive structure for Sponsors.

WEIL'S REPRESENTATIVE U.S. IPO EXPERIENCE

<p>AGILITI, INC. (F/K/A AGILITI HEALTH, INC.) (COUNSEL TO UNDERWRITERS)</p> 	<p>ALTC ACQUISITION CORP.</p> 	<p>AUSTERLITZ ACQUISITION CORPORATION I</p> 	<p>AUSTERLITZ ACQUISITION CORPORATION II</p> 	<p>AVISTA PUBLIC ACQUISITION CORP. II</p> 	<p>CHURCHILL CAPITAL CORP VII</p> 
<p>DEEP LAKE CAPITAL ACQUISITION CORP.</p> 	<p>DEFINITIVE HEALTHCARE CORP.</p> 	<p>DHC ACQUISITION CORP. (COUNSEL TO SOLE BOOK-RUNNING MANAGER AND OTHER UNDERWRITERS)</p> 	<p>DUN & BRADSTREET HOLDINGS, INC.</p> 	<p>FIRST LIGHT ACQUISITION GROUP, INC.</p> 	<p>FIRST WATCH RESTAURANTS, INC.</p> 
<p>FOLEY TRASIMENE ACQUISITION CORP. II</p> 	<p>FORTISTAR SUSTAINABLE SOLUTIONS CORP.</p> 	<p>FORTRESS CAPITAL ACQUISITION CORP.</p> 	<p>FORTRESS VALUE ACQUISITION CORP. III</p> 	<p>FORTRESS VALUE ACQUISITION CORP. IV</p> 	<p>FLUENCE ENERGY, INC. (COUNSEL TO UNDERWRITERS)</p> 
<p>GORES GUGGENHEIM, INC.</p> 	<p>GORES HOLDINGS VII, INC.</p> 	<p>GORES HOLDINGS VIII, INC.</p> 	<p>GORES HOLDINGS IX, INC.</p> 	<p>GORES METROPOULOS II, INC.</p> 	<p>GORES TECHNOLOGY PARTNERS, INC.</p> 
<p>GORES TECHNOLOGY PARTNERS II, INC.</p> 	<p>JACK CREEK INVESTMENT CORP.</p> 	<p>KERNEL GROUP HOLDINGS, INC. (COUNSEL TO UNDERWRITER)</p> 	<p>OATLY GROUP AB (COUNSEL TO UNDERWRITERS)</p> 	<p>PIONEER MERGER CORP. (COUNSEL TO UNDERWRITER)</p> 	<p>PORTILLO'S, INC.</p> 
<p>ROSS ACQUISITION CORP. II</p> 	<p>SOVOS BRANDS</p> 	<p>TPG INC.</p> 	<p>TPG PACE BENEFICIAL II CORP.</p> 	<p>TPG PACE SOLUTIONS CORP.</p> 	<p>THE VITA COCO COMPANY, INC. (COUNSEL TO UNDERWRITERS)</p> 

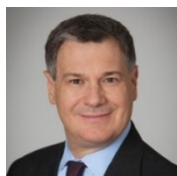
WEIL'S GLOBAL PRIVATE EQUITY PRACTICE

An elite global platform with 30+ years of market knowledge

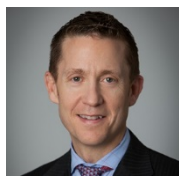
Deep experience across all of the major private equity asset classes

Advisors to one of the broadest groups of financial sponsors and investors in the world on cutting-edge transactions in a seamless, commercial and results-focused manner

KEY CONTACTS



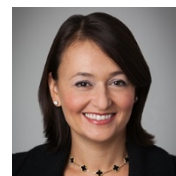
Douglas Warner
Co-Head of Global Private Equity
doug.warner@weil.com
+1 (212) 310-8751



Kevin J. Sullivan
Co-Head of U.S. Private Equity
kevin.sullivan@weil.com
+1 (617) 772-8348



Alexander D. Lynch
Head of Capital Markets
alex.lynch@weil.com
+1 (212) 310-8971



Lyuba Goltser
Co-Head, Public Company Advisory
lyuba.goltser@weil.com
+1 (212) 310-8048