WEIL GOTSHAL

WEIL, GOTSHAL & MANGES SURVEY

SPONSOR-BACKED GOING PRIVATE TRANSACTIONS

JUNE 2010

SELECTED SPONSOR-BACKED GOING PRIVATE TRANSACTIONS IN 2009 IN WHICH WEIL, GOTSHAL & MANGES LLP REPRESENTED THE ACQUIROR OR THE SELLER

SkyTerra Communications

$1.2 billion acquisition
of SkyTerra Communications, Inc.
by
Harbinger Capital Partners Master Fund I
and
Harbinger Capital Partners
Special Situations Fund

Charlotte Russe

$380 million tender offer
acquisition of
Charlotte Russe Holding, Inc.
by
Advent International Corp.

GenTek

$673 million tender offer
acquisition of
GenTek Inc.
by
American Securities LLC

Cedar Fair

$2.4 billion sale of
Cedar Fair, L.P.
to
Apollo Global Management

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Introduction

Welcome to our fourth annual 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 Asia-Pacific. We believe Weil Gotshal is uniquely positioned to perform this survey given our international private equity platform and network of offices throughout the United States, Europe and Asia-Pacific.

We are happy to discuss with clients and friends the detailed findings and analyses underlying this survey.

We want to pay special thanks to the many attorneys at Weil Gotshal who contributed to this survey, including Kyle Gann, Sachin Kohli, U-Hyeon Kwon, Jamie Lurie, Frank Martire, Andrew Arons, Nadia Karkar, Peter McRae, Megan Pendleton, Damali Peterman, Jenna Schaeffer, Matthew Speiser and Emily Wapples.

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Research Methodology

Weil Gotshal surveyed 28 sponsor-backed going private transactions announced from January 1, 2009 through December 31, 2009 with a transaction value (i.e., enterprise value) of at least $100 million (excluding target companies that were real estate investment trusts).

Fourteen of the surveyed transactions in 2009 involved a target company in the United States, nine involved a target company in Europe and five involved a target company in Asia-Pacific. 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 28 surveyed transactions included the following target companies:

UNITED STATES

Airvana, Inc.

Allion Healthcare, Inc.

Bankrate, Inc.

Cedar Fair, L.P.

Charlotte Russe Holding, Inc.

Entrust, Inc.

GenTek Inc.

IMS Health Incorporated

MSC Software Corporation

Parallel Petroleum Corporation

PharmaNet Development Group, Inc.

QuadraMed Corporation

SkyTerra Communications, Inc.

SumTotal Systems, Inc.

EUROPE

Bjorge ASA

Goldshield Group Plc

HTL-Strefa Spólka Akeyjna

Just Retirement (Holdings) Plc

Parmasteelisa SpA

Powerleague Group Plc

Synnove Finden ASA

Terveystalo Healthcare Oyj

Wydawnictwa Szkolne I Pegagogiczne

ASIA

Energy Developments Ltd.

Chimney Co., Ltd.

Macquarie Communications Infrastructure Group

Sihuan Pharmaceutical Holding Group Ltd.

USJ Co Ltd.

United States

Key Conclusions in 2009

2009 was a difficult year for sponsor-backed going private transactions in the United States with only 14 deals being announced. In the first half of the year, due to the virtual unavailability of new loans for acquisition financing, activity was all but non-existent as there were only three deals announced. However, activity rebounded in the second half of the year with 11 deals being announced.

While the limited data points render it difficult to generalize, a number of market and legal trends are identifiable based on this survey. These include:

- 2009 witnessed an 8% increase in aggregate transaction value when compared to 2008. The largest transaction announced in 2009 had a transaction value of approximately $5.2 billion, a 148% increase from the largest transaction announced in 2008. The number of transactions was consistent year-over-year with 14 transactions in 2009 compared to 15 in 2008.
- Interestingly, specific performance provisions enforceable against the buyer were much more common in 2009. 57% of the surveyed transactions in 2009 permitted the seller to seek specific performance against the buyer rather than be limited to a reverse break-up fee or monetary damages (whereas 7% of the surveyed transactions in 2008 allowed the seller to seek specific performance). This is not a surprising result considering target's desire to achieve deal certainty and the smaller sizes of deals in 2009.
- As a result of the increase in specific performance provisions, reverse break-up fees appeared in 77% of the surveyed transactions in 2009 (excluding "all-equity" deals) down from 87% in 2008. None of the "all-equity" deals included the option of terminating the transaction upon payment of a reverse break-up fee. In an effort to limit the optionality built-in to the reverse break-up fee structure and incent sponsors to consummate the transaction, target boards negotiated for a reverse break-up fee with more teeth as the average fee was 6% of the target's equity value in 2009.
- The percentage of transactions constituting club deals involving two or more private equity sponsors was once again small when compared to the pre-credit crunch era. Only 14% of the 2009 transactions constituted a club deal compared to 37% of the 2007 transactions. As deal sizes increase, we expect to see club deals come back into prominence and we have already seen this occur in connection with several 2010 transactions.
- The tender offer became even more prevalent in 2009, continuing a trend that started in 2007. 36% of the surveyed transactions in 2009 utilized a tender offer structure (predominately "all-equity deals").
- Not surprisingly, the lingering effects of the credit crisis continued to adversely impact the debt-to-equity ratios of sponsor-backed going private transactions. Equity accounted for an average of 56% of acquiror capitalization for transactions between $100 million and $1 billion in value and 43% of acquiror capitalization for transactions greater than $1 billion in value.
- The go-shop provision continued to be a common feature of going private transactions in 2009 with 36% of surveyed transactions including this form of post-signing market check. Continuing a trend from 2008, sponsors were again resistant to giving a significantly reduced go-shop break-up fee (no transaction had a go-shop break-up fee of less than 45% of the normal break-up fee).
- When compared to 2008, the 2009 surveyed transactions reveal a material increase in the number of target-friendly MAE exceptions, making it even more difficult for a buyer to prove the occurrence of an MAE. However, buyers successfully negotiated an objective MAE test, such as minimum closing cash, minimum leverage or minimum EBITDA, in 50% of the 2009 surveyed transactions, reflecting the increasing frequency of such conditions in debt commitment papers.

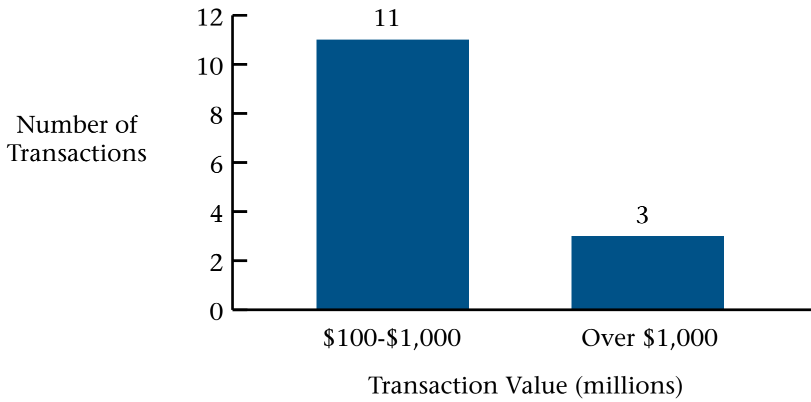
2010 Outlook

In terms of both volume and transaction size, the sponsor-backed going private market has come to life thus far in 2010. Through May 31, there have been 14 sponsor-backed going private transactions announced with a transaction value of at least $100 million. The average transaction value for the going private transactions announced thus far in 2010 is $908 million and the largest transaction value is $3.4 billion.

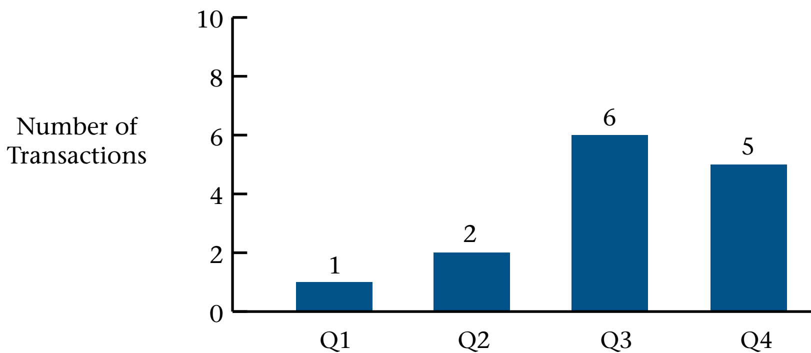
Although it may be too early to highlight trends for 2010, we note several key observations below.

- **Allocation of financing risk continues to be a fact-specific decision that is adjusted from deal-to-deal.** The most common approach thus far in 2010 preserves the reverse break-up fee construct if the debt financing isn't available at closing but allows the target to seek specific performance as long as the lenders and the target are willing and able to close and all conditions in the acquisition agreement are satisfied.
- **Reverse break-up fees have become more punitive.** Unlike the pre-credit crunch transactions in which the size of the reverse break-up largely mirrored the size of the typical break-up fee, the size of the reverse break-up fee for 2010 transactions has averaged 9.32% of the target's equity value (includes one reverse break-up fee that was 38.05% of the target's equity value under certain circumstances).
- **Special provisions designed to more expressly address the complex interaction among sponsor, target and lender are appearing in acquisition agreements.** For instance, a choice of forum provision can apply not only to the target and the buyer, but also the debt financing sources in an effort by the lenders to avoid being sued by targets in unfriendly jurisdictions. Another common example is a provision prohibiting the target from bringing a lawsuit against the lenders in situations in which the reverse break-up fee is payable by the sponsor.
- **Think twice before agreeing to a go-shop provision.** As witnessed in the competition for CKE Restaurants, sponsors may be willing to top each other's bids for an attractive asset. If a target board demands a go-shop provision, sponsors should ensure that the go-shop break-up fee is significant enough to deter an interloper and that it has strong deal protections otherwise, including the right to match any superior proposal by an interloper.
- **Sponsor-backed going private transactions are once again facing increased resistance and opposition from activist investors.** Sponsors should ensure that they understand the target's stockholder composition. If faced with serious shareholder opposition, sponsors may consider offering shareholders the opportunity to participate in the future growth of the company in the form of a contingent value right or stub equity or negotiating for a unilateral sponsor right to extend the date of the stockholder meeting to enable additional solicitation efforts or a break-up fee or expense reimbursement if the target stockholders vote the deal down.

Market Information

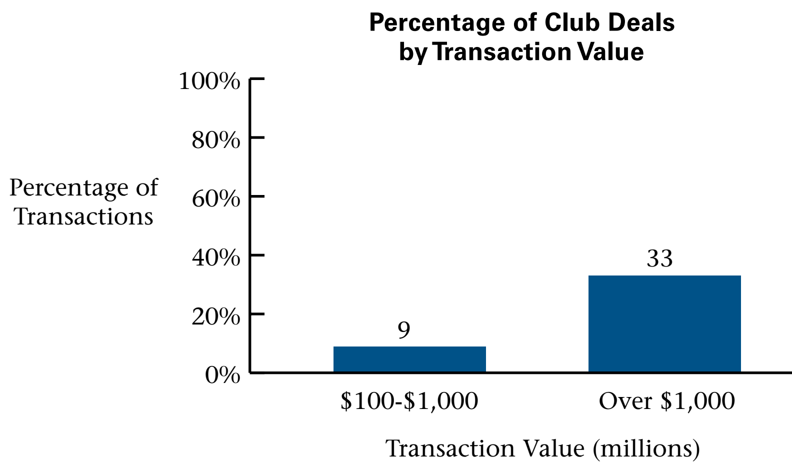


Transaction values in our study range from $124 million to $5.2 billion. The volume of surveyed transactions remained consistent with 14 in 2009 and 15 in 2008. The 14 going private transactions represent an aggregate transaction value equal to approximately $12.7 billion, representing an approximate 8% increase over the aggregate transaction value of such transactions in 2008.

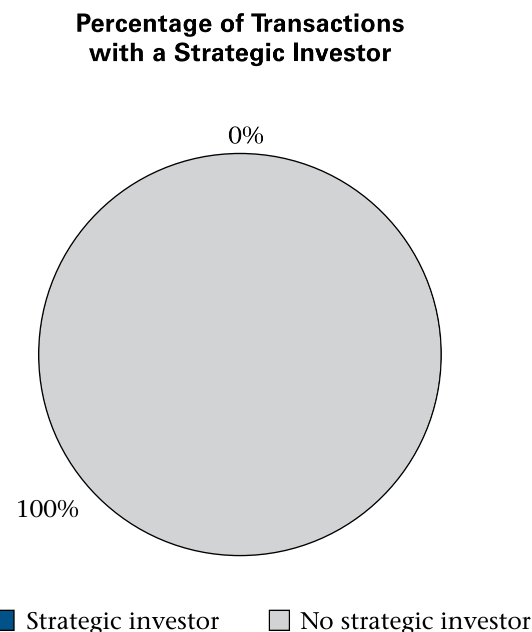


Due to the credit crunch there were very few deals in the first half of 2009 and 11 of the 14 deals were announced in the second half of 2009 (six in the third quarter and five in the fourth quarter).

Club Deals

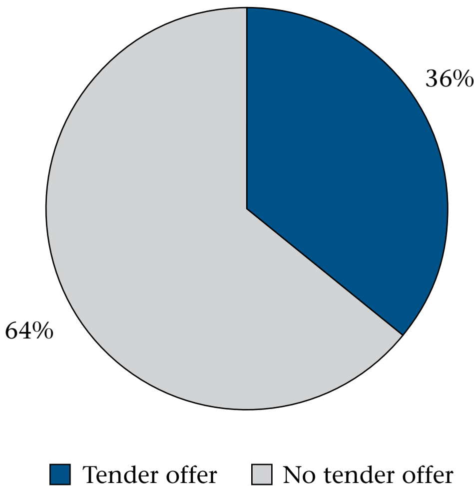


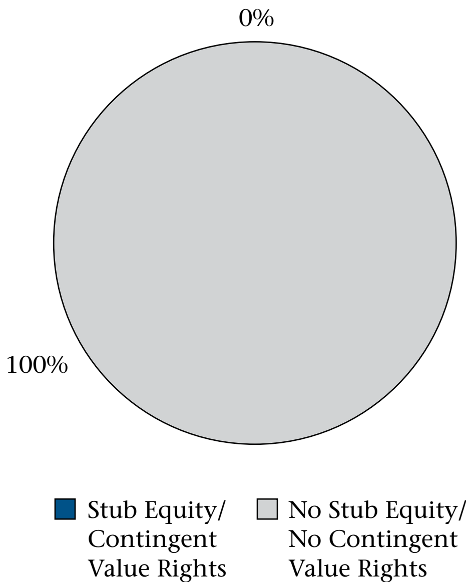
Not surprisingly, as transaction values generally remained well below those seen in the pre-credit crunch era, there was only a small percentage of "club deals" involving two or more private equity sponsors in 2009. Another potential obstacle for club deals is the *Dahl* decision in federal district court in Massachusetts. The *Dahl* court refused to dismiss a class action lawsuit brought by various stockholders against a number of private equity firms claiming that the firms violated US antitrust laws in connection with various club deals. The *Dahl* class action suit is still being litigated and the outcome of the trial may provide guidance to sponsors as to what behavior, if any, in future club deals may violate the antitrust laws.



Interestingly, no private equity sponsor partnered with a strategic investor in any going private transaction in 2009 (although there were several notable other transactions announced in 2009 in which a sponsor partnered with a strategic investor). There may be an increase in 2010 of going private transactions in which a sponsor and a strategic investor partner in order to bridge a funding gap. In addition to funding, a sponsor may want to partner with a strategic investor to gain further operational expertise with respect to the target's industry.

Alternative Transaction Structures

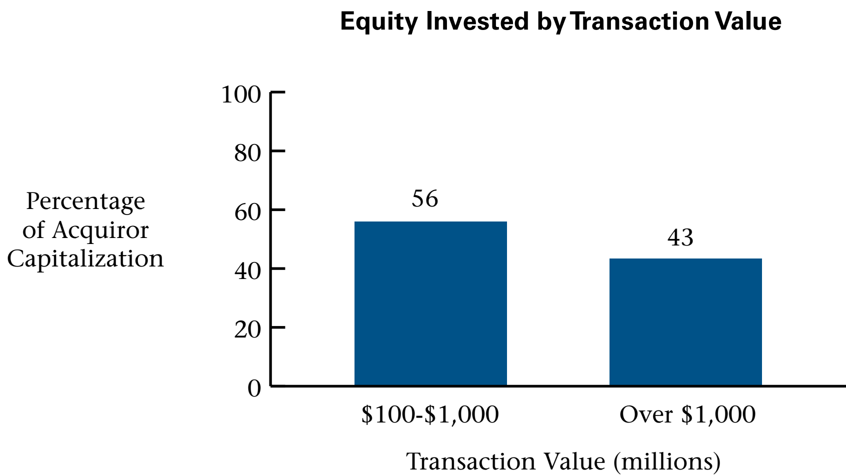




In 2009, sponsors utilized a tender offer in several going private transactions in order to address certain transaction-specific issues, particularly in the smaller "all-equity" deals. A tender offer may be the ante required to play in the same game as a strategic buyer looking to acquire a target and could offer a critical tactical advantage in a situation in which a bid by a strategic buyer may encounter regulatory scrutiny. However, tender offers can be more difficult to finance than the typical merger structure due to the impact of the margin regulations limiting the amount banks can lend against "margin" stock and related collateral considerations.

No sponsor-backed going private transaction in 2009 employed a stub equity structure or involved contingent value rights. A stub equity structure gives target stockholders the opportunity to retain a minority stake in the newly private company and thereby participate in its future growth. A contingent value rights structure gives target stockholders the opportunity to receive additional cash consideration upon the occurrence of certain events or the satisfaction of certain milestones. Stub equity and contingent value rights may be utilized in future transactions as recent deals have encountered stockholder resistance and stub equity and contingent value rights may be a way to bridge the value gap.

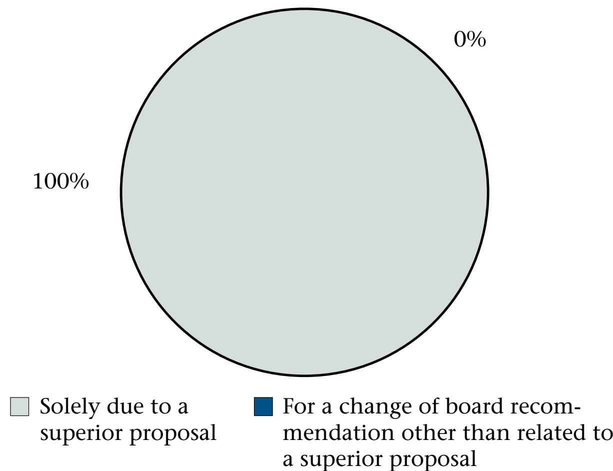
Financing



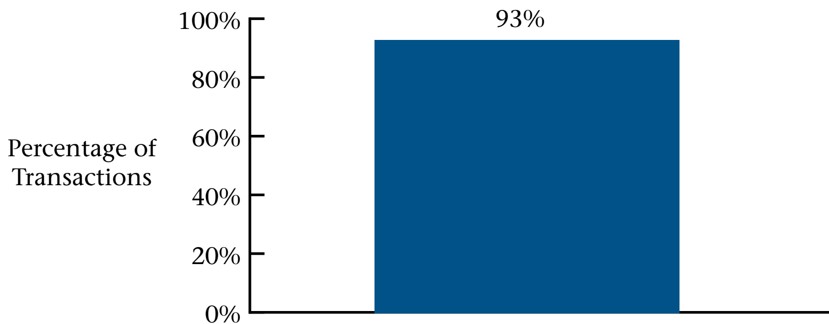
As leveraged lending was scarce throughout 2009, it should be no surprise that 2009 transactions, like the 2008 transactions, were typically financed with at least a majority of equity (average of 52% of acquiror capitalization).

In 2009, debt financing continued to be a differentiating ability among sponsors instead of the commodity it had become pre-credit crunch. The deep freeze of the primary loan market in the first half of the year began to thaw in the second half. The initial thaw in many cases took the form of "best efforts" rather than committed financings and "clubbed" financings where the sponsor put together in advance a group of lenders to finance an acquisition since the lead lenders didn't want to take syndication risk on the whole financing. However, committed financing reappeared in a number of fourth quarter deals and the market even supported at least two new financings with a PIK toggle feature.

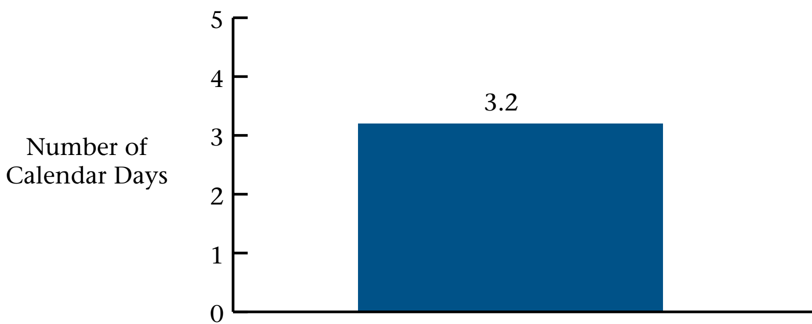
Fiduciary Out/Matching Rights



No 2009 transactions permitted the target company to terminate the agreement for a change of board recommendation other than in connection with a "superior proposal" (e.g., the target company discovers "gold" or its prospects improve materially from the date the merger agreement was signed).



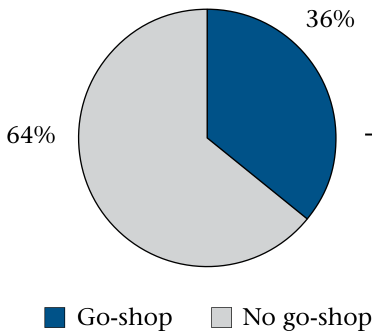
The number of surveyed transactions in which private equity sponsors had the right to match a competing offer was slightly higher this year than last year (93% v. 80%).



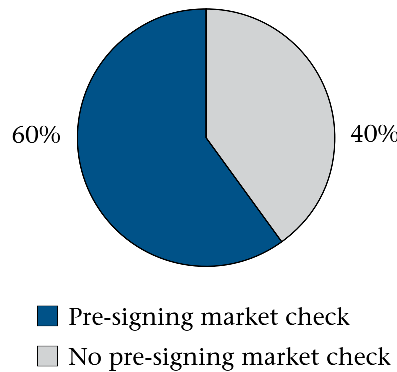
The time period for private equity sponsors to match a competing offer was shorter this year than last year (3.2 v. 3.5).

Go-Shops

Percentage of Transactions with a Go-Shop

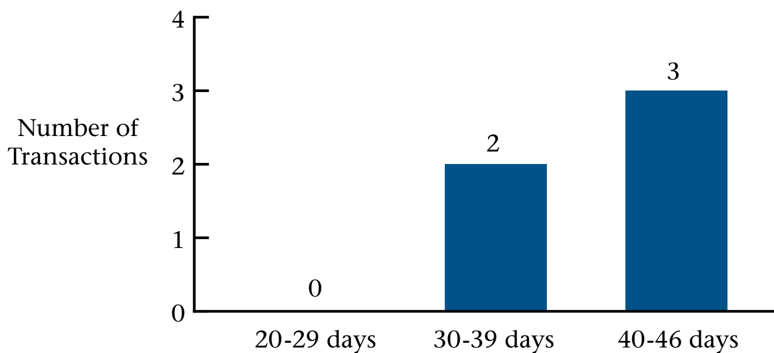


Percentage of those Transactions with a Pre-Signing Market Check



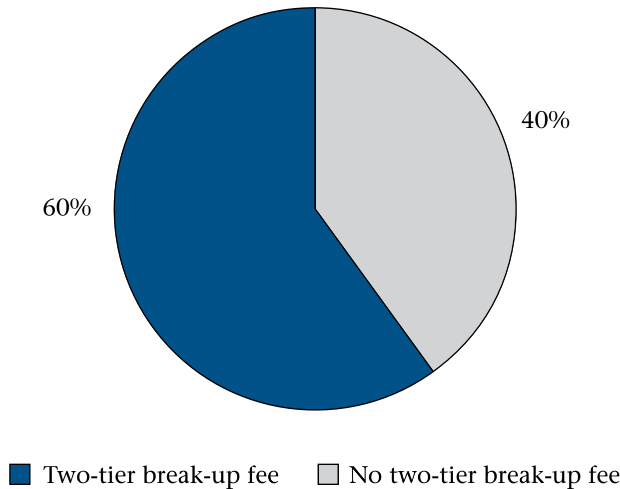
The go-shop provision was less common in going private transactions in 2009 with 36% of surveyed transactions including this form of post-signing market check (compared to 53% in 2008). Surprisingly, 60% of the transactions with a go-shop had some form of pre-signing market check. The lower percentage of surveyed transactions with a go-shop provision may be in response to the fact that four sponsor-backed transactions in 2007 and two in 2008 were broken-up by interlopers who submitted bids during the go-shop period.

Length of Go-Shop

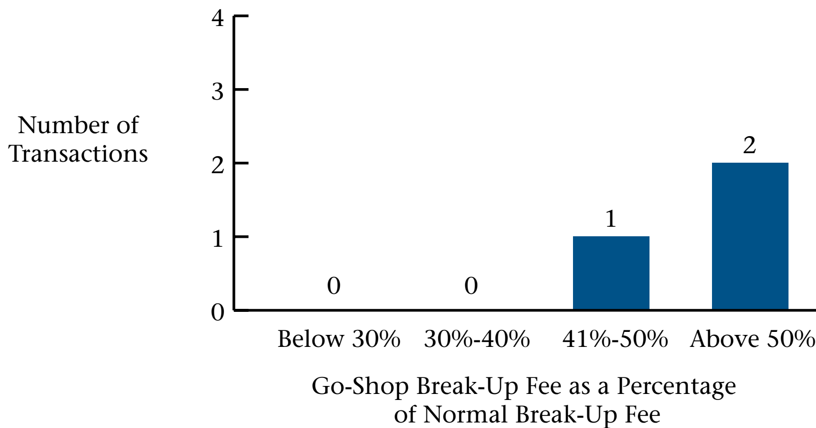


The length of the go-shop period in sponsor-backed transactions in 2009 ranged from 30 to 46 days. When compared to 2006 (50% of go-shop periods were between 20-29 days), go-shop periods continue to be much longer despite 60% of the 2009 go-shop transactions having some form of pre-signing market check.

Go-Shops



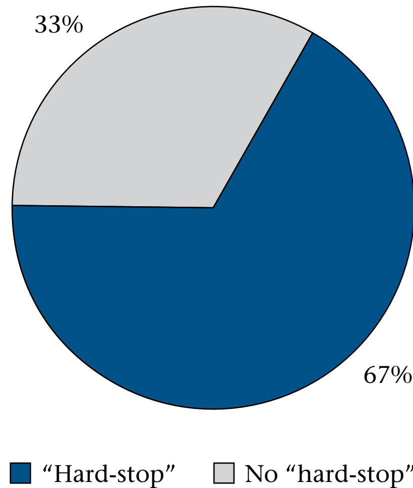
In 60% of the surveyed transactions, a superior proposal entered into as a result of the go-shop triggered the payment of a reduced break-up fee as target boards took the view that the traditional 2% to 4% of equity value break-up fee is inconsistent with the spirit of the go-shop as a true post-signing "test the market" process.



The reduced go-shop break-up fee ranged from 46% to 70% of the normal break-up fee in 2009. Similar to 2008, and unlike 2007, there were no reduced go-shop break-up fees below 40% of the normal break-up fee. The hesitation to give a significant discount to the normal break-up fee may be a result of the topping bids that have emerged by way of the go-shop period over the course of the last three years.

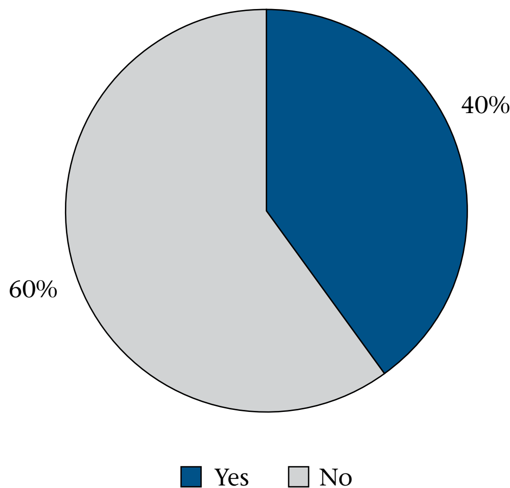
Go-Shops

Percentage of Go-Shop Transactions with a "Hard-Stop" on any Reduced Break-Up Fee for Competing Proposals Solicited During the Go-Shop Period



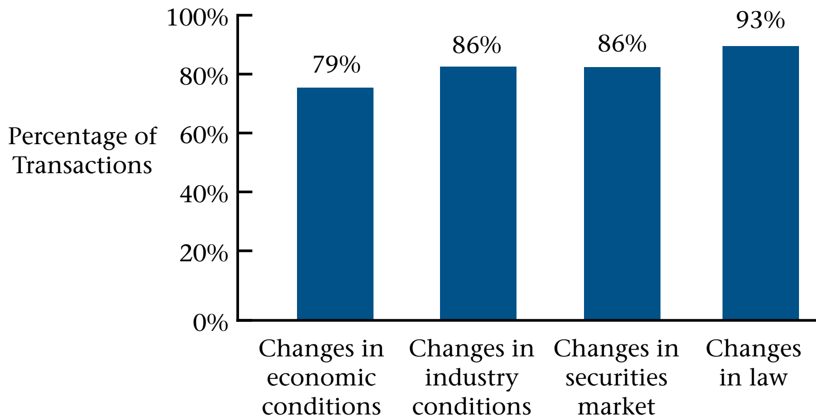
In 2009, a "hard-stop" was utilized in 67% of the surveyed transactions. A hard-stop imposes a deadline on the target board to negotiate a definitive agreement with a competing bidder solicited during the go-shop period in order for the target to benefit from the reduced go-shop break-up fee.

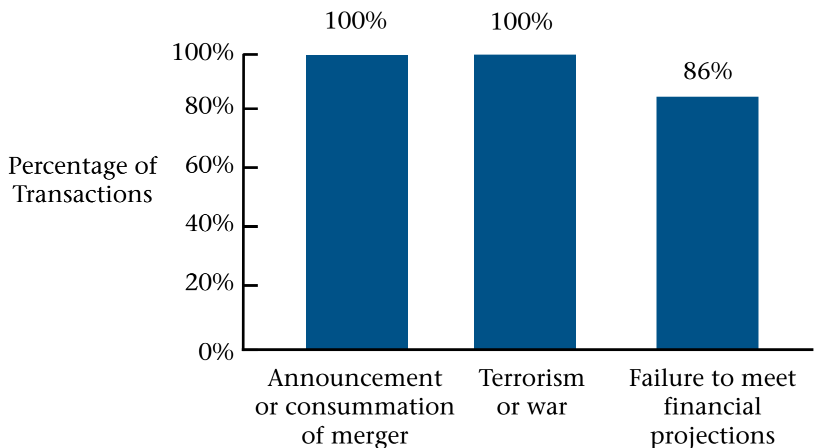
Percentage of Go-Shop Transactions that Eliminate a Matching Right During the Go-Shop Period



In 2009, 40% of the surveyed transactions with a go-shop provision eliminated the matching right during the go-shop period, up from 25% of such transactions in 2008.

Material Adverse Effect

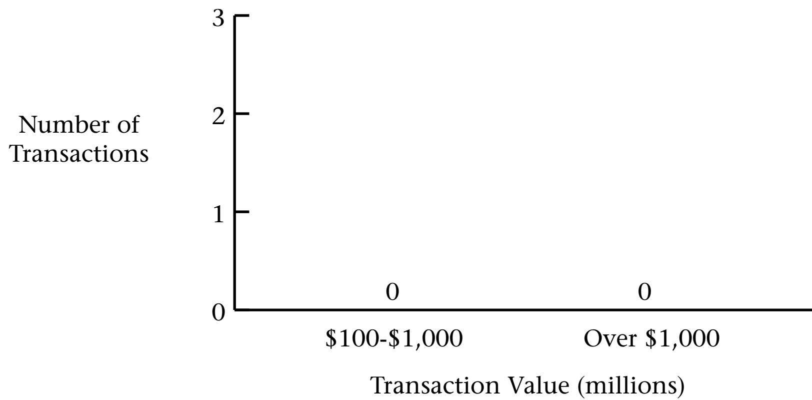




When compared to 2008, the 2009 surveyed transactions reveal a material increase in the number of target-friendly MAE exceptions, making it even more difficult to prove an MAE. Buyers have had success though qualifying these exceptions so that such exceptions only apply to the extent the event in question disproportionately affected the target. In *Huntsman*, the Delaware Chancery Court confirmed that establishing an MAE under Delaware law is a very high hurdle. As a result, it remains dangerous to rely on a general MAE clause to walk away from an acquisition agreement and it may make sense to negotiate an objective finance related closing condition, such as minimum cash, EBITDA or required credit agency ratings. Buyers successfully negotiated an objective MAE test in 50% of the surveyed transactions.

Additionally, the number of surveyed transactions that included an adverse change in the target's prospects in the definition of an MAE decreased from 7% in 2008 to 0% in 2009.

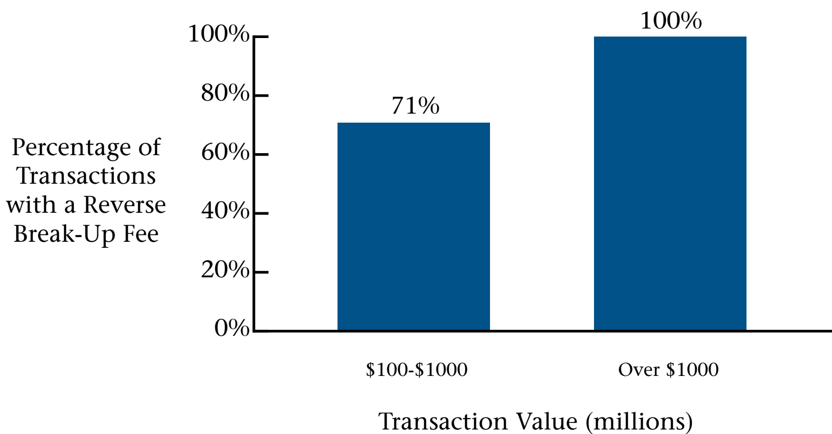
Financing Outs



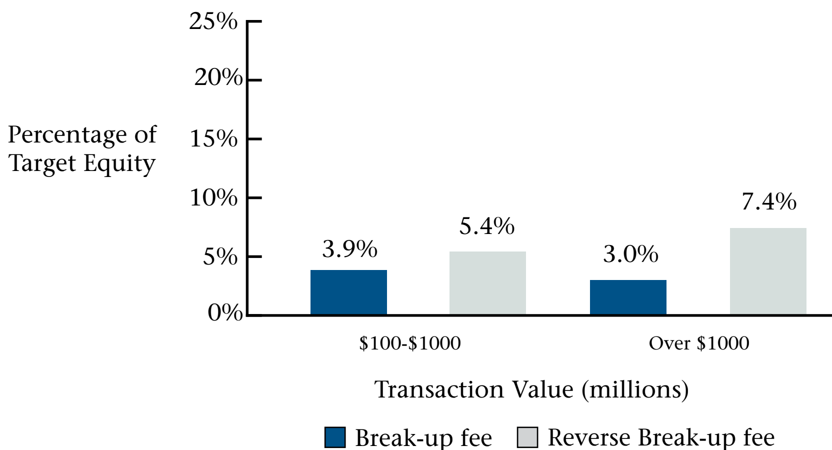
No sponsor-backed going private transaction in 2009 had a true financing out where no reverse break-up fee or other remedy would be available against the sponsor for failure to close (compared to 20% of such transactions in 2008).

As noted in our outlook for 2010, special provisions designed to more expressly address the complex interaction among sponsor, target and lender are appearing in 2010 acquisition agreements. For instance, a choice of forum provision can apply not only to the target and the buyer, but also the debt financing sources in an effort by the lenders to avoid being sued by targets in unfriendly jurisdictions. Another common example is a provision prohibiting the target from bringing a lawsuit against the lenders in situations in which the reverse break-up fee is payable by the sponsor.

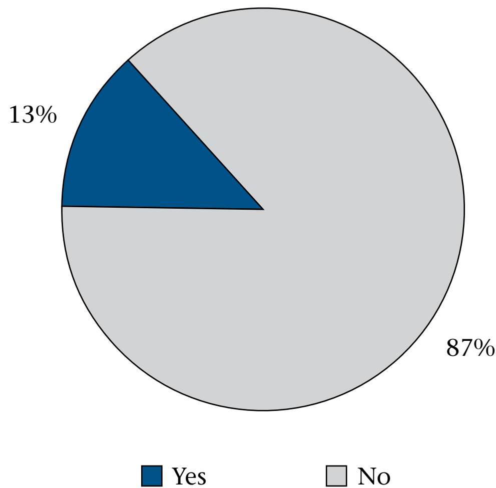
Break-Up Fees and Reverse Break-up Fees



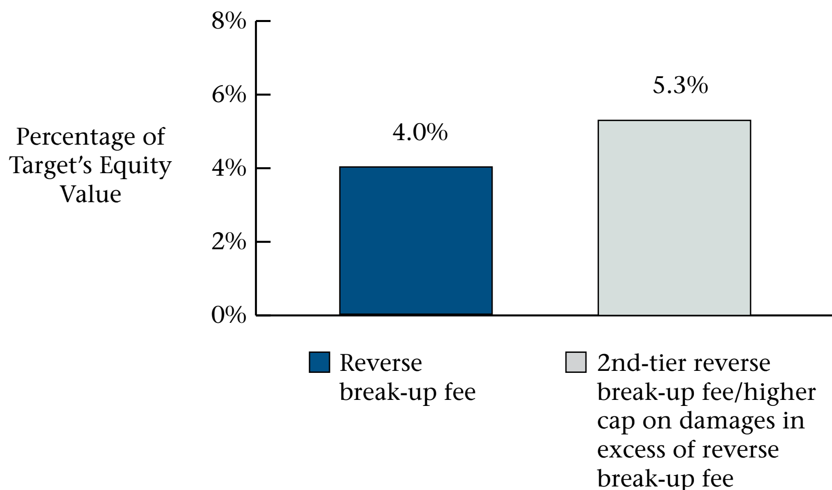
Reverse break-up fees appeared in 77% of the surveyed transactions in 2009 (excluding "all-equity" deals) compared to 87% in 2008. However, despite speculation that a new model would emerge in which sponsors would be legally obligated to close, reverse break-up fees were still included in a majority of deals. Nevertheless, other constructs designed to limit the optionality built-in to the reverse break-up fee structure and encourage sponsors to consummate the transaction surfaced in 2009. One approach has been to increase the size of the fee to an amount that would create a bigger deterrent to the sponsor from walking away (the average reverse break-up fee in 2009 as a percentage of the target's equity value was 6% whereas it was 4.4% in 2008). Another approach preserves the reverse break-up fee construct if the debt financing isn't available at closing, but allows the target to seek specific performance as long as the lenders and the target are willing and able to close and all conditions in the acquisition agreement are satisfied.



Break-Up Fees and Reverse Break-up Fees

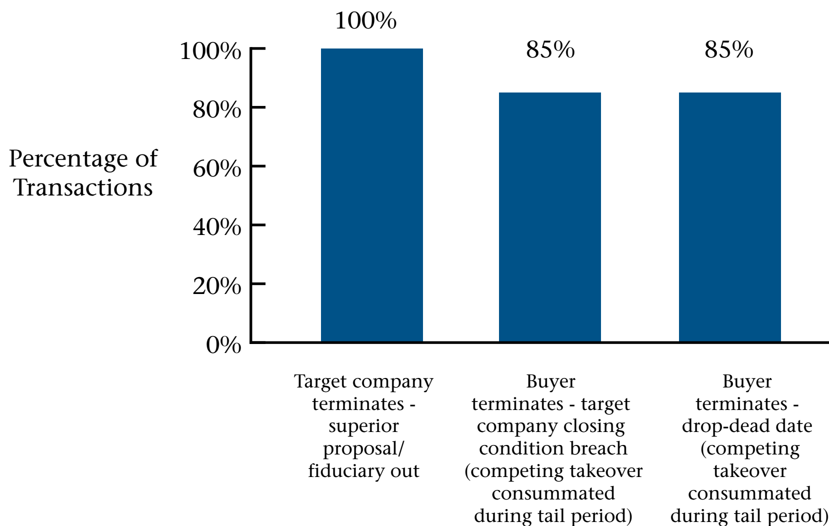


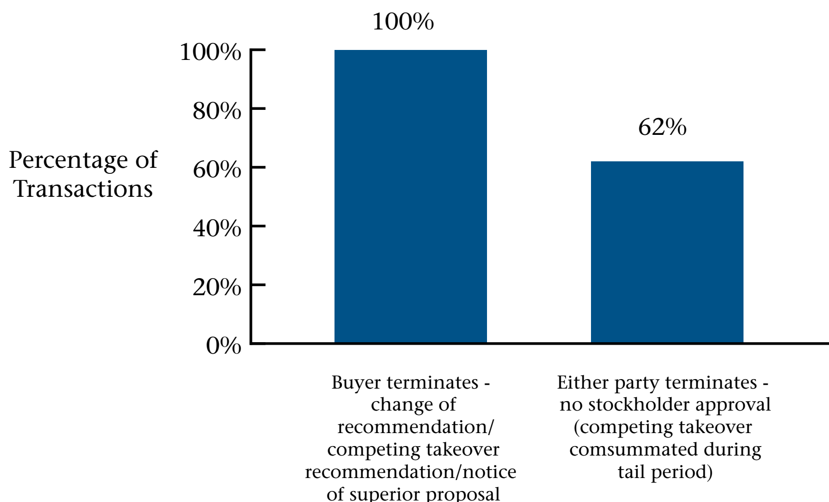
Target boards in a small minority of surveyed transactions negotiated for either a higher second-tier reverse break-up fee or a higher cap on damages, in addition to the reverse break-up fee. These additional monetary remedies were typically available to the seller only in circumstances in which the buyer knowingly and intentionally breached its obligation to consummate the transaction despite the availability of financing. To the extent there are second-tier damages for a knowing and intentional breach, buyers should ensure the acquisition agreement has a strict cap on these damages.



The average spread between the first-tier and second-tier reverse break-up fee/higher cap on damages was 1.3% of the target's equity value for all surveyed transactions in 2009.

Break-Up Fees and Reverse Break-up Fees



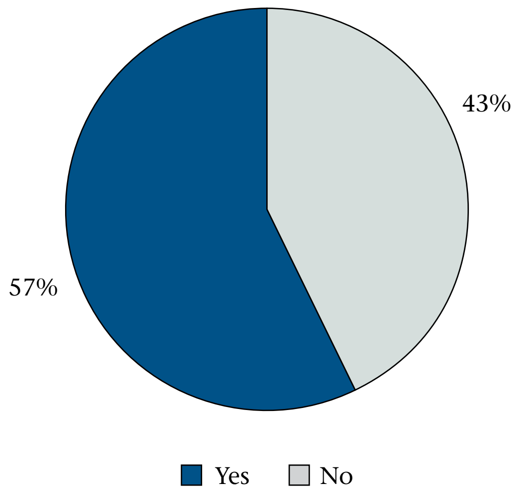


The five scenarios listed on the charts on this page are the most common scenarios in which a break-up fee must be paid. In addition to payment of a break-up fee, several transactions included target reimbursement of the buyer's transaction expenses (usually subject to a cap) if the agreement is terminated due to a failure to secure stockholder approval for a target company breach leading to the failure of a closing condition.

One surveyed transaction included a naked no-vote termination fee in an amount equal to 0.72% of the target's equity value (equal to the size of the termination fee payable in all other scenarios). Eight surveyed transactions included a naked no-vote expense reimbursement feature and the capped expense amount for these transactions ranged from 0.5% to 1.7% of the target's equity value.

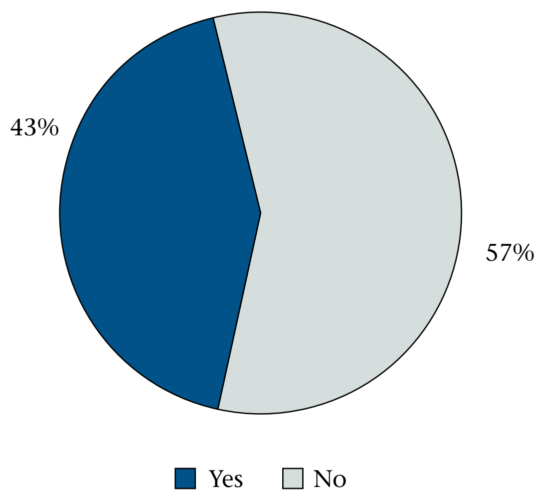
Target Company Remedies

Percentage of Transactions with a Specific Performance Provision Enforceable against the Buyer



Yes No

Percentage of Transactions with Non-Recourse Language with respect to a Target's Directors, Stockholders and Affiliates



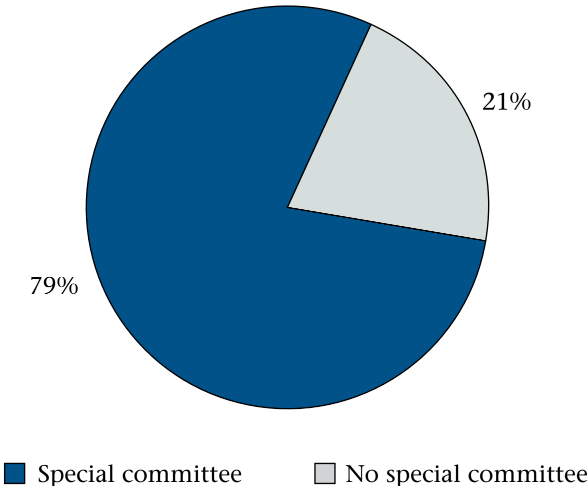
Yes No

Interestingly, specific performance provisions enforceable against the buyer were much more common in 2009. 57% of the surveyed transactions in 2009 permitted the seller to seek specific performance against the buyer rather than be limited to a reverse break-up fee or monetary damages (whereas 7% of the surveyed transactions in 2008 allowed the seller to seek specific performance). 100% of "all-equity" deals featured specific performance provisions in which the sponsor was obligated to close irrespective of the availability of debt financing.

The *Huntsman* case also highlighted the importance of drafting a tight "non-recourse" provision. As a buyer, sponsors should seek to ensure that the merger agreement specifically protects directors, officers, stockholders and affiliates of the buyer from any type of litigation. However, the percentage of surveyed transactions that provided such protection decreased from 73% in 2008 to 43% in 2009.

Special Committees

Percentage of Transactions with a Special Committee



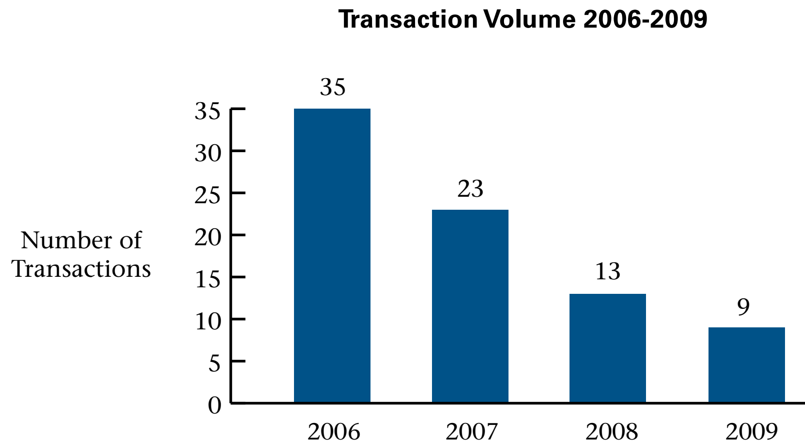
Special committee   No special committee

In 79% of the 2009 surveyed transactions (compared to only 47% in 2008), the target's board of directors formed a special committee for the proposed transaction. The more frequent utilization of a special committee may have partially been a consequence of certain Delaware decisions in 2009 that emphasized the benefits of such a committee (e.g, *Landry's Restaurants*). The use of special committees will of course be most prevalent in those transactions in which directors are either part of, or closely affiliated with, the buyout group. A private equity sponsor should keep in mind that it is normally "buying" the stockholder litigation that will often accompany a going private transaction. Accordingly, it is in the interest of the private equity sponsor to ensure that the target is following a defensible sale process in selling the company to reduce the settlement value of any stockholder litigation. Sponsors will also want to run a defensible sale process in order to minimize the risk of troublesome disclosure in the proxy statement that could raise red flags for target stockholders and thereby threaten stockholder approval of the transaction.

Europe

Key Conclusions

The market for sponsor-backed going private transactions in Europe continued to remain depressed in 2009 as the effects of the global financial crisis persisted. As might be expected deal volume was low with only nine relevant transactions being announced (2008: 13), having an aggregate transaction value of $1.97 billion (2008: $12.2 billion). The average transaction size in 2009 was $220 million.

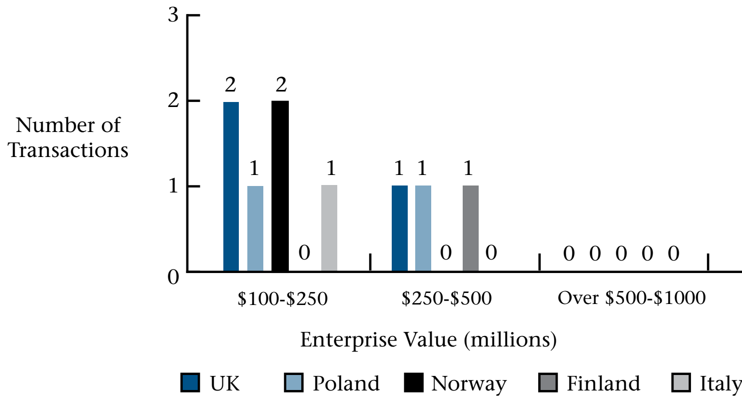


Following the dramatic economic events at the end of 2008, there was almost no deal activity in the first half of the year with only a single transaction being announced. However as some (albeit limited) confidence and finance returned to the market in the second half of the year transaction volumes picked up a little with a further eight transactions being announced.

The UK remained the most active market in Europe, albeit with only three transactions.

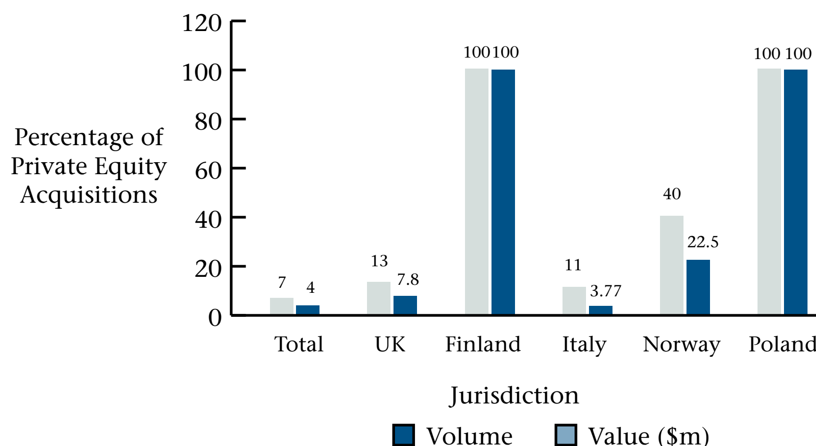
As has been noted in previous surveys the market in Europe for going private transactions varies as different rules are applied to takeovers in different jurisdictions.

Jurisdiction



The UK continued to be the most active European market for relevant transactions, although both deal size and transaction volumes fell, consistent with the trend across Europe, partly as a result of the continued unavailability of credit. The aggregate value of relevant transactions in the UK was $732 million in 2009 (2009: $8.2 billion) with only three transactions being announced (2008: 7).

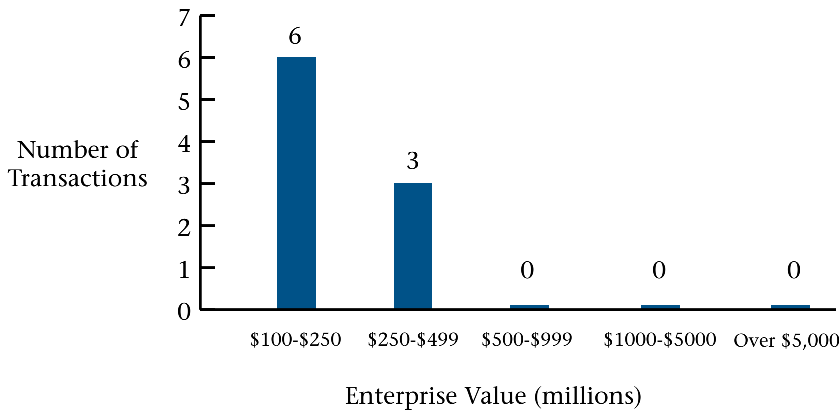
The largest announced transaction was the $407 million take private of Terveystalo Healthcare Oyj by funds managed by Bridgepoint.



* Source: Mergermarket. Includes only transactions with disclosed value greater than $100m

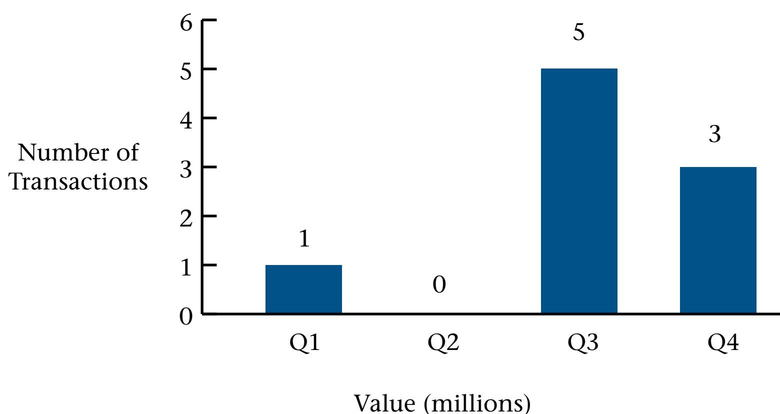
It is difficult to make generalized comments with the limited survey data available for 2009 however, as would be expected, private equity activity in general remained depressed and transaction values continued to fall.

Market Information



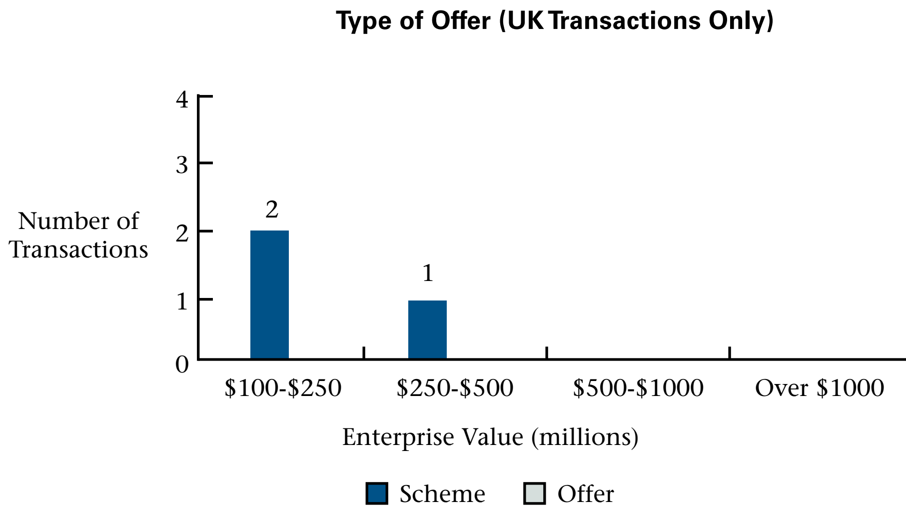
In 2009 there was no single announced transaction in the survey with a value of $500 million or greater. The largest transaction, as mentioned previously, was at $407 million. The contrast with 2008 and 2007 is stark where transaction values ranged up to $2.8 billion and $22 billion, respectively. Two thirds of all surveyed transactions were for less than $250 million.

Further evidence of the deterioration in markets over the past three years can be seen by comparing aggregate transaction values: $1.97 billion in 2009; $12.2 billion in 2008; and $70.6 billion in 2007. Aggregate transaction value has fallen by 97% over the previous three years.



As was noted in last year's survey, deal activity came almost to a standstill in the aftermath of the Lehman Brothers bankruptcy filing. Given the poor state of the financial markets and the economy in general going into 2009, there was, as would be expected, almost no deal activity in the beginning of the year. However, as some tentative greenshoots began to appear and the immediate crisis of 2008 subsided, transaction activity picked up in the second half of the year: all but one of this year's transactions occurred in the second half.

UK Transactions – Type of Offer



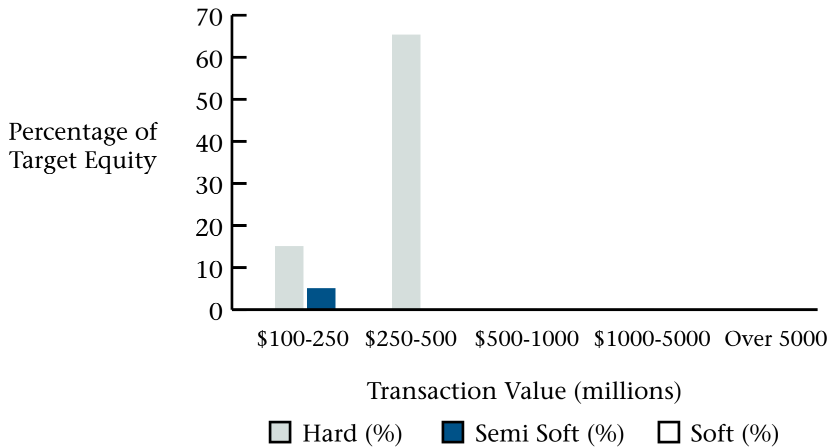
There are two ways in which a going private transaction can be structured in the UK – either by way of an offer made to all shareholders or using a technique known as a scheme of arrangement, whereby all the shares of the target are cancelled and new shares are issued to the bidder in exchange for the payment of consideration to the target company's shareholders.

The scheme of arrangement method has the advantage both that no stamp duty (at a rate of 0.5% of the value of the transaction) is paid and also that once the threshold for the scheme is reached (75% of shares voted, excluding shares held by the bidder and its associates) 100% control is obtained.

Under an offer, the bidder will set the threshold for acceptances for the offer to become unconditional (usually set at 90% but often later relaxed to a lower level). Statutory provisions apply under which the bidder can squeeze out minority shareholders if 90% of the shares are acquired, but if this threshold is not reached, the bidder will have to deal with any remaining minority shareholders who have not accepted the offer.

For these reasons, a scheme has generally been the most popular route for bidders in recent years and in 2009 the figures bore this out with 911 UK transactions making use of a scheme, although the sample size was somewhat limited.

UK Transactions – Irrevocable Undertakings



Irrevocable undertakings are used in UK transactions for bidders to get comfort in advance of making an offer that they will have target shareholder support. In a recommended offer, a bidder will usually expect the recommending directors to enter into some form of irrevocable undertaking in respect of the shares held by them personally.

Similarly, any stockholders with significant stakes will also be approached to gauge their interest in the bid. However, bidders must pay heed to the rules set out in the Takeover Code, requiring disclosure of the full terms of any irrevocable, and also be aware that the seeking of an irrevocable will make the counterparty an insider to the offer. Due to the need to limit the number of parties who are aware that a potential offer may be made, in practice this means that only a very limited number of parties should be approached to give such an undertaking.

The different types of commitment which can be given are: hard undertakings, genuinely irrevocable commitments binding unless the offer lapses; soft undertakings, binding only if there is no higher competing offer made; and so-called semi-soft undertakings, binding until an offer is made which is higher by a threshold amount.

Asia-Pacific

Key Conclusions

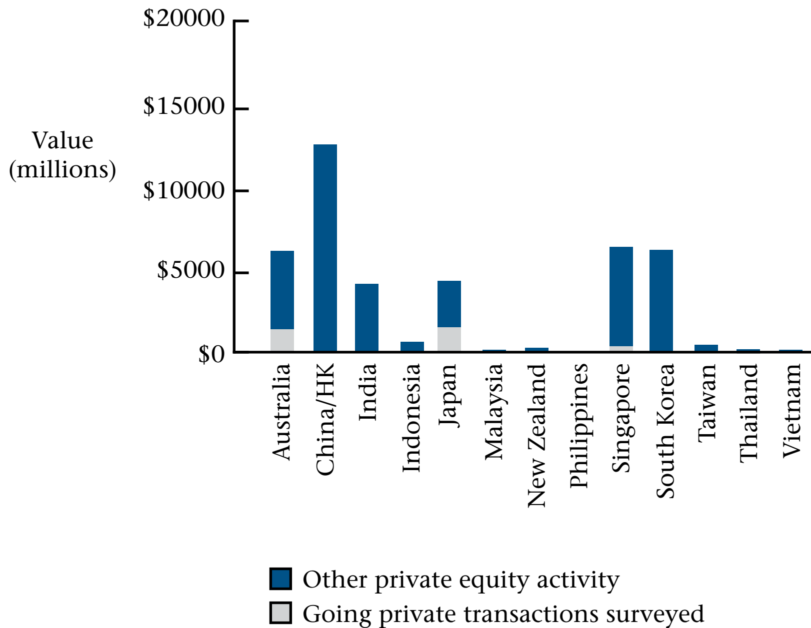
In 2009, total private equity activity in Asia-Pacific[1] continued its decline from the high-water mark hit in 2007 and ended the year down approximately 23% from 2008 and 54% from 2007. The decline of total private equity activity in 2009, however, cannot fully account for the continued reduction in the number of surveyed sponsor-backed going private transactions in the region. Only five going private transactions form part of our survey this year (as compared to 11 in 2008).

Some conclusions and trends for going private transactions in the region for 2009 include:

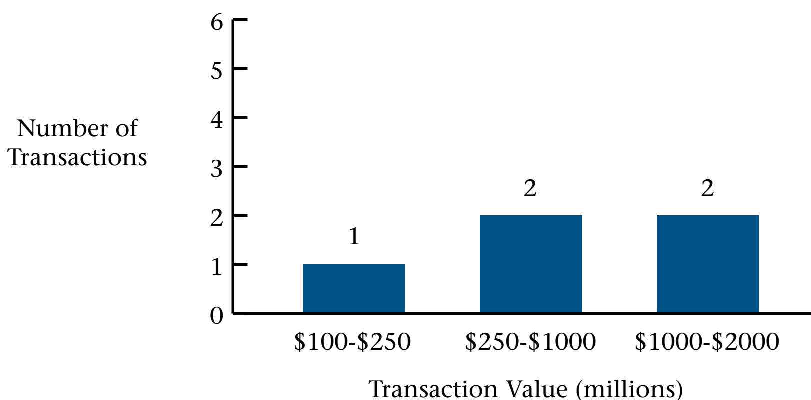
- The five surveyed Asia-Pacific going private transactions represent an aggregate transaction value of approximately $4.0 billion, constituting about 9% of private equity activity, by deal value, in the region (same as the 9% in 2008).
- As with previous years, going private transactions continue to occur primarily in more mature markets in the region.
- The small sample of the surveyed transactions appears to reflect the gradual improvement in the deal markets in 2009: three out of the five surveyed transactions were announced in the second half of the year.
- As with previous years, sponsors in the surveyed transactions continued to team up with other parties, including other private equity firms and target management.
- Tender offers and schemes of arrangement continue to be the two main forms of takeover deal structures in the region.
- Break-up fee provisions were included in the only surveyed transaction effected through a scheme of arrangement. A tender offer in this region typically does not involve an agreement between the bidder and target company, thus the absence of break-up fee provisions.
- As with previous years, a few 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 or memorandum of terms with the target or its shareholders. As a result, these "indicative proposals" are not reflected in the survey.

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

Market Information



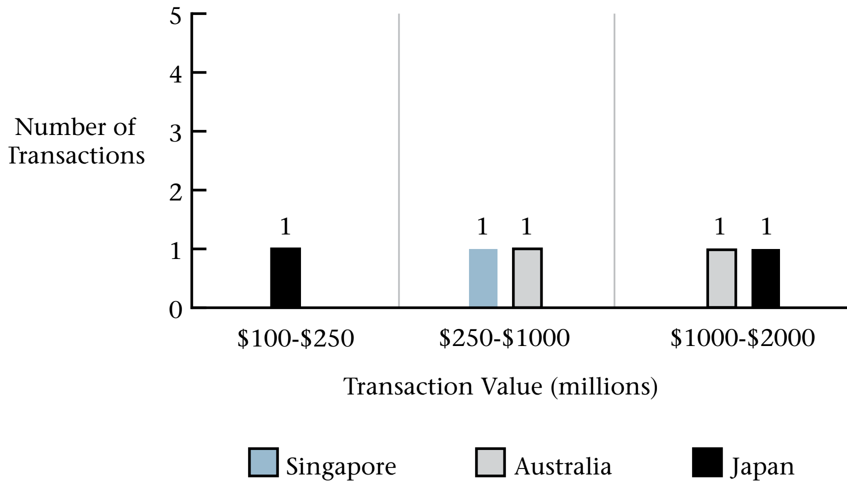
The surveyed going private transactions (totaling about $4.0 billion) accounted for approximately 9% of private equity activity, by deal value, in the Asia-Pacific region in 2009 (same as the 9% in 2008). Other types of transactions in the region included private buyouts and PIPEs (both of which increased significantly in 2009), expansion/growth capital (which declined dramatically) and turnaround/restructuring (which dropped significantly).



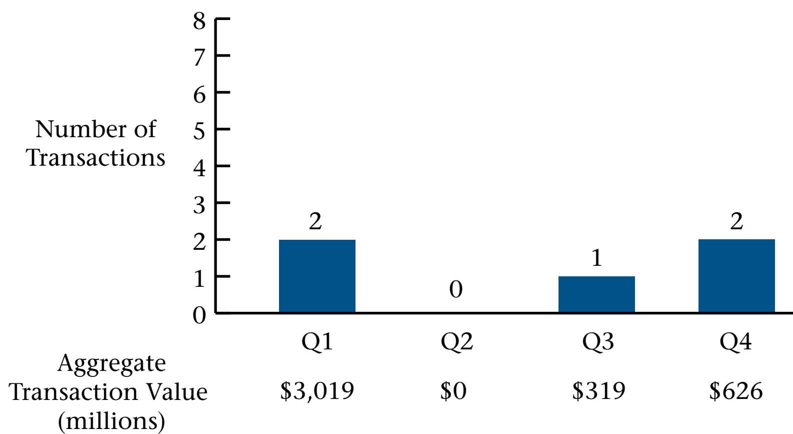
There were five transactions in 2009 meeting the survey criteria. Transaction values in the survey ranged from $231 million to $1.7 billion.

Similar to previous years, in 2009 there were quite a number of sponsor-backed going private “indicative proposals” that were “announced” before any deal was struck between buyer and target and/or with the deal subsequently rejected or withdrawn prior to any definitive transaction document or formal offer to shareholders. Such “possible” transactions do not form part of the survey.

Market Information

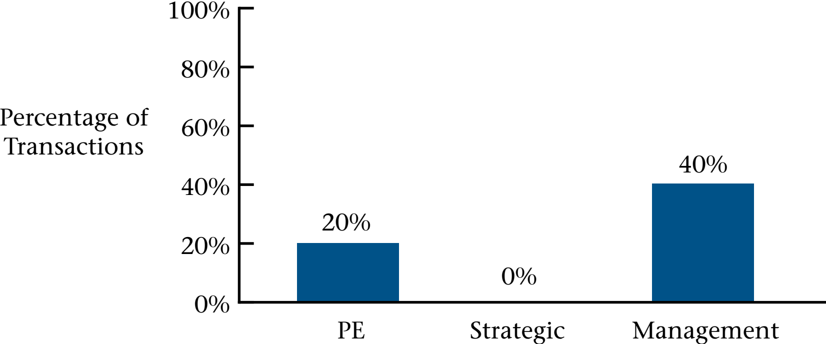


Typically, more mature markets in Asia-Pacific see more sponsor-backed going private transactions. This year is no exception. The five surveyed deals in 2009 were in Australia, Japan and Singapore.

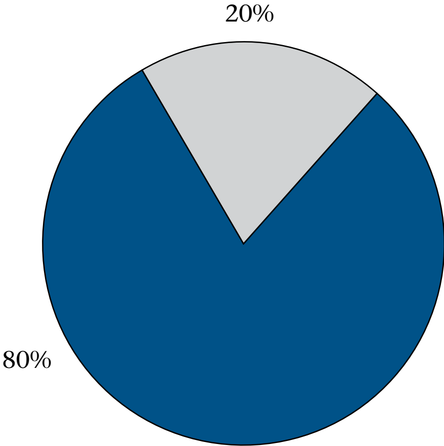


During the course of 2009, the general deal environment improved. This appears to be reflected in the market activity during the year. Three out of five transactions were announced in the second half of 2009.

Transaction Structures



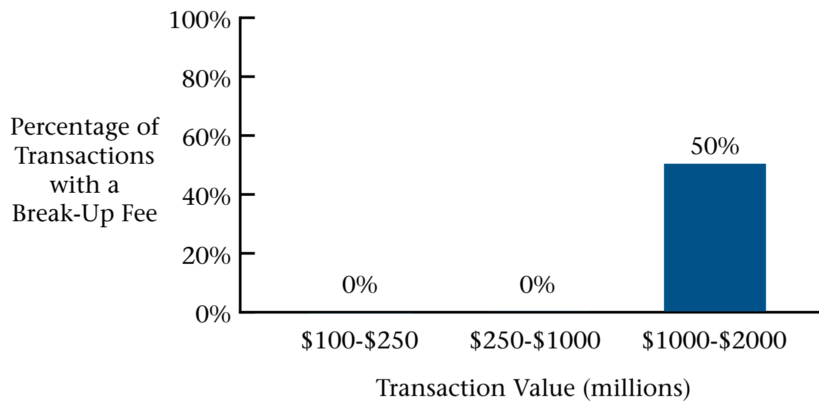
Private equity sponsors have been teaming up with other parties in effecting going private transactions in the region. Three of this year's five surveyed transactions involved multiple buyers (one teaming up with other private equity sponsors, and two teaming up with target company's management).



As would be expected, the legal regimes applicable to public takeovers in the jurisdiction of the target company determine the form of transaction. All the transactions surveyed in 2009 were accomplished by either (i) a cash offer for shares or (ii) a scheme of arrangement.

As with previous years, cash offers continue to be the more popular form for the surveyed transactions in this region.

Break–Up Fees



Break-up fee provisions were included in the only surveyed transaction effected through a scheme of arrangement. A tender offer in this region typically does not involve an agreement between the bidder and the target company, thus the lack of break-up fee provisions.

About Weil Gotshal

Weil, Gotshal & Manges provides clients with one-stop, global service for sophisticated transactional legal advice. With over 400 M&A and private equity lawyers worldwide – including numerous lawyers ranked in leading legal directories – our Firm represents buyers and sellers in the full range of corporate transactions, including public and private deals, friendly or hostile takeovers, leveraged buyouts, joint ventures, strategic alliances, spin-offs, venture and growth capital investments, proxy contests, tender offers, distressed M&A, and public-to-private transactions.

Our client roster demonstrates the range of our attorneys' expertise. We represent leading corporations, financial institutions, and first-tier private equity sponsors in transactions across numerous industries around the world.

For public company clients, we have deep experience in closing some of the world's most visible and complex M&A transactions, helping to generate billions in value each year. Our M&A deal teams are further bolstered by top-ranked practice specialists in antitrust, corporate finance, governance, intellectual property, executive compensation and benefits, regulatory, and tax, providing each client with just the right mix of skills needed to execute complex solutions to their M&A challenges.

Our private equity lawyers are equally adept at handling a variety of transactions, integrating their insight and judgment with that of lawyers around the firm to complete complex regional and cross-border deals. We have extensive experience with acquisitions and financings of, and investments in, public and private companies and with a variety of exit strategies, including spin-offs, divestitures, recapitalizations, mergers, and IPOs. We also have extensive experience with "club" transactions involving the representation of multiple private equity sponsors.

Our private equity practice is further enhanced by our highly regarded team of fund formation lawyers. We represent clients in establishing a wide variety of funds, including buyout, infrastructure, distressed debt, mezzanine, real estate opportunity, venture and hedge funds, designing structures and terms to facilitate fundraising on a tax-efficient basis and to withstand the challenges of difficult economic and regulatory environments. Our experience is enhanced by extensive representations of large institutional investors. The combined expertise of our M&A and private equity lawyers provides clients with a powerful resource in developing strategies to achieve their business objectives.

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