Weil Survey
Sponsor-Backed Going Private Transactions

September 2011

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Introduction

Welcome to our fifth 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 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 who contributed to this survey, including Naomi Munz, Dan Niedzwiecki, Ramona Nee, Andrew Nelson, Matt Newby, Sarah Stasny, Michael Szlamkowicz, Stephen Vander Stoep, Ryan Gallagher, Kyle Gann, Sachin Kohli, Kathy Krause, U-Hyeon Kwon, Jennifer Tsai, Jennifer Cheng, Kate Clark, Rose Constance, Jeff Friedman, Irini Kalamakis, Jocelyn Kanoff, Eoghan Keenan, Jamie Lurie, Frank Martire, Ray Mercedes, Faraz Rana, Amie Tang, Ryan Taylor, Cassie Waduge, Andrew Arons, Kevin Crews, David Gail, Darlyn Heckman, Jill Meyer, Megan Pendleton, Damali Peterman, Jenna Schaeffer, Jessica Sheridan, Matthew Speiser, Stephanie Baton, Peter Milligan, Hayley Lund, Emily Wapples, Erika Evasdottir, Clarence Cheuk and Carrie Suen.

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Research Methodology

Weil surveyed 60 sponsor-backed going private transactions announced from January 1, 2010 through December 31, 2010 with a transaction value (i.e., enterprise value) of at least $100 million (excluding target companies that were real estate investment trusts).

Thirty-nine of the surveyed transactions in 2010 involved a target company in the United States, thirteen involved a target company in Europe and eight 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 60 surveyed transactions included the following target companies:

United States

Alloy, Inc.
American Commercial Lines Inc.
Burger King Holdings, Inc.
BWAY Holding Company
CKE Restaurants, Inc.
CommScope, Inc.
CPI International, Inc.
Del Monte Foods Company
Double-Take Software, Inc.
Dynamex Inc.
DynCorp International Inc.
Dynegy Inc.
The Gymboree Corporation
Health Grades, Inc.
Infogroup Inc.
Interactive Data Corporation
Internet Brands, Inc.
inVentiv Health, Inc.
J.Crew Group, Inc.
Jo-Ann Stores
National Dentex Corporation
NBTY, Inc.
NightHawk Radiology Holdings, Inc.
Novell, Inc.
OMNI Energy Services Corp.
Phoenix Technologies Ltd.
Plato Learning, Inc.
Polymer Group, Inc.
Prospect Medical Holdings, Inc.
Protection One, Inc.
RCN Corporation
Res-Care, Inc.
SonicWall, Inc.
SouthWest Water Company
Syniverse Holdings, Inc.
Thermadyne Holdings Corporation
Virtual Radiologic Corporation

Europe

Academedia
Brit Insurance Care
Chrysalis Plc
Inspired Gaming
SkillSoft
SMARTRAC
Spice plc
Stallergenes
Teleplan International
Tomkins
Trafficmaster
Utimaco Safeware

Asia

Aboitiz Transport System Corporation
Fuji Foods, Inc.
Gold-Pak Co., Ltd.
Healthscope Limited
Intoll Group
Invoice Inc.
Matahari Department Store Tbk PT
Sanyo Electric Logistics Co.

United States

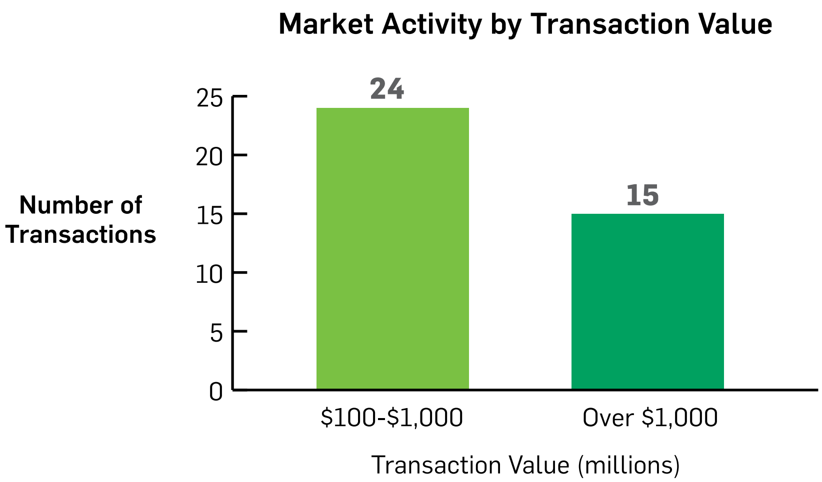
Key Conclusions

With a significant rebound in the availability of debt financing for new acquisitions, 2010 was a strong year for sponsor-backed going private transactions in the United States. Thirty-nine sponsor-backed going private transactions in the United States were announced over the course of 2010.

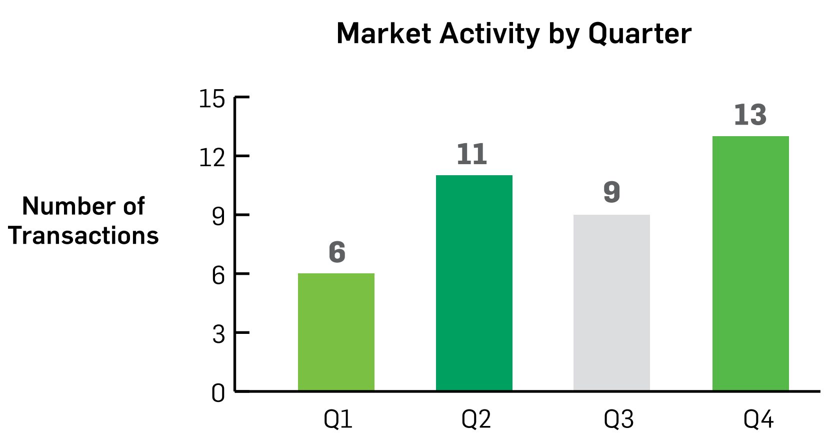
A number of market and legal trends are identifiable based on this survey. These include:

- When compared to 2009, 2010 witnessed a 335% increase in aggregate transaction value and a 179% increase in the number of announced transactions. However, neither the aggregate transaction value nor the number of transactions announced reached the level of the pre-credit crisis peak in 2007.
- Due to the strong credit markets, debt-to-equity ratios in sponsor-backed going private transactions rebounded in 2010. Equity accounted for an average of 51% of acquiror capitalization for transactions between $100 million and $1 billion in value and 36% of acquiror capitalization for transactions greater than $1 billion in value.
- No sponsor-backed going private transaction in 2010 had a financing out.
- The go-shop provision continued to be a common feature of going private transactions in 2010 with 51% 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 (67% of the reduced go-shop break-up fees were in excess of 50% of the no-shop break-up fee).
- Although not nearly as prevalent as in 2009, the tender offer was once again utilized in 2010, continuing a trend that started in 2007. Fifteen percent of the surveyed transactions in 2010 utilized a tender offer structure (compared to 36% of the surveyed transactions in 2009).
- Excluding the "all-equity" deals, some form of a reverse break-up fee appeared in 90% of the surveyed transactions in 2010 compared to 77% in 2009.
- Three different reverse break-up fee constructs were used in the surveyed transactions for 2010: a "pure option" reverse break-up fee (21% of the surveyed transactions with a reverse break-up fee), a reverse break-up fee for a financing failure (45% of the surveyed transactions with a reverse break-up fee), and a two-tier reverse break-up fee (34% of the surveyed transactions with a reverse break-up fee).
- Specific performance provisions enforceable against the buyer were again common in 2010. 77% of the surveyed transactions in 2010 permitted the seller to seek specific performance against the buyer in certain circumstances rather than be limited to a reverse break-up fee or monetary damages.
- Within the reverse break-up fee for financing failure construct, 73% of the surveyed transactions with a transaction value in excess of $1 billion and 12.5% of the transactions with a transaction value below $1 billion provided the target with the limited right to specifically enforce the equity financing only in the event that the debt financing is available, the buyer would otherwise be required to close and the closing would occur if the equity and debt financing were funded (i.e., specific performance lite).
- Similar to what we found in 2009, the MAE definitions for the 2010 surveyed transactions continue to be target-friendly with several exceptions for changes that would not expressly constitute an MAE.
- Despite the increase in transaction value of the surveyed transactions, the percentage of transactions constituting club deals involving two or more private equity sponsors was once again small when compared to the pre-credit crisis era. Only 15% of the 2010 transactions constituted a club deal compared to 37% of the 2007 transactions.

Market Information

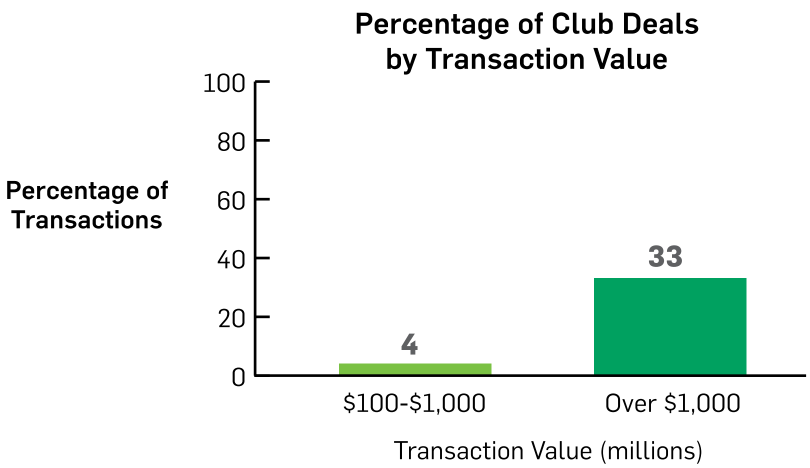


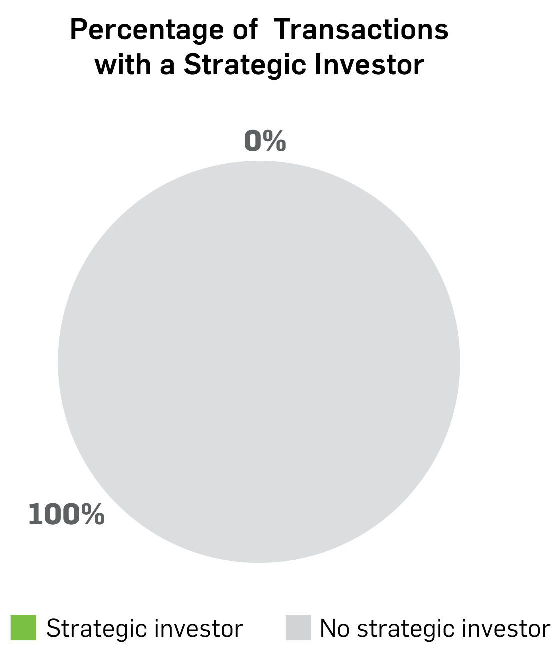
Transaction values in our study range from $122 million to $5.3 billion. The volume of surveyed transactions increased by 179% with 39 in 2010 and 14 in 2009. The 39 going private transactions represent an aggregate transaction value equal to approximately $55.2 billion, representing an approximate 335% increase in the aggregate transaction value of such transactions from 2009 ($12.7 billion).



Private equity deal activity was fairly consistent throughout the course of 2010 with 17 surveyed transactions signed in the first half of 2010 and 22 surveyed transactions signed in the second half of 2010.

Club Deals



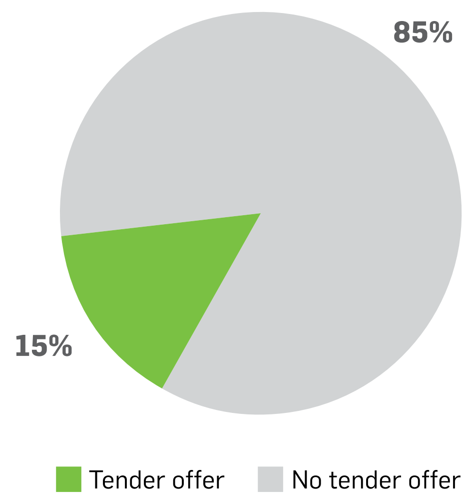


Despite the increase in transaction value of the surveyed transactions, there was only a small percentage of "club deals" involving two or more private equity sponsors in 2010. Another potential obstacle for club deals is the Dahl case in federal district court in Massachusetts. The Dahl case involves a class action lawsuit brought by various shareholders against a number of private equity firms claiming that the firms violated US antitrust laws in connection with various club deals. In a ruling on September 7th, a U.S. District Judge decided that the plaintiff in the Dahl case could seek information on ten additional deals to support their argument. Interestingly, there has been at least one going private in 2011 in which a private equity sponsor has "clubbed" together with two pension funds.

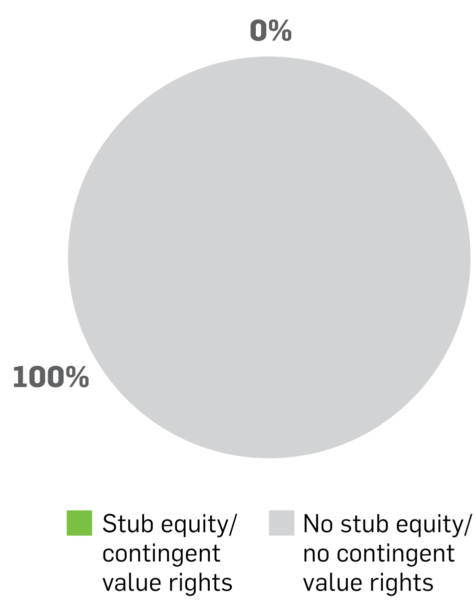
It is worth noting that no private equity sponsor partnered with a strategic investor in any going private transaction in 2010. In the event that the debt financing markets continue to be weak and sponsors continue to look at larger deals, we expect to see more deals in which sponsors team up with their limited partners to syndicate equity in order to bridge a funding gap. There may also be an increase in 2011 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

Percentage of Transactions with a Tender Offer



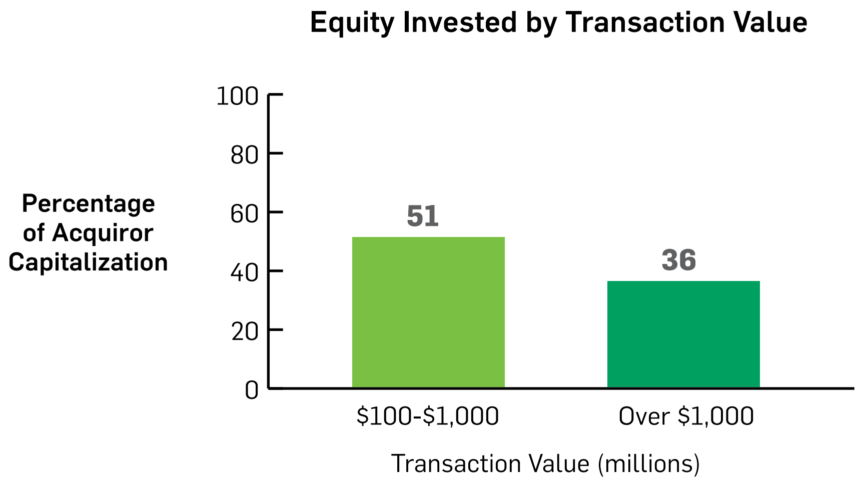
Percentage of Transactions with Stub Equity or Contingent Value Rights



Although there were not as many tender offers in 2010 as there were in 2009, which may be a result of sponsors taking advantage of the expediency with which a tender offer can be completed in order to close before the end of 2009 out of fear of changes to tax rates, sponsors utilized a tender offer in several going private transactions in 2010 in order to address certain transaction-specific issues. 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 unless the shares tendered in the offer (together with any "top-up" option) will be sufficient to complete a second-step short-form merger.

No sponsor-backed going private transaction in 2010 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.

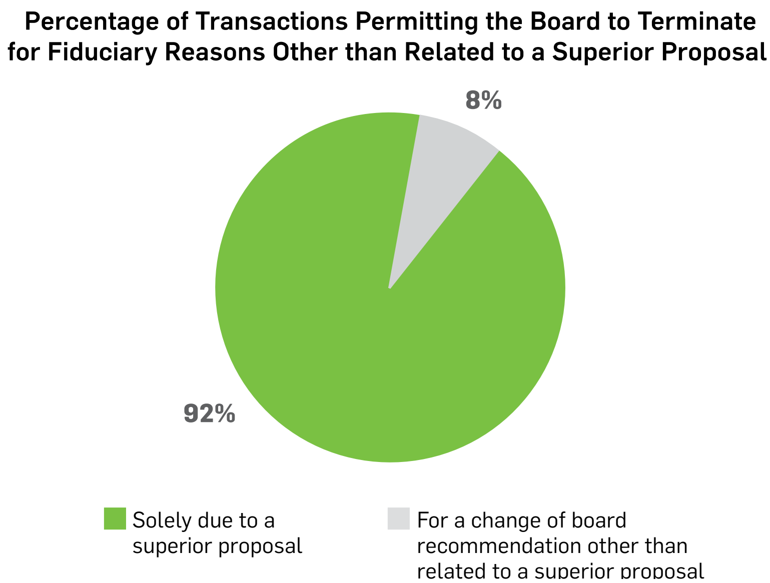
Financing



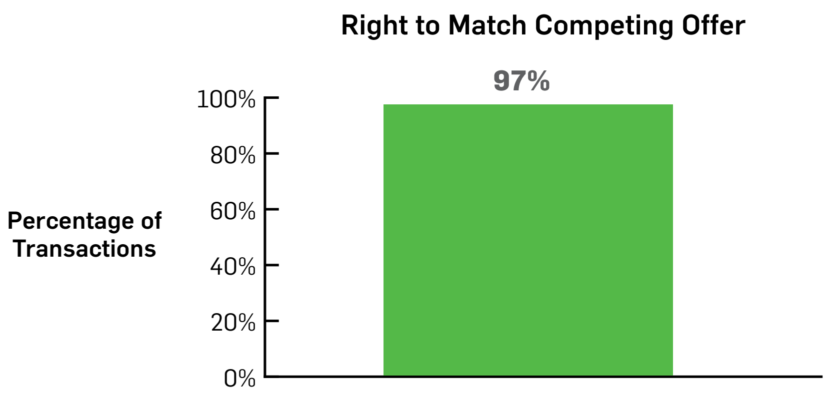
In 2010, the surveyed transactions with a transaction value less than $1 billion were typically financed with at least a majority of equity (average of 51% of acquiror capitalization) whereas the surveyed transactions with a transaction value greater than $1 billion were typically financed with at least a majority of debt (average of 64% of acquiror capitalization).

In 2010, debt financing for new acquisitions significantly rebounded as strong primary financing markets were driven by a world-wide search for yield in an era of close to zero risk-free interest rates and the improving global economy. The rebound in the debt financing markets diminished the need for "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. Liberal debt terms returned in 2010 with some new "covenant-lite" loans and PIK toggle bonds. CLO refinancing activity returned and there was a modest amount of formation activity for new CLOs.

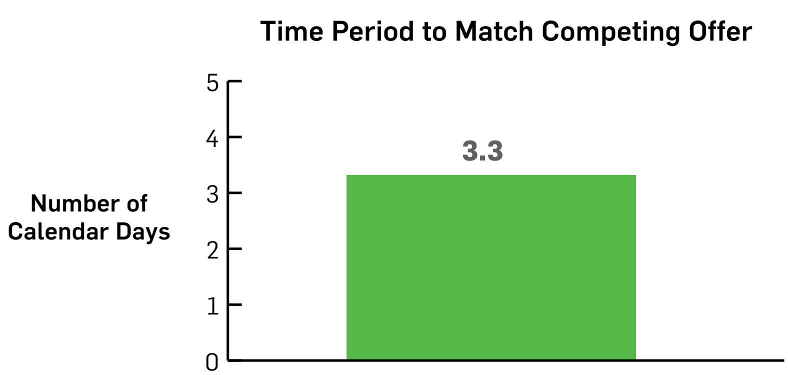
Fiduciary Out/Matching Rights



8% of the 2010 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).

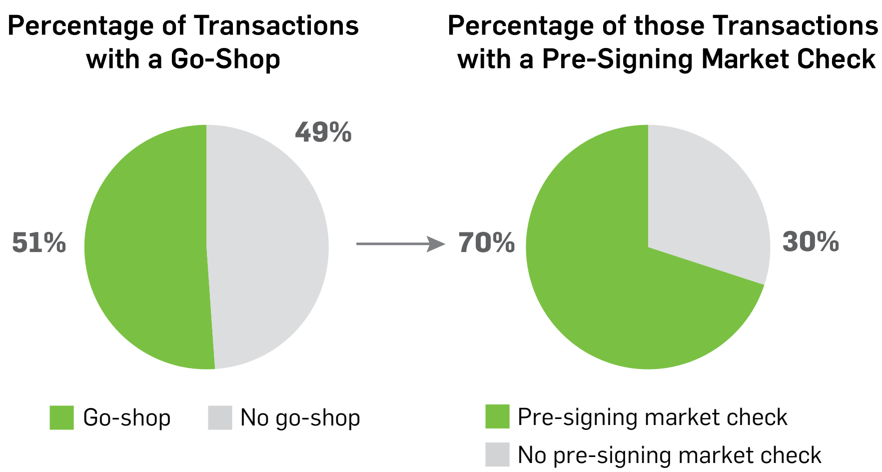


The number of surveyed transactions in which private equity sponsors had the right to match a competing offer was slightly higher this year than last year (97% v. 93%). A small minority of the surveyed transactions provide for the elimination or modification of matching rights under certain circumstances, such as the submission of a competing bid in excess of a certain percentage of the orginal purchase price or during the go-shop period.

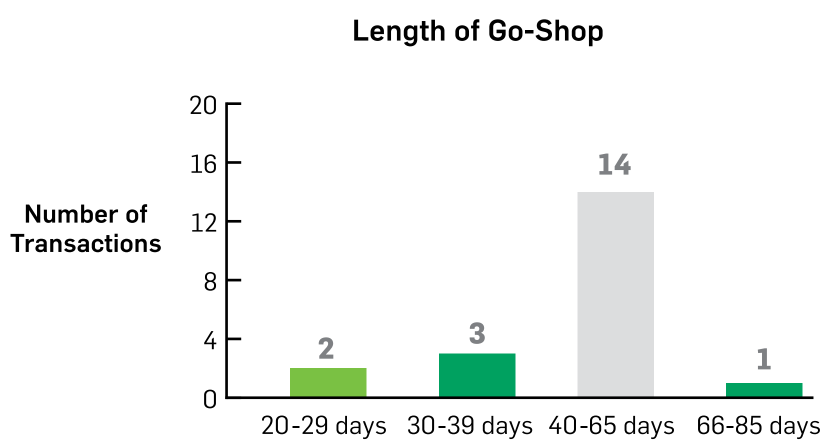


The time period for private equity sponsors to match a competing offer was slightly longer this year than last year (3.3 v. 3.2). The time period to match a competing offer can also be reduced in the event that a pre-existing superior proposal is simply being amended or modified.

Go-Shops



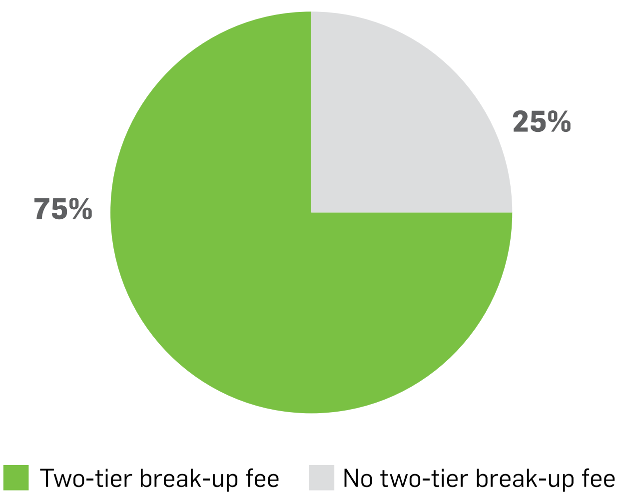
The go-shop provision was more common in going private transactions in 2010 with 51% of surveyed transactions including this form of post-signing market check (compared to 36% in 2009). Surprisingly, 70% of the transactions with a go-shop had some form of pre-signing market check. Additionally, it is worth noting that go-shop provisions appear to have recently led to a greater number of successful interloping bids.



The length of the go-shop period in sponsor-backed going private transactions in 2010 ranged from 20 to 85 days. 75% of the 2010 go-shop periods were at least 40 days in length. When compared to 2006 (50% of go-shop periods were between 20-29 days), go-shop periods continue to be much longer despite 70% of the 2010 go-shop transactions having some form of pre-signing market check.

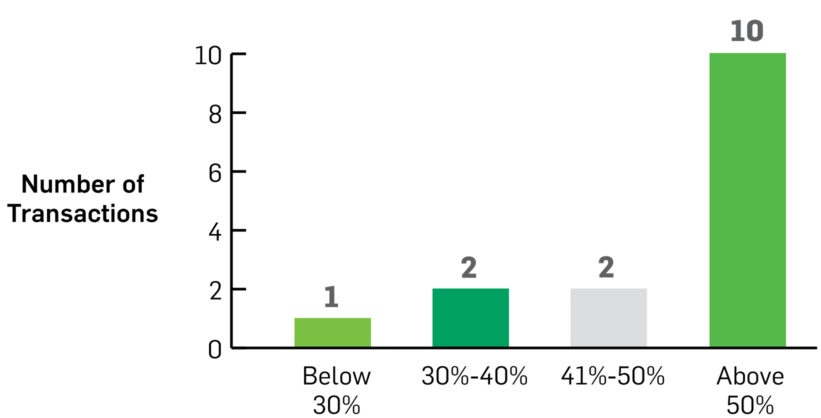
Go-Shops

Percentage of Go-Shop Transactions with a Two-Tier Break-Up Fee



In 75% of the surveyed go-shop 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.

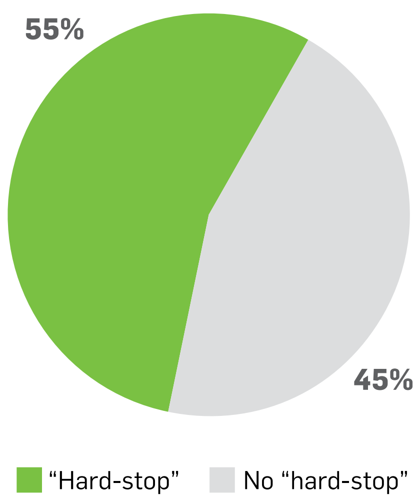
Size of Go-Shop Break-Up Fee vs. Normal Break-Up Fee



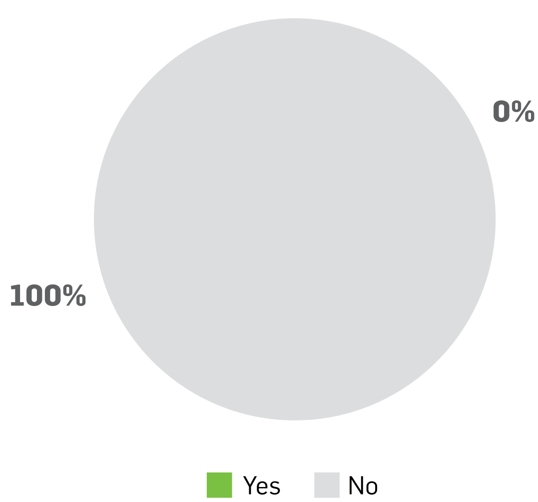
The reduced go-shop break-up fee ranged from 28.6% to 85.7% of the normal break-up fee in 2010. 67% of the reduced go-shop break-up fees were in excess of 50% of the normal break-up fee. The hesitation to give a significant discount to the normal break-up fee may be a result of the topping bids that 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



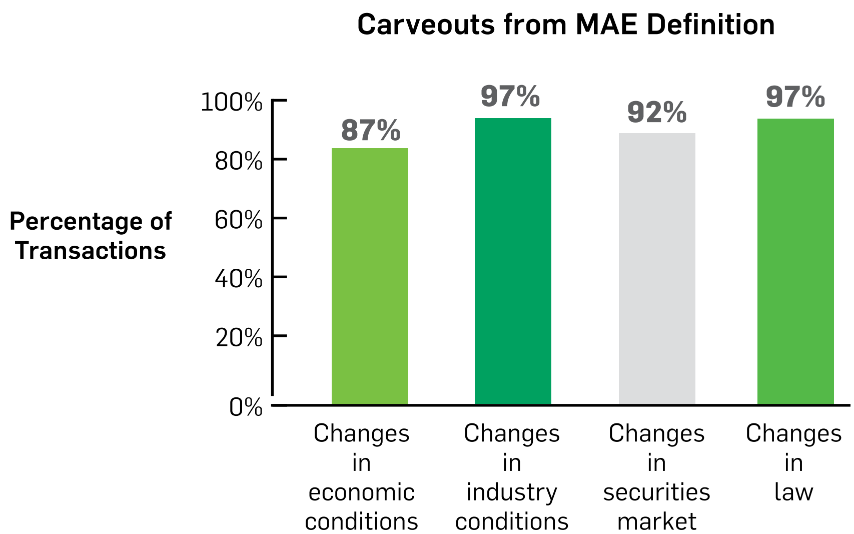
Percentage of Go-Shop Transactions that Eliminate a Matching Right During the Go-Shop Period

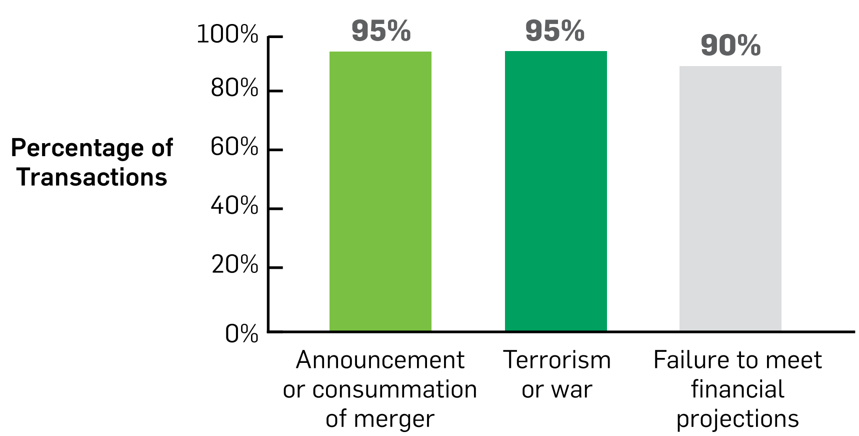


In 2010, a "hard-stop" was utilized in 55% of the surveyed go-shop transactions. A hard-stop imposes a deadline on the target board to negotiate a definitive agreement with a competing bidder solicited during the go-shop period in order for the target to benefit from the reduced go-shop break-up fee. An interesting recent development is that many transactions are including a modified "hard-stop" in which the target is permitted to shop its signed deal for an initial period that would then be followed by an abbreviated secondary period. In this abbreviated secondary period, the target could not shop the signed deal but would get the benefit of the reduced go-shop break-up fee in the event that an interloper who submitted a superior proposal during the initial period signs a definitive agreement in the secondary period.

In 2010, 0% of the surveyed transactions with a go-shop provision eliminated the matching right during the go-shop period, down from 40% of such transactions in 2009.

Material Adverse Effect



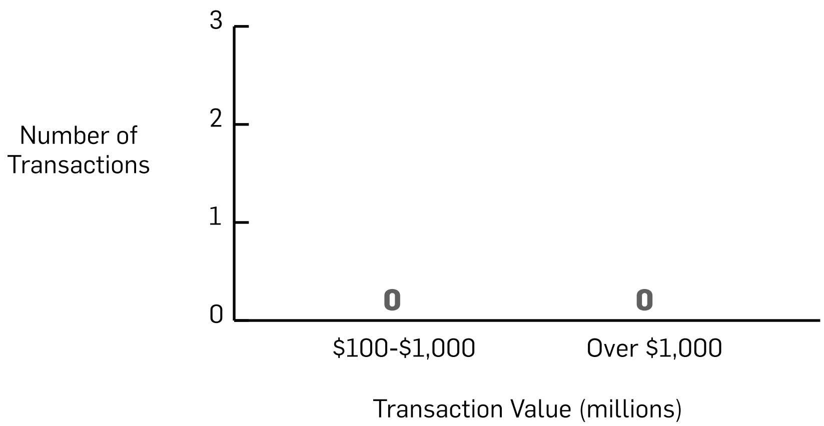


When compared to 2008, the 2010 surveyed transactions reveal a material increase in the number of target-friendly MAE exceptions, making it even more difficult to prove an MAE, a trend that began in 2009 following the termination of several deals during the credit crisis. Buyers have had success though 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.

Additionally, the number of surveyed transactions that included an adverse change in the target's prospects in the definition of an MAE increased from 0% in 2009 to 5% in 2010. The leverage that a favorable MAE clause may deliver to a private equity buyer is being demonstrated in the dispute between Cerberus and Innkeepers USA Trust. The MAE definition in the merger agreement did not include any target-friendly MAE exceptions and also included an adverse change in the target's prospects. Time will only tell as the Innkeepers dispute unfolds, but this MAE definition may help shift some of the risk associated with a general downturn in the economy or an adverse change in earnings or projections from the buyer to the seller.

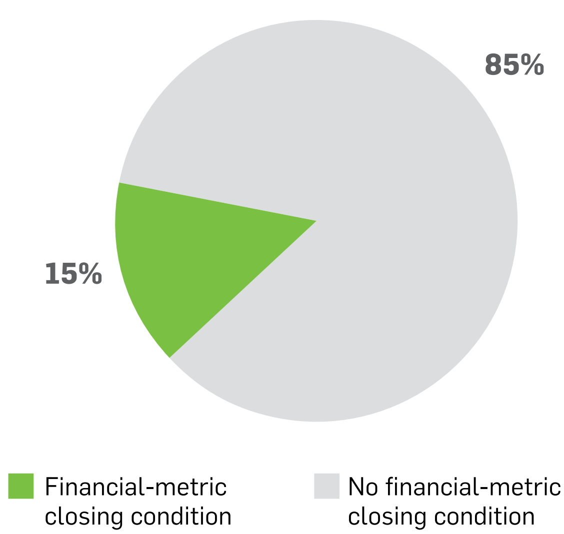
Financing Outs

Financing Outs by Transaction Value



No sponsor-backed going private transaction in 2010 had a true financing out where no reverse break-up fee or other remedy would be available against the sponsor for failure to close.

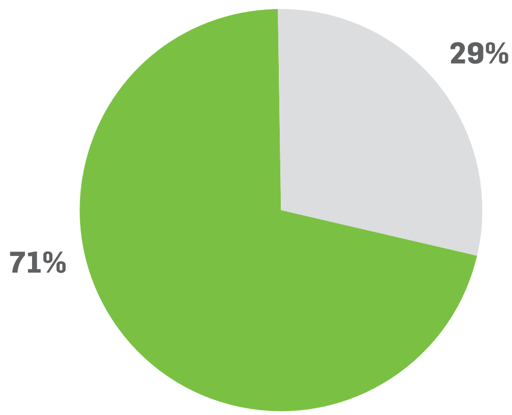
Percentage of Transactions with a Financial-Metric Closing Condition



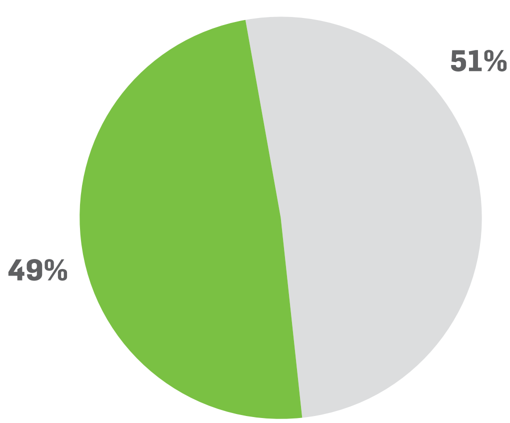
As previously mentioned, in several of the surveyed transactions, sponsors have successfully negotiated for a financial-metric closing condition that is intended to measure the financial health of the target as of the closing date and grant the sponsor a walk-away right in the event the financial-metric closing condition is not satisfied. A closing condition tied to a minimum EBITDA threshold or a maximum leverage ratio were the two most common examples of financial-metric closing conditions in the surveyed transactions. Another financial-metric closing condition that was utilized by a sponsor in 2010 was solvency of the target before giving effect to the debt financing.

Finance-Related Provisions

Percentage of Transactions with an Obligation on the Sponsor to Cause the Lenders to Fund and/or Enforce its Rights under the Debt Commitment Letter



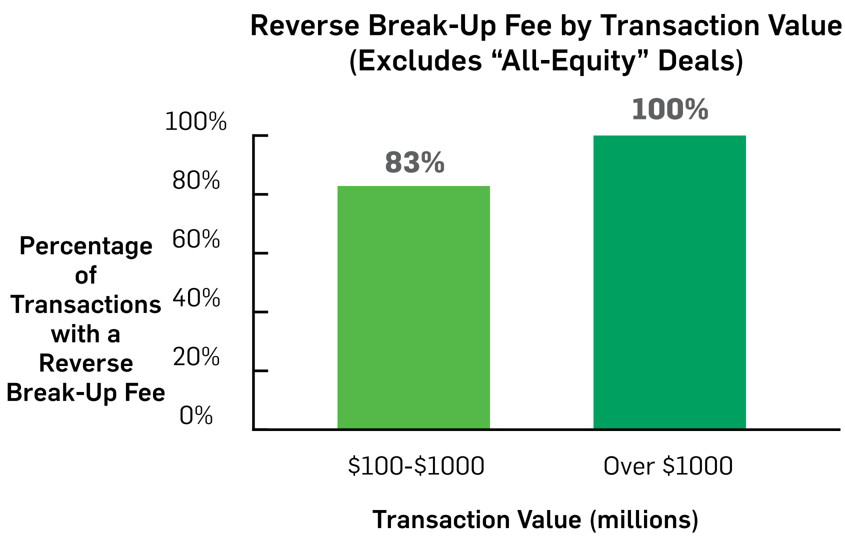
Percentage of Transactions with an Exclusive Forum Selection Provision Applicable to Lenders



Special provisions designed to more expressly address the complex interaction among sponsor, target and lender appeared in 2010 acquisition agreements. For instance, a provision that is becoming more common is one that would obligate the sponsor to cause the lenders to fund and/or enforce its rights under the debt commitment letter (particularly an obligation to pursue litigation against the lenders if they refuse to fund). This type of provision was included in 71% of the surveyed transactions. It is important to note though that the specific performance provision would have to permit the enforcement of covenants for this type of provision to be effective.

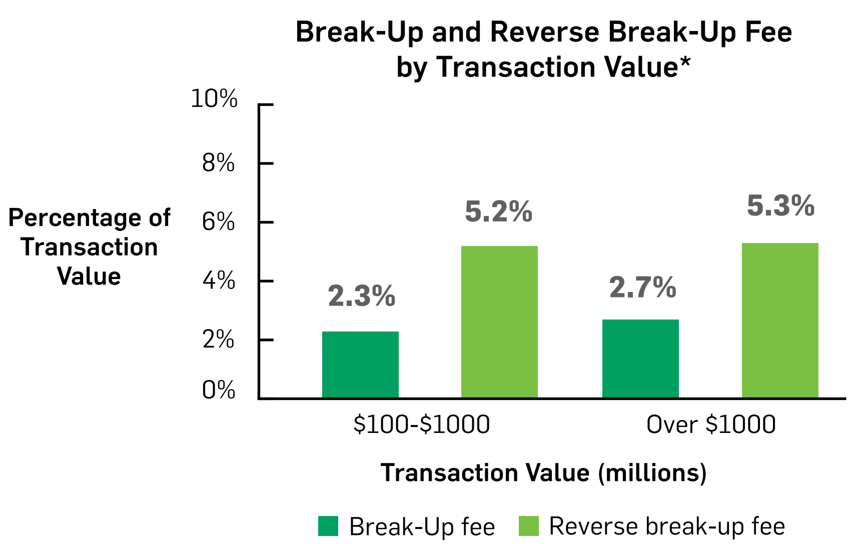
Another example is a choice of forum provision that applies not only to the target and the buyer, but also the debt financing sources in an effort by the lenders to avoid being sued by targets in unfriendly jurisdictions. This type of forum selection provision was included in 51% of the surveyed transactions and 85% of such provisions expressly covered tort claims. 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



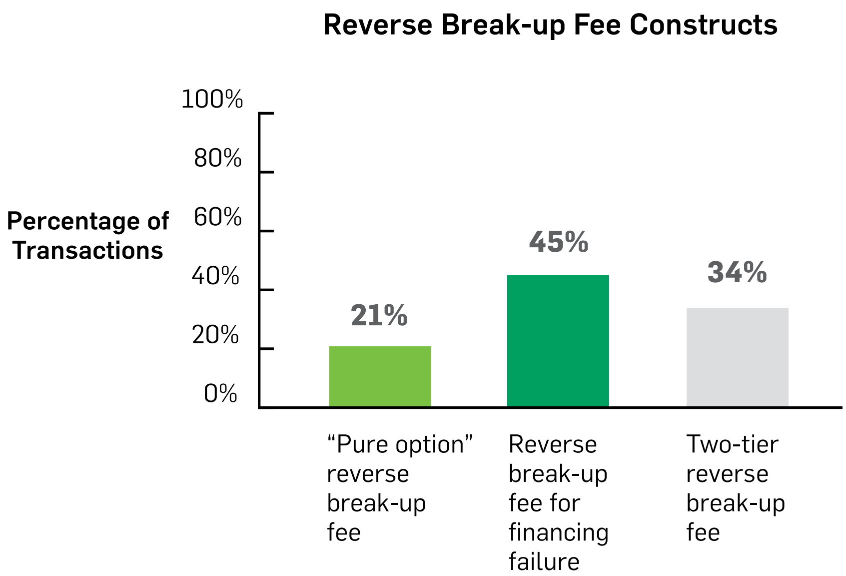
Interestingly, some form of a reverse break-up fee appeared in 90% of the surveyed transactions in 2010 (excluding "all-equity" deals) compared to 77% of the surveyed transactions in 2009. Some form of a reverse break-up fee appeared in almost every deal with a transaction value in excess of $1 billion as sponsors cannot be expected to close if the debt financing isn't available, in part due to "diversity" limitations in fund documents that restrict sponsors from investing more than a specified percentage of the fund in any one deal.

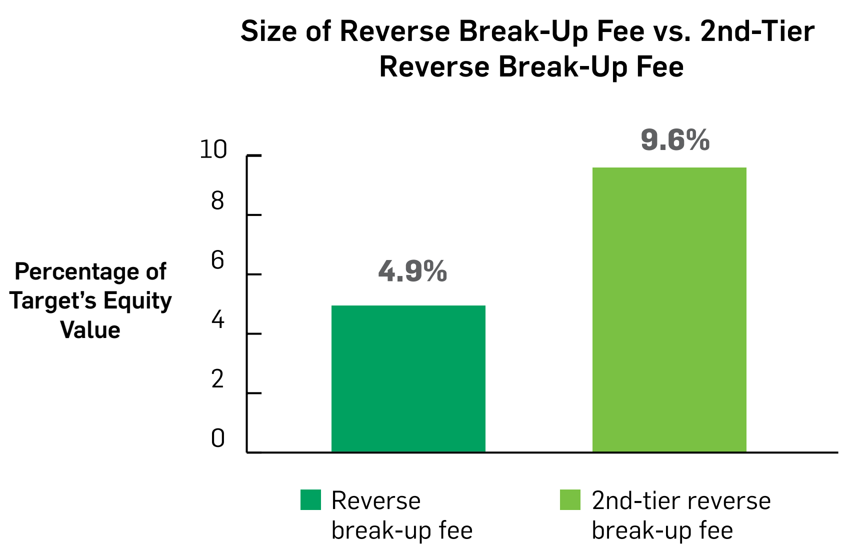
Despite speculation that a new model would emerge in which sponsors would be legally obligated to close, some form of a reverse break-up fee is still being included in almost every deal. Nevertheless, other constructs designed to limit the optionality built into the reverse break-up fee structure and encourage sponsors to consummate the transaction continued to be utilized in 2010. 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 (excluding those deals with a two-tier reverse break-up fee structure) in 2010 as a percentage of the transaction value was 5.2%). The largest one-tier reverse break-up fee as a percentage of transaction value for the surveyed transactions was 8.37% and the smallest was 1.67%.



*Excludes transactions with a two-tier reverse break-up fee.

Break-Up Fees and Reverse Break-up Fees



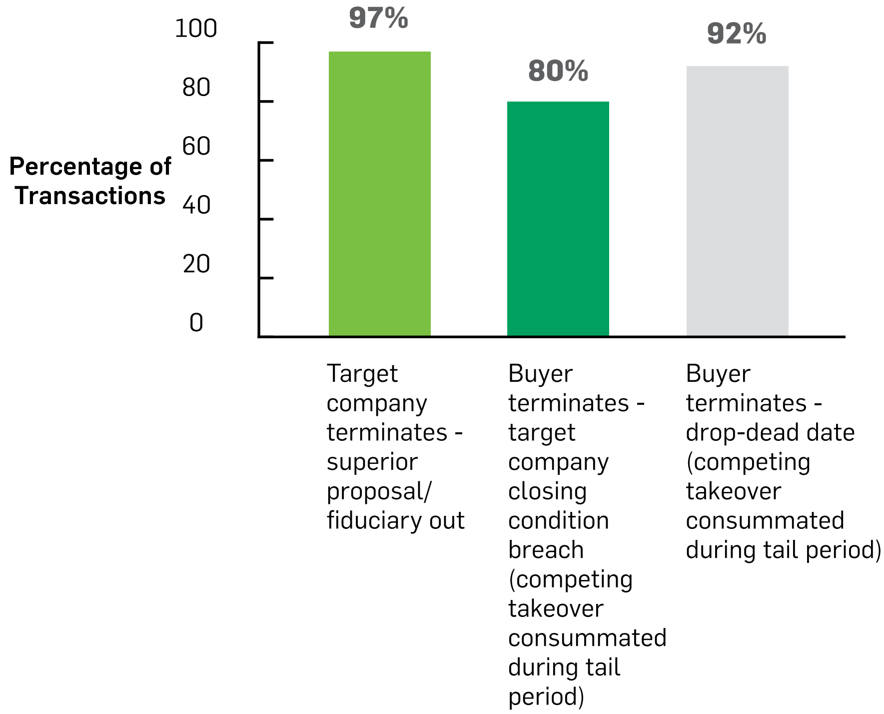


In 2010, there were three primary reverse break-up fee constructs. These include a “pure option” reverse break-up fee, a reverse break-up fee for financing failure and a two-tier reverse break-up fee. A “pure option” reverse break-up fee construct was used in 21% of the surveyed transactions with a reverse break-up fee. In this construct, the reverse break-up fee payable by the sponsor is the sole and exclusive remedy for all breaches and the target has no right to specific performance. A reverse break-up fee for financing failure construct was used in 45% of the surveyed transactions with a reverse break-up fee. In this construct, the reverse break-up fee caps the sponsor's liability only in the event of a financing failure and the target retains some type of a specific performance remedy. 73% of the surveyed transactions with a transaction value in excess of $1 billion and 12.5% of the transactions with a transaction value below $1 billion provided the target with the limited right to specifically enforce the equity financing only in the event that the debt financing is available, the buyer would otherwise be required to close and the closing would occur if the debt financing was funded or available to be funded (i.e., specific performance lite). A two-tier reverse break-up fee construct was used in 34% of the surveyed transactions with a reverse break-up fee. In this construct, the sponsor would pay a lower reverse break-up fee for non-willful breaches and/or financing failure and a higher reverse break-up fee for willful breaches and/or a financing failure.

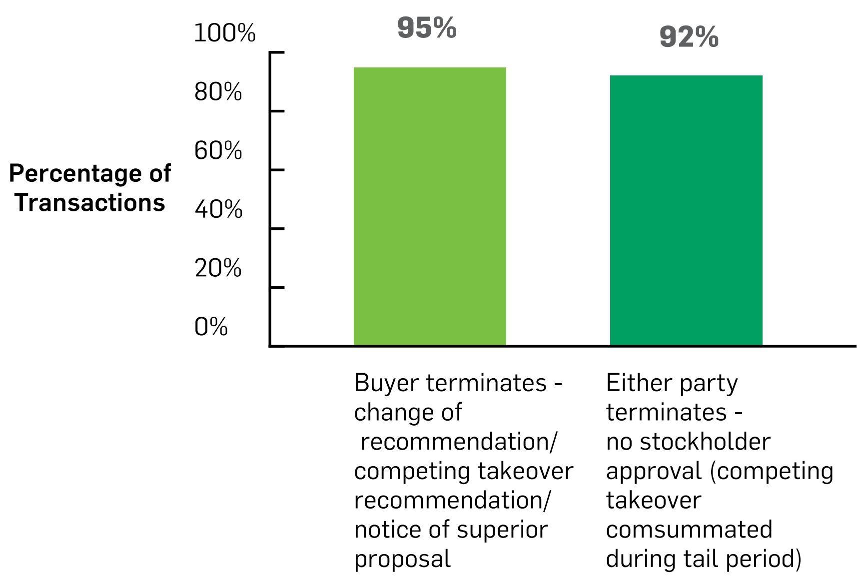
Typically, the size of the second-tier reverse break-up fee is approximately double the size of the first-tier reverse break-up fee.

Break-Up Fees and Reverse Break-up Fees

Termination Scenarios Where Buyer Receives a Break-up Fee



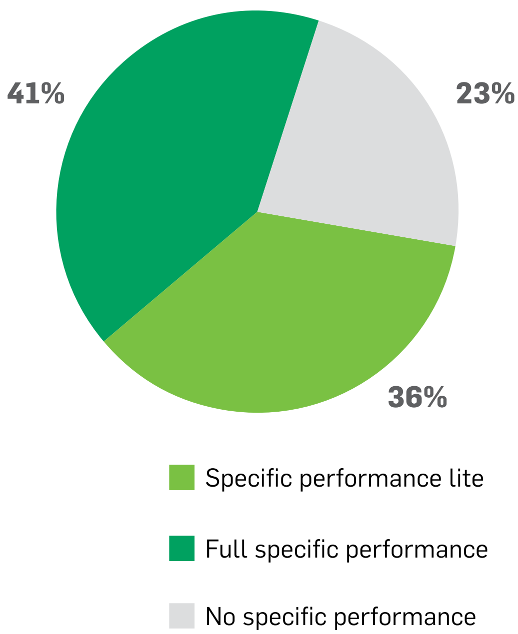
The five scenarios listed on the charts on this page are the most common scenarios in which a break-up fee must be paid. In addition to payment of a break-up fee, several transactions included target reimbursement of the buyer's transaction expenses (usually subject to a cap) if the agreement is terminated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



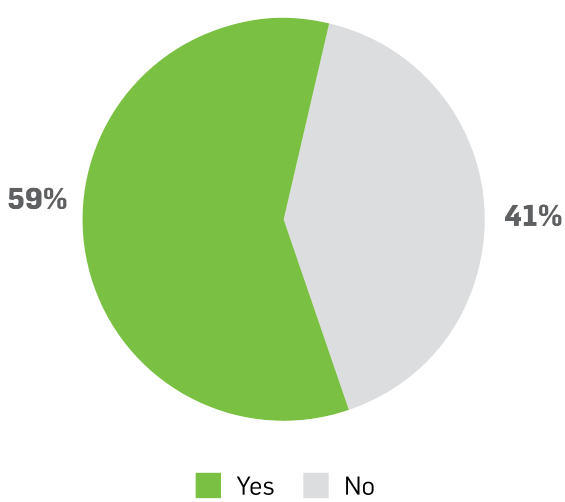
5 surveyed transactions included a naked no-vote termination fee and all such naked no-vote termination fees were equal to the size of the termination fee payable in all other scenarios. 15 surveyed transactions included a naked no-vote expense reimbursement feature and the capped expense amount for these transactions ranged from 0.3% to 1.4% of the target's equity value. The amount of any reimbursable expenses is often netted against any break-up fee that subsequently becomes payable.

Target Company Remedies

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



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

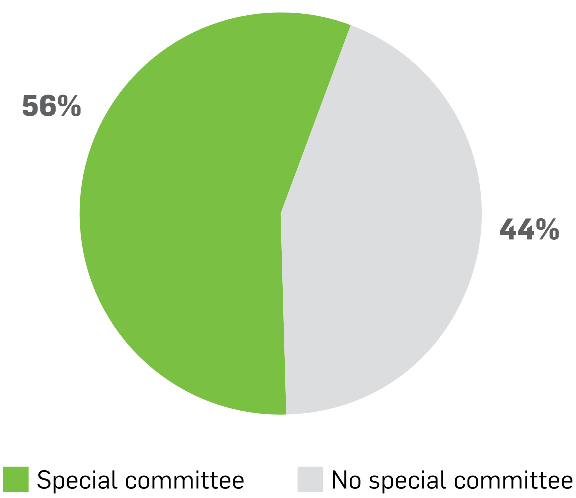


Specific performance provisions enforceable against the buyer were again common in 2010. 77% of the surveyed transactions in 2010 permitted the seller to seek some form of specific performance against the buyer rather than be limited to a reverse break-up fee or monetary damages (57% of the surveyed transactions in 2009 allowed the seller to seek specific performance). 47% of the surveyed transactions that included some form of specific performance in favor of the target utilized the specific performance lite model. 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. The percentage of surveyed transactions that provided such protection increased from 43% in 2009 to 59% in 2010.

Special Committees

Percentage of Transactions with a Special Committee



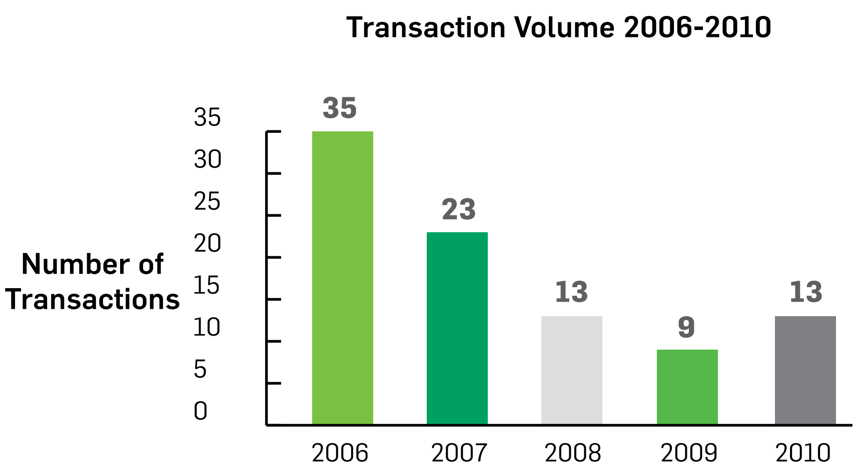
In 56% of the 2010 surveyed transactions, the target's board of directors formed a special committee to evaluate, negotiate and approve the proposed transaction. The use of special committees will of course be most prevalent in those transactions where directors are either part of, or closely affiliated with, the buyout group. As several buyouts in 2010 once again proved, a private equity sponsor should keep in mind that it is normally "buying" the shareholder litigation that will often accompany a going private transaction. Accordingly, it is in the best interests of all parties to ensure that the target is using a robust sales process to reduce the likelihood of shareholder litigation and minimize the risk of required disclosure in the proxy statement that could be a negative factor in obtaining the necessary shareholder vote to approve the transaction.

Europe

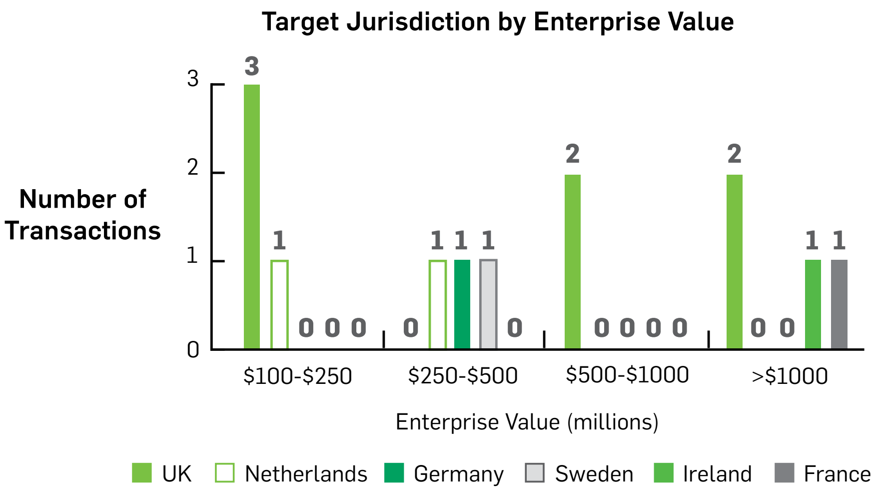
Key Conclusions

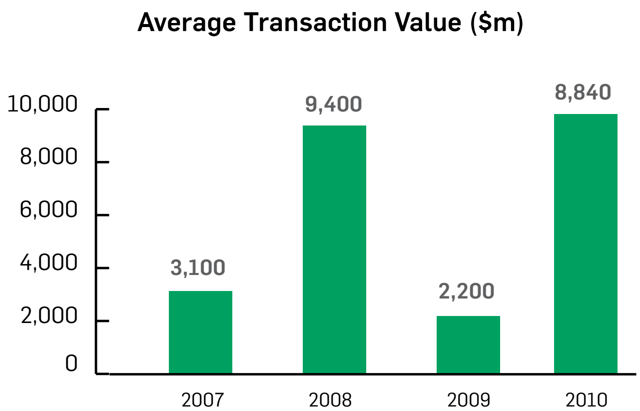
While markets across Europe began to recover from the lows of 2009, deal activity for the most part remained subdued, with the number of transactions across Europe recovering to 2008 levels, with 13 transactions being announced (2009: 9). The aggregate value of transactions for the period rose more substantially to $11.5 billion (2009: $1.97 billion). Average transaction size also increased to $884 million (2009: $220 million).

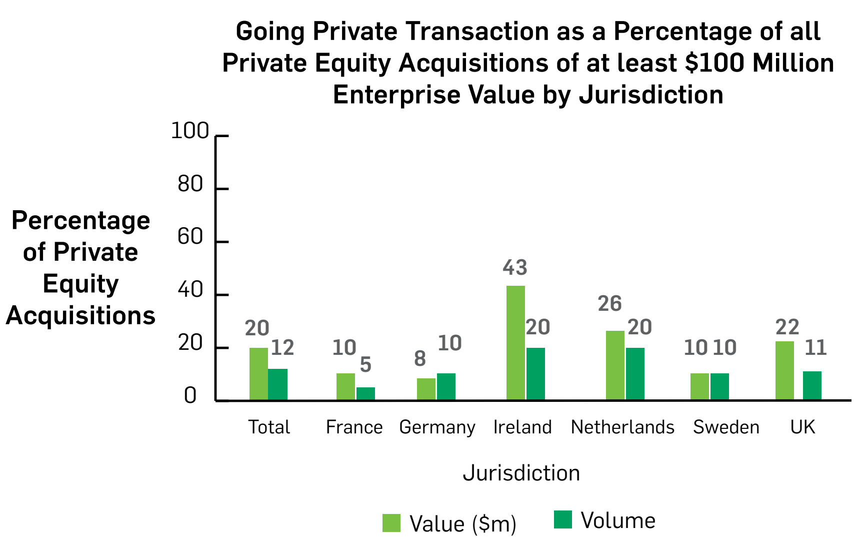
As in previous years, the UK market accounted for the most significant share of relevant transactions in terms of both value and volume, with seven transactions announced having an aggregate value of $7.863 billion.



Jurisdiction





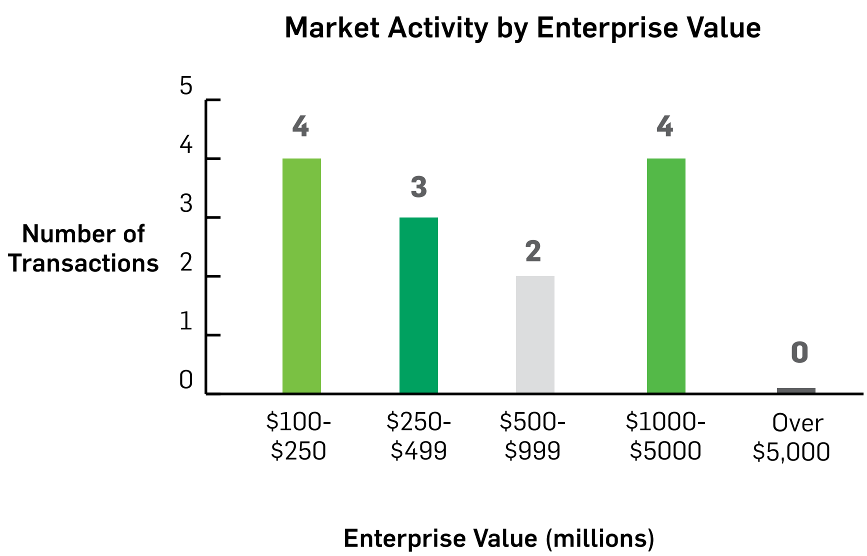


The UK maintained its position as the most active market in Europe, accounting for seven of the 13 relevant transactions with an aggregate value of $7.863 billion (2009: $732 million). This included, however, one deal which was subject to the shared jurisdiction of the UK Takeover Panel and the Netherlands Authority for the Financial Markets (Apollo and CVC's bid for Brit Insurance). With two further transactions (the acquisitions of Teleplan International and SMARTRAC) subject to the jurisdiction of the Netherlands Authority for the Financial Markets, the Dutch Market was the second most active market in Europe.

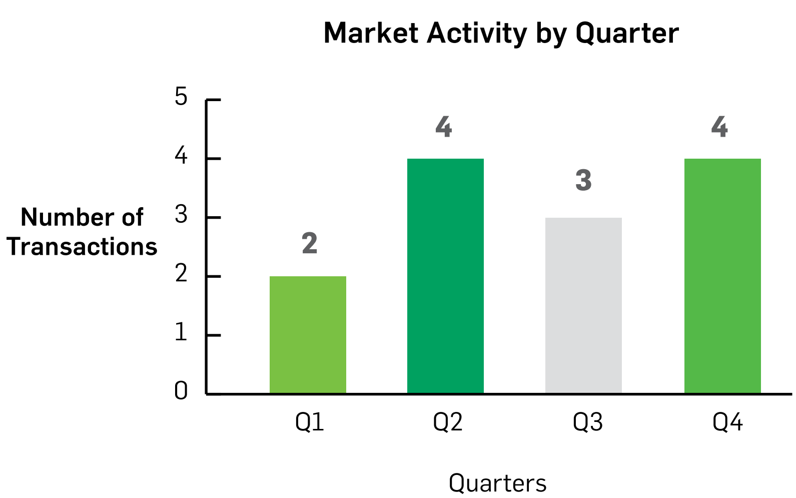
The survey showed a more even spread of transactions across the value range compared with the previous year, with a higher average transaction value of $883.3 million. This contrasts to the previous year where transactions were concentrated towards the lower end of the value range (2009 average transaction value: $219.2 million).

Going private transactions make up a significant percentage of total private equity transactions, particularly when analyzed by value, reflecting the generally higher average transaction value of going private transactions. While these figures represent an increase upon those for 2009 (7% of total private equity deal value and 4% of total deal volume), they are still lower than 2008 figures where 30% of private equity deal value and 14% of private equity deal volume was through take private transactions.

Market Information

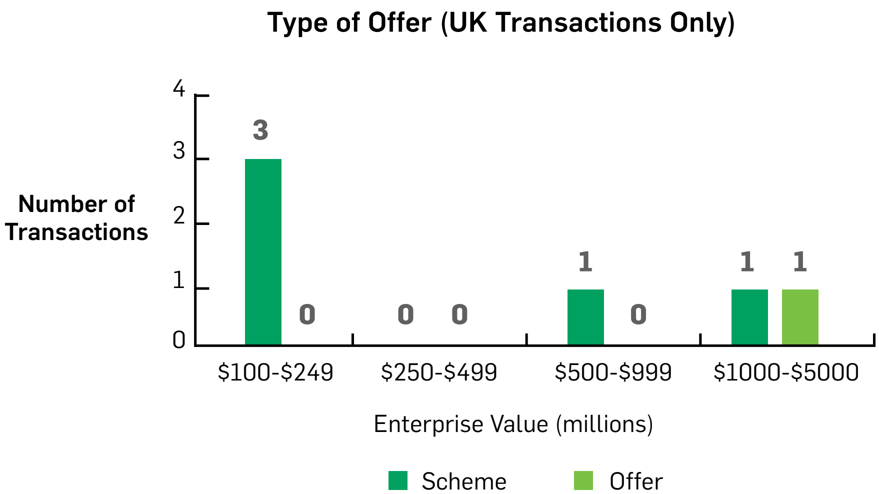


Improving credit markets in 2010 helped sponsors pursue transactions of increasing value. Whereas in 2009 there were no sponsor-backed going private transactions in Europe with a value of $500 million or greater (the highest transaction value in 2009 was $366.2 million), 2010 saw six such transactions, of which four exceeded $1 billion. The largest transaction in 2010 saw a significant rise in deal value to $4.77 billion from $407 million in 2009.



After a slow start with only two relevant transactions occurring in the first quarter, market activity increased and remained generally constant on a quarterly basis throughout the year, consistent with improving market conditions compared with 2009.

UK Transactions – Type of Offer

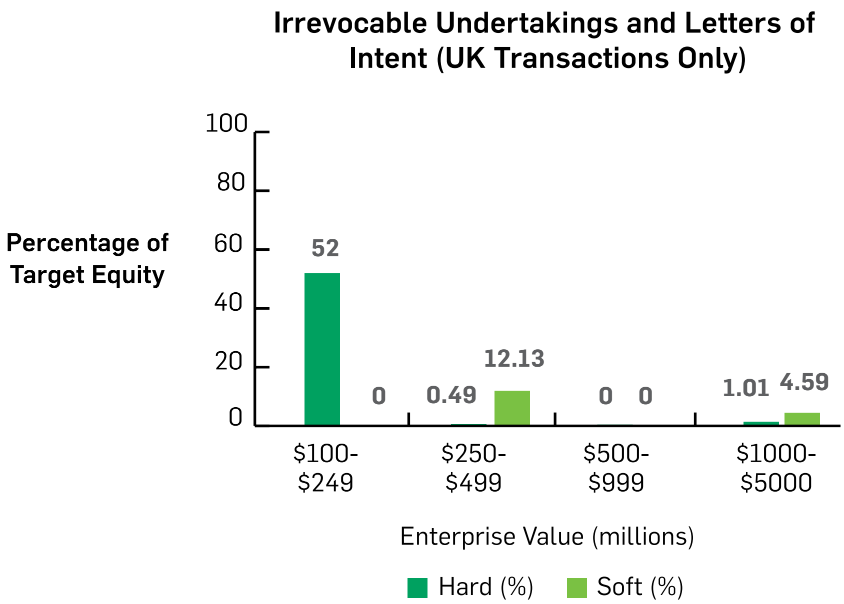


A going private transaction in the UK can be structured either by way of an offer made to all shareholders or using a technique known as a scheme of arrangement, whereby all the shares of the target are cancelled and new shares are issued to the bidder in exchange for the payment of consideration.

Once the threshold for a scheme of arrangement is reached (75% of shares, excluding shares held by the bidder and its associates), 100% control is obtained. By contrast, under an offer, statutory provisions apply under which the bidder can squeeze out minority shareholders if 90% of the shares are acquired.

The UK figures for 2010 show that a scheme is the preferred route, with six out of the seven UK transactions in this survey making use of a scheme. Over the past three years, 75% of all sponsor-backed going private transactions involving UK targets have been effected by way of a scheme of arrangement. The only transaction to use the offer method was Apollo and CVC's bid for Brit Insurance where there was a 95% acceptance condition (in order to reach the squeeze-out threshold of 95% under Dutch law). The Dutch target was not capable of a winding up under the Companies Act 2006 and therefore could not propose a scheme of arrangement.

UK Transactions – Irrevocable Undertakings



Irrevocable undertakings are used in UK transactions for bidders to get comfort in advance of making a formal offer that they will have target shareholder support for their bid. 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 shareholders 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 UK Takeover Code, requiring disclosure of the full terms of any irrevocable undertaking, and also be aware that the seeking of an irrevocable undertaking 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 are normally approached to give such an undertaking.

The different types of commitment which can be given are: (i) hard undertakings, genuinely irrevocable commitments binding unless the offer lapses; (ii) soft undertakings, binding only if there is no higher competing offer made; and (iii) so-called semi-soft undertakings, binding until an offer is made which is higher by a threshold amount. Hard undertakings were given in all of the seven UK transactions, with semi-soft undertakings also being given in respect of an additional percentage of the target equity in two of these transactions.

UK Transactions – Proposed Changes to the UK Takeover Code

In July 2011, the Takeover Panel announced a number of changes to the Takeover Code. The implementation date for the final changes was September 19, 2011 and they will apply to all offer periods starting on or after this date, with transitional provisions applicable to those offers already live at the time of implementation.

The changes most likely to have the most significant effect on sponsor-backed going private transactions are:

- the abolition of deal protection measures, including a prohibition on inducement or break fees;
- the identification of any potential bidder in any leak announcement;
- the introduction of a four-week "put up or shut up" period for the announcement of a firm offer following a leak announcement; and
- enhanced disclosure requirements, including the detailed disclosure of financing arrangements and offer-related fees.

Deal protection measures have previously been featured regularly in going private transactions. The inability to rely on such measures in the future could result in greater emphasis being placed on the use of irrevocable undertakings to increase certainty.

The naming of potential bidders and the short timetable as a result of the four-week "put up or shut up" period will likely be the greatest challenge to going private transaction volume. As a result of this, bid preparations will have to be further advanced and developed prior to a sponsor initially approaching a target. A recent British Venture Capital Association research survey on the potential impact of the changes has found that 20% of potential bidders consider they would definitely be discouraged from making a bid as a result of the four week "put up or shut up" period, with over 90% of respondents stating that it took at least six weeks to organize a bid. The ability of the target board to make a leak announcement and trigger the shortened timetable bestows upon the board greater power to influence the course of a bid. The Takeover Panel may extend the four week period for a particular bid, but will generally only do so at a late stage in the timetable and with the agreement of the target board. Obtaining the target board's cooperation will therefore become more important.

Asia-Pacific

Key Conclusions

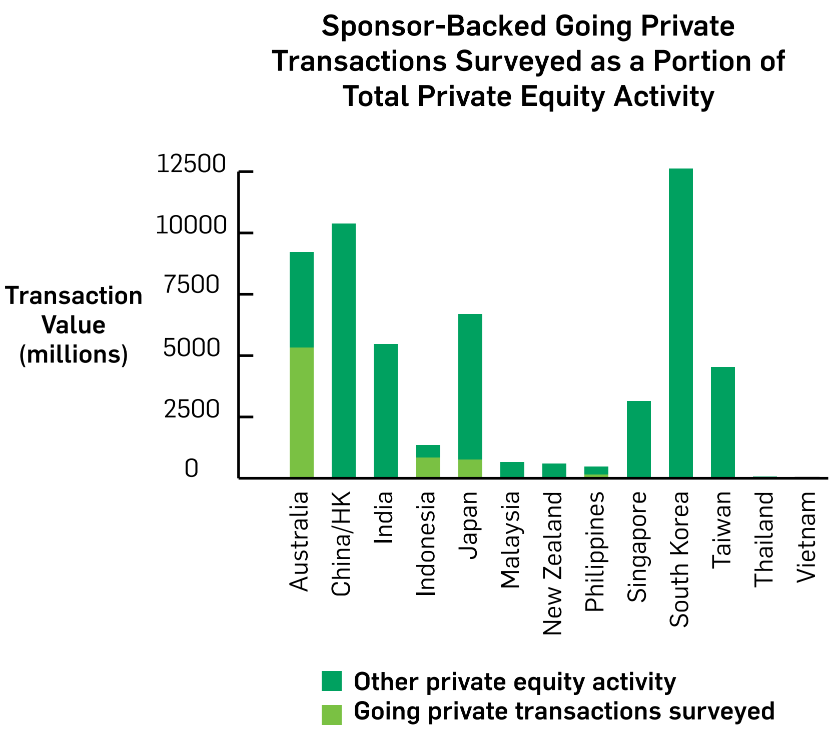
In 2010, total private equity activity in Asia-Pacific increased significantly from 2009 and ended the year up approximately 23% from 2009. There was also an increase in the number and transaction value of surveyed sponsor-backed going private transactions in the region. Eight going private transactions form part of our survey this year (as compared to five in 2009).

Some conclusions and trends for going private transactions in the region for 2010 include:

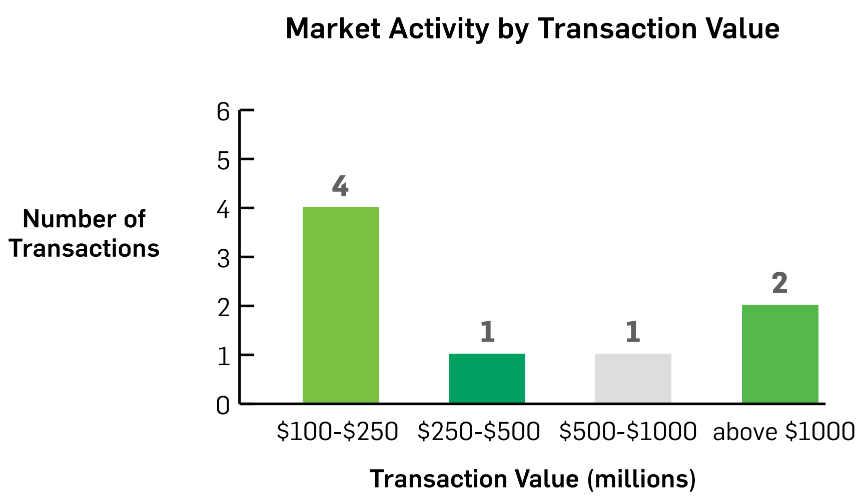
- The eight surveyed Asia-Pacific going private transactions represent an aggregate transaction value of approximately $7.1 billion, constituting about 14% of private equity activity, by deal value, in the region (much higher than the $4.0 billion and 9% in 2009).
- As with previous years, going private transactions continue to occur primarily in more mature markets in the region.
- The surveyed transactions appear to reflect the continuing improvement in the deal markets in 2010: five out of the eight 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, strategic investors 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 certain surveyed transactions 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.
- Sponsors in four surveyed transactions financed their acquisition partly through debt. As expected, debt financing was more commonly used in transactions involving targets in more mature markets.
- 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.

Since later 2010, a number of US-listed companies with business operations mainly in China have announced that they have entered into definitive agreements with or received proposals from private equity investors (typically in consortium with the founders of such companies) to take the companies private. These companies are either organized in certain offshore jurisdictions (such as Cayman Islands) or in the US (if the later, the company in many instances became public in the US through a so-called "reverse merger" with a SPAC rather than through an initial public offering). Many industry participants have observed that the trading multiples of such US-listed Chinese businesses are often lower than those of comparable companies listed in China (e.g., the Hong Kong Stock Exchange).

Market Information



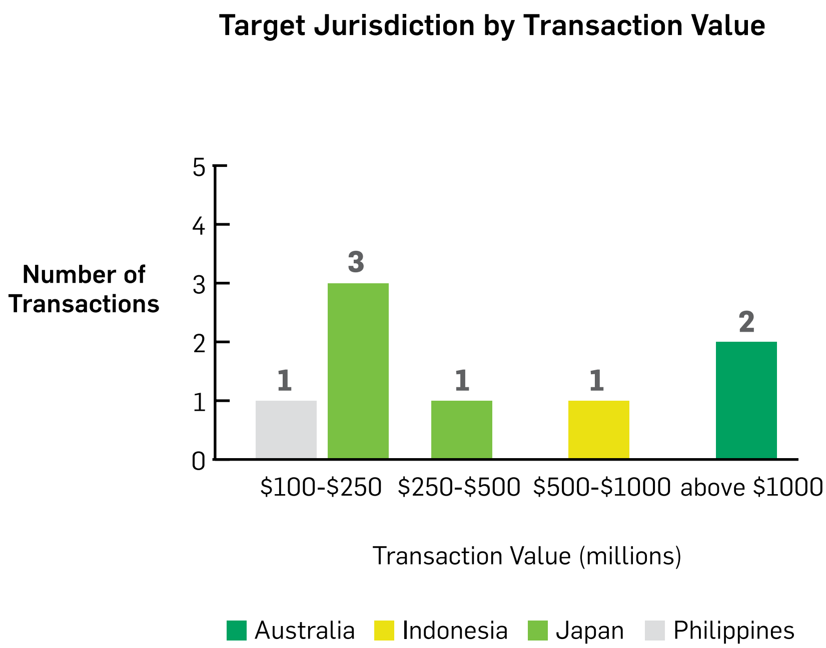
The surveyed going private transactions (totaling about $7.1 billion) accounted for approximately 14% of private equity activity, by deal value, in the Asia-Pacific region in 2010 (much higher than the $4.0 billion and 9% in 2009). Other types of transactions in the region included private buyouts and PIPEs.



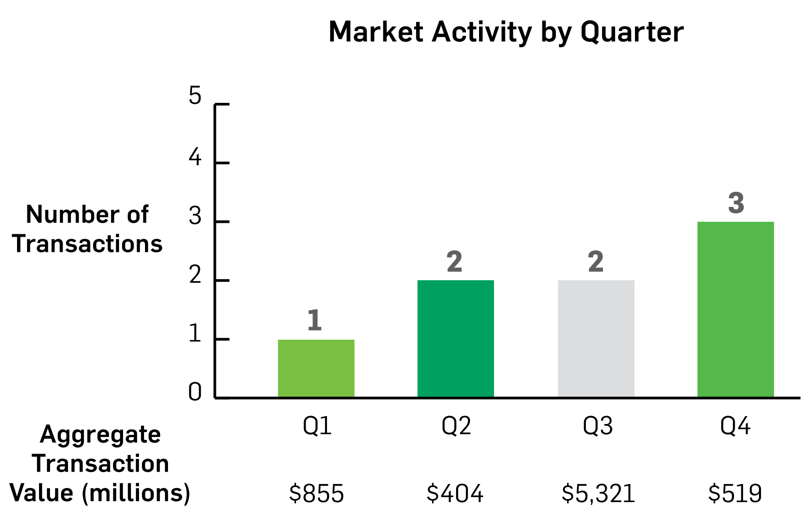
There were eight transactions in 2010 meeting the survey criteria. Transaction values in the survey ranged from $110 million to $3.0 billion.

Similar to previous years, in 2010, there were 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

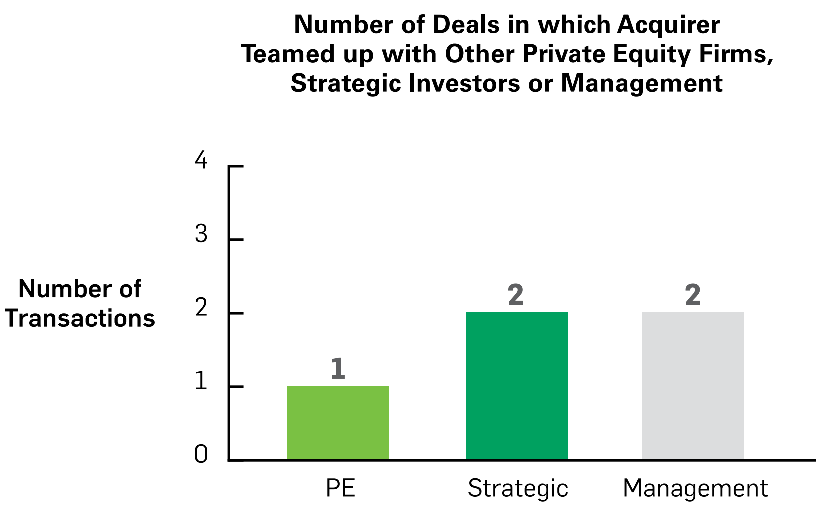


Typically, more mature markets in Asia-Pacific see more sponsor-backed going private transactions. This year is no exception. Six of the eight surveyed deals in 2010 were in more mature markets: Australia(2) and Japan(4).

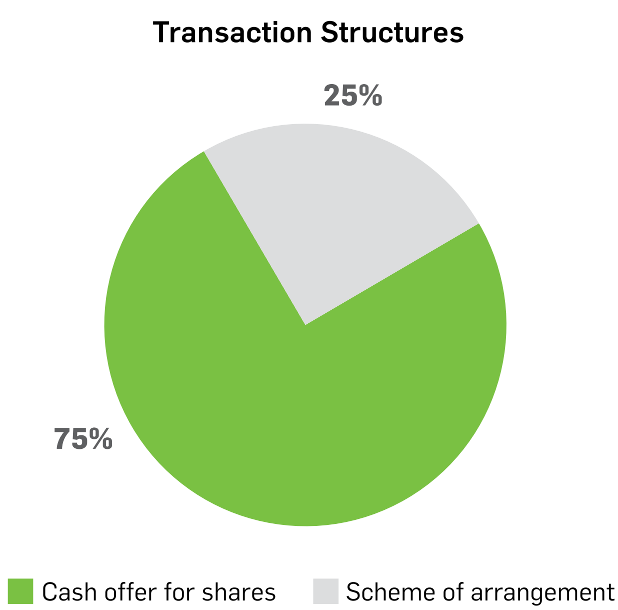


During the course of 2010, the general deal environment continued to improve. This appears to be reflected in the market activity during the year. Five out of the eight transactions were announced in the second half of 2010.

Transaction Structures



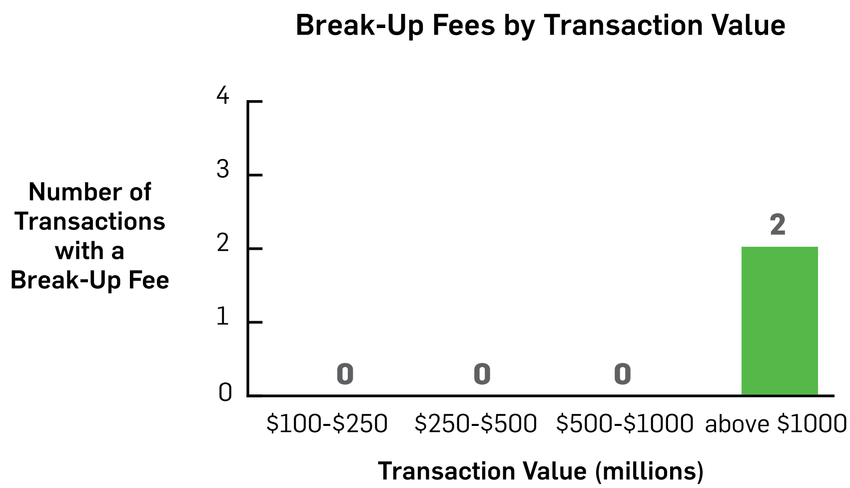
Private equity sponsors have been teaming up with other parties in effecting going private transactions in the region. Five of this year's eight surveyed transactions involved teaming up with private equity sponsors, strategic investors or target company's management.



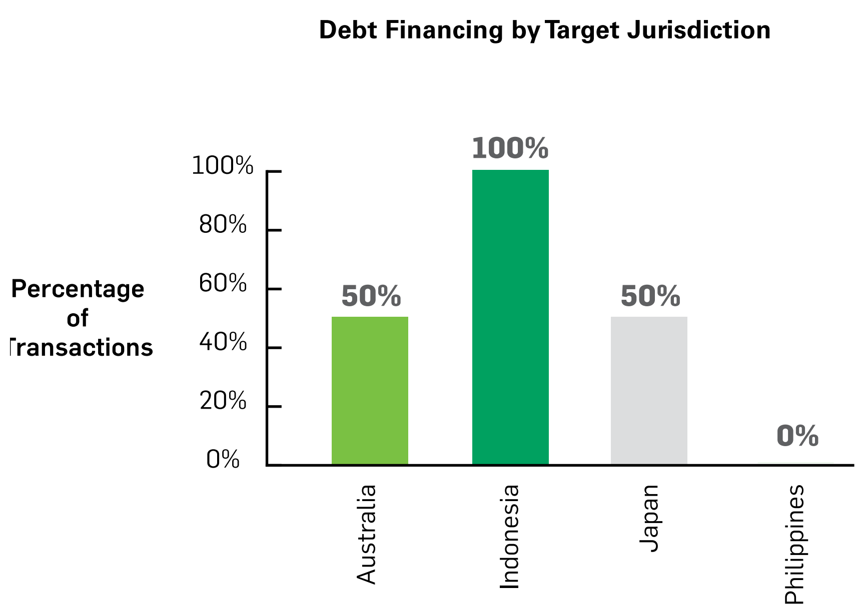
As would be expected, the legal regimes applicable to public takeovers in the jurisdiction of the target company determine the form of transaction. All the transactions surveyed in 2010 were accomplished by either (i) a cash offer for shares or (ii) a scheme of arrangement.

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

Break-Up Fees and Debt Financing



Break-up fee provisions were included in certain surveyed transactions 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.



Four out of the eight surveyed transactions had debt financing, which appeared to be more commonly used by sponsors in more mature markets: Australia (1), Indonesia (1) and Japan (2).

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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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