Weil

A LOOK AT GOVERNANCE AND LIQUIDITY ARRANGEMENTS IN SPONSOR-BACKED

INITIAL PUBLIC OFFERINGS

MAY 2018

2018
Private Equity
Surveys

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INTRODUCTION & RESEARCH METHODOLOGY

Welcome to Weil, Gotshal & Manges LLP's survey of governance and liquidity arrangements in sponsor-backed initial public offerings ("IPOs") in the United States. In preparing this survey, we reviewed and analyzed the material terms of 13 IPOs consummated on United States listing exchanges in calendar year 2017 by companies that had one or more private equity sponsor owner(s) (each, a "Sponsor"). The 13 surveyed transactions consisted of 6 "club" deals (i.e., a deal that has more than one Sponsor with a material ownership position in the company) and 7 single-Sponsor deals. Specifically, the 13 surveyed transactions included the following Sponsor-backed companies:

- Emerald Exposition Events, Inc.
- Evoqua Water Technologies Corp.
- Floor & Décor Holdings, Inc.
- Foundation Building Materials Inc.
- Gardner Denver Holdings Inc.
- Invitation Homes Inc.
- National Vision Holdings, Inc.
- NCS Multistage Holdings, Inc.
- Optinose, Inc.
- PQ Group Holdings Inc.
- SailPoint Technologies Holdings, Inc.
- Sea Ltd.
- Wideopenwest, Inc.

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

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

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SUMMARY OF KEY FINDINGS

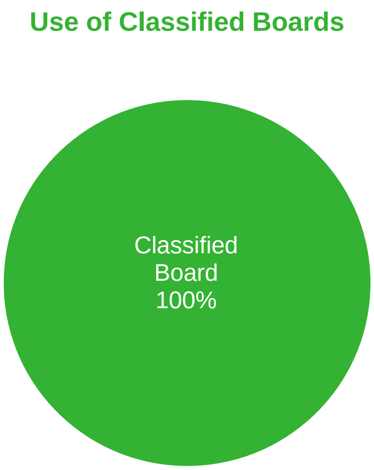
- Sponsor-backed IPO companies typically (77%) avail themselves of at least some “controlled company” exemptions available under applicable listing requirements, which, among other things, exempt such companies from certain board and committee director independence requirements (other than with respect to the audit committee).
- In all of the surveyed deals, Sponsors adopted a classified board structure for the newly-public company in connection with an IPO.
- In “club” deals, Sponsors usually (67%) secured contractual rights to nominate or designate directors to serve on the public company’s board of directors (in some cases, including committees thereof) following an IPO. In single-Sponsor deals, Sponsors also usually secured such rights (86%).
- In a minority of deals (31%), Sponsors secured shareholder consent or veto rights over the public company taking certain post-IPO actions.
- In “club” deals, a limited number of Sponsors (33%) secured the ability to assign their governance rights to a transferee. Such provisions were not found in single-Sponsor deals.
- Share transfer restrictions (other than compliance with underwriters’ lock-ups and compliance with securities laws) rarely continue post-IPO in both single-Sponsor and “club” deals. These restrictions can include, among others, (a) transfer limitations based on the relative ownership of a shareholder as compared to other shareholders, (b) enhanced lock-up provisions, (c) a right of first offer in favor of the Sponsor or other shareholders on transfers, (d) tag-along rights, (e) drag-along rights and obligations, and (f) agreements requiring coordination among multiple shareholders on sales of shares. In “club” deals, Sponsors with such arrangements should be mindful of the possibility of forming a “group” under Section 13 of the Exchange Act.
- Sponsors always secure demand registration rights following an IPO.
- In a majority of deals surveyed, Sponsors secured rights to obtain company information directly from the company or rights of access to the company’s senior management.

KEY FINDINGS

GOVERNANCE

Sponsor-backed IPO companies typically avail themselves of at least some "controlled company" exemptions available under applicable listing requirements. In 77% of the surveyed IPOs, the company disclosed in its prospectus that it would be treated as a "controlled company" under applicable listing requirements. A controlled company is a company in which more than 50% of the voting power for election of directors is held by an individual, a group or another company. Controlled companies are exempt from the listing requirements to have a majority of independent directors and from having fully independent compensation and nominating committees (but must have a fully independent audit committee).

In all of the surveyed deals, Sponsors used a classified board structure for the newly-public company in connection with its IPO. In a classified board, directors are separated into a number of classes (typically three) that each serve "staggered," multi-year terms (typically three years), rather than a single class of directors where each director is elected on an annual basis.



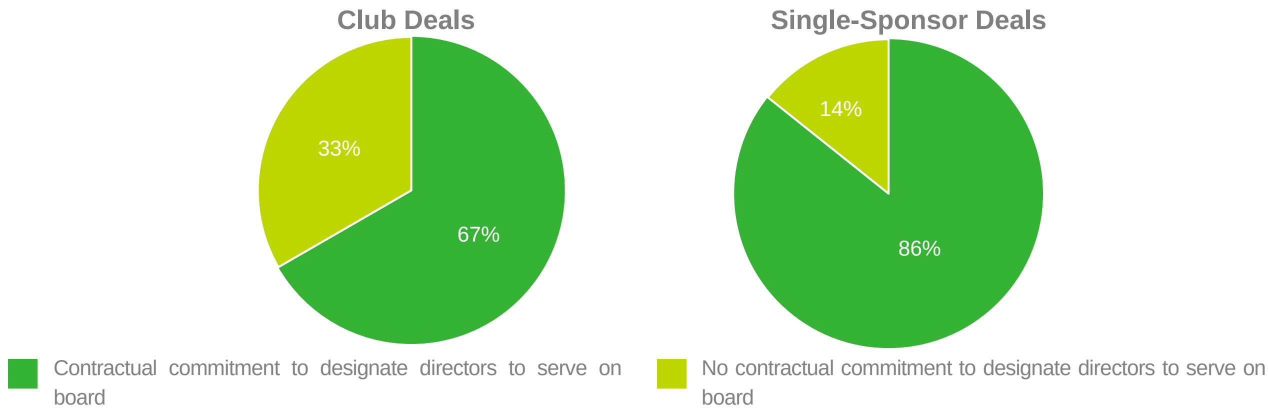
- A classified board serves a number of functions: it helps ensure that the Sponsor is represented on the board for at least three years following an IPO since the last class will not be subject to election until the third year (assuming a three-year term) and it allows the Sponsor to retain some board representation following one or more offerings.
- Newly public companies adopting a classified board structure (especially if together with other defensive measures such as super-majority shareholder approval requirements) should understand that these practices are criticized by leading proxy advisory firms (ISS and Glass Lewis) due to concerns that such a structure limits the accountability of directors to shareholders. Directors should understand the risk of receiving a recommendation against their election at the annual meeting as a result of adopting these practices. Once the Sponsor fully or substantially exits, the portfolio company will come under pressure to eliminate the classified board and other provisions viewed as adverse to shareholders.

In club deals, Sponsors usually secured contractual rights to nominate or designate directors to serve on the public company's board of directors (in some cases, including committees thereof) following an IPO. In single-Sponsor deals, Sponsors secured such rights in a significant majority of deals.

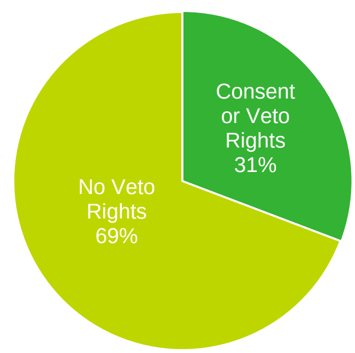
- These rights were typically structured as (1) a right for the Sponsor to nominate a certain number of directors to the board, (2) an agreement among pre-IPO shareholders to vote their shares in favor of a certain number of Sponsor nominees or (3) a combination of both.
- Generally, the number of directors a Sponsor was entitled to nominate or designate was proportional to (or otherwise tied to) its ownership position in the company post-IPO and fell away completely once

the Sponsor's ownership level fell below a specified percentage of the company's outstanding equity (typically around 10%).

Board Rights



Sponsor Veto Rights



Sponsors sometimes secure a limited set of shareholder consent or veto rights over the public company taking certain actions following an IPO. In 31% of the surveyed IPOs, the Sponsor had consent or veto rights in its capacity as a shareholder with respect to the company taking certain actions following an IPO. In some cases, these consent and/or veto rights applied to a limited set of fundamental protections (e.g., amendments to important sections of the company's certificate of incorporation or bylaws, altering the size and/or composition of the board, change of control transactions, or effecting a voluntary liquidation). However, in other cases, a Sponsor's consent or veto rights extended to other more operational matters, including with respect to:

- Consummating acquisitions or dispositions in excess of a specified threshold and change of control transactions;
- Incurring indebtedness in excess of a specified threshold;
- Entering into new lines of business or materially changing existing lines of business;
- Appointing, removing or changing the compensation of certain senior executive officers;
- Initiating or settling litigation in excess of a specified threshold;
- Adopting a new equity incentive plan or modifying existing plans; and
- Effecting certain dividends, distributions, repurchases or redemptions of company shares.

Shareholder consent and veto rights provide an additional layer of protection for the Sponsor and permit the Sponsor to make decisions directly in its capacity as a shareholder.

These veto rights typically terminate when the Sponsor's equity ownership dropped below a specified threshold, sometimes as low as 10% of the company's outstanding shares.

A limited number of Sponsors secured the ability to assign their governance rights to a transferee. While no Sponsors in a single-Sponsor deal secured such rights, 33% of Sponsors in "club" deals had such rights. The ability to assign governance rights to a transferee could increase the value of a minority stake sold in a private transaction.

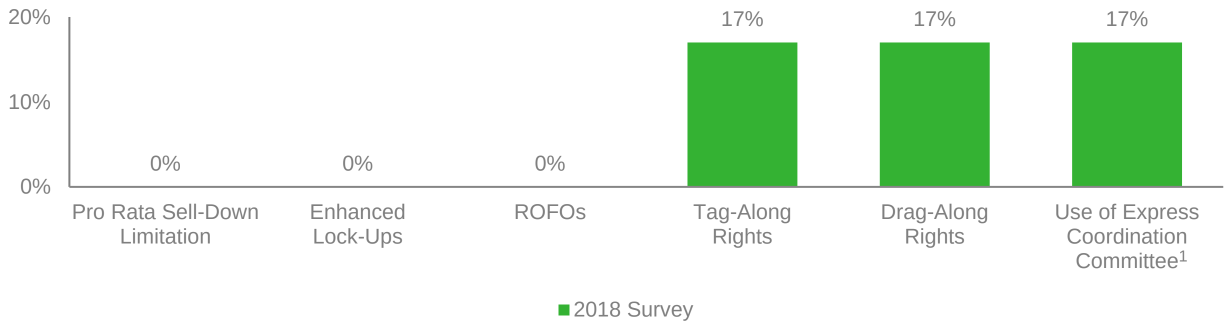
In a significant majority of deals, Sponsors included supermajority-voting requirements for the shareholders to take certain post-IPO actions in the organizational documents of the Company. In 77% of the surveyed IPOs, the public company had supermajority-voting provisions that required a supermajority of the shareholders with respect to the company taking certain actions following an IPO. In most cases, the supermajority voting provisions applied to a limited number of fundamental protections.

LIQUIDITY

In single-Sponsor deals, share transfer restrictions on pre-IPO shareholders (other than compliance with underwriters' lock-ups and compliance with securities laws) rarely continue post-IPO, but are more common in club deals. Typically, transfer restrictions are more common in club deals, as Sponsor shareholders, who usually hold substantial stakes in the public company, wish to control the timing and volume of any sales of shares by other Sponsors to reduce the risk of "front running."

- In 17% of the club deals we surveyed, Sponsors included in post-IPO shareholder agreements some of the legal mechanisms typically included in private company shareholder agreements with respect to transfer restrictions, rights and obligations, as highlighted in the chart below.

Transfer Provisions in Club Deals



[1] A coordination committee is designed to prevent "front-running" or uncoordinated selling by co-investors, each of which may adversely affect the market price of the public company's stock.

Sponsors always secure demand registration rights following an IPO. In all of the surveyed IPOs, the Sponsor had the right to demand registration of its company shares on at least one occasion following an IPO (and in the vast majority of cases for both single-Sponsor deals and club deals, the Sponsor(s) had a right to unlimited demand registrations). Sponsors also typically had piggyback registration rights on the registration of company shares by the company or another major shareholder.

ACCESS & INFORMATION RIGHTS

In a majority of deals surveyed, Sponsors secured rights to obtain company information directly from the company or rights of access to the company's senior management. In 62% of the surveyed IPOs, the Sponsor negotiated a contractual right to receive certain company information (regardless of whether such information was made publicly available) or a right to have access to the senior management team to discuss company information.

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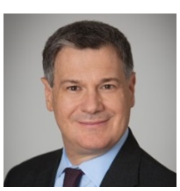

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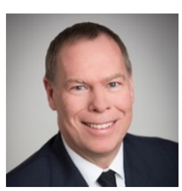

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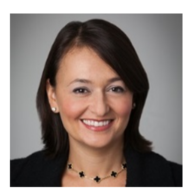

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