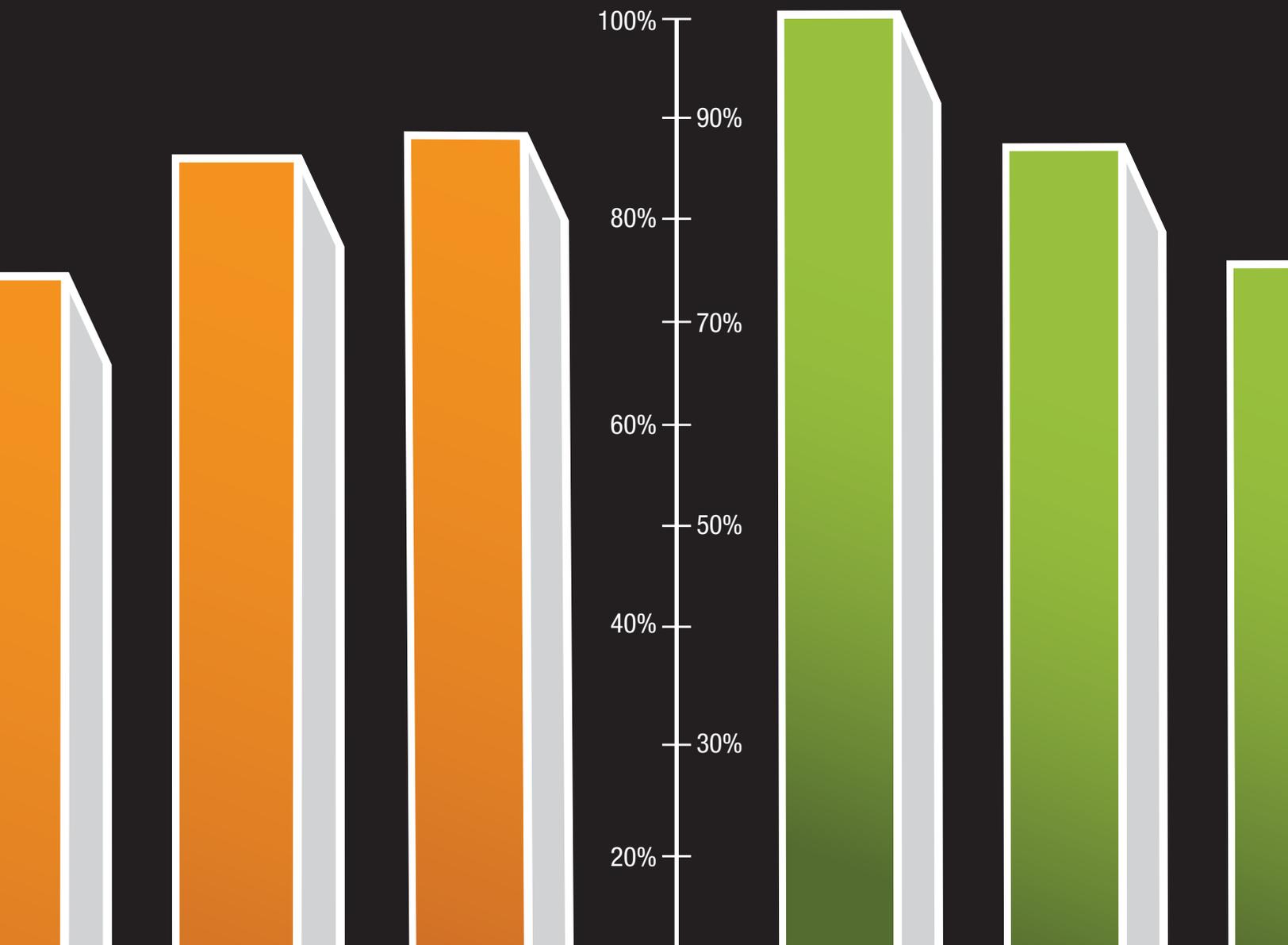


October 2012

# M&A LEADERS SURVEY

Morrison & Foerster  
451 Group



Concern over sluggish economic growth in the United States has tech dealmakers feeling less optimistic about the M&A market today than they were six months ago, according to a key finding from the latest M&A Leaders Survey issued by global law firm Morrison & Foerster and 451 Research, a technology research firm. The October 2012 survey charts the sentiments of players across the tech dealmaking community, including CEOs, CFOs, business development executives, in-house counsel, venture capital and private equity firms, and investment bankers.

MoFo and 451 launched the inaugural survey in April 2012. The second survey, distributed in early October 2012 and detailed below, sought respondents' views on:

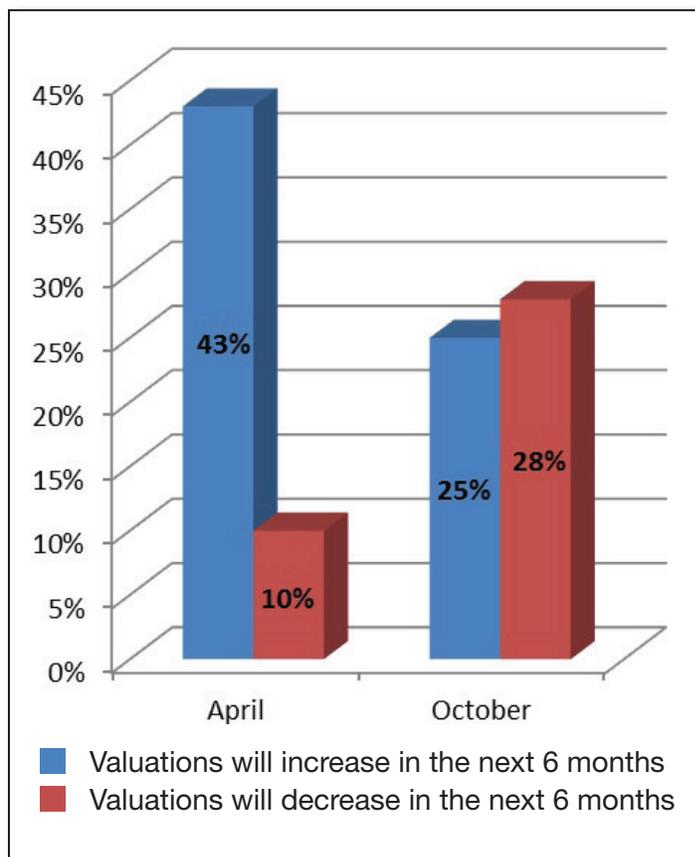
- the level of M&A activity over the past six months, as compared to the previous two years;
- their expectations of M&A activity over the next six months, as compared to 2012 to date; and
- deal structures, including term sheets, letters of intent, exclusivity agreements, and post-closing indemnity agreements.

### I. Market Analysis and Outlook

When comparing deal activity over the past six months with similar periods in the past two years, the sentiment of respondents is decidedly mixed. An almost equal number report that deal activity is less active (33%) as compared to those who say it is more active (35%). Looking forward, however, the outlook appears brighter, with 49% predicting that their M&A activity will increase over the next six months. Still, any optimism associated with that figure needs a caveat: the number is a full 10 percentage points lower than the figure reported in our April survey.

Similarly, when it comes to prospective M&A valuations, respondents are about evenly split, with 25% saying valuations will go up and 28% saying they will go down in the coming six-month period. The significance of those numbers, however, is again to be found in the marked decline in expected valuations from the last survey. In April, about 43% believed valuations would increase and only 10% thought they would decrease.

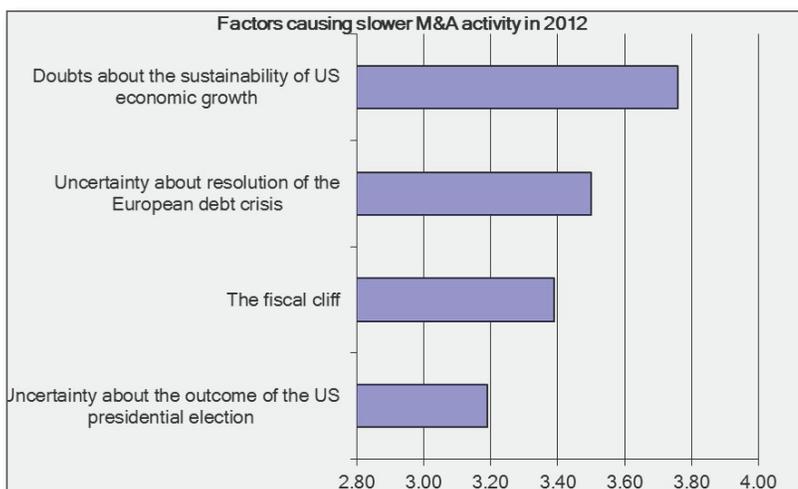
What's behind the waning optimism? In descending order of importance, the respondents found the following macroeconomic factors to be "somewhat strong" or "very strong" factors contributing to the decline in 2012 M&A spending: doubts about the sustainability of U.S. economic growth (70%), uncertainty about the resolution of the European debt crisis (58%), lack of clarity about the so-called "fiscal cliff" – the automatic triggering of tax hikes and spending cuts scheduled to take effect in the United States in



January if alternatives are not put in place (53%), and uncertainty about the outcome of the U.S. presidential election (46%).

Reflecting the range of industries represented in the survey (see Section III below), the respondents' written comments to this question reveal a variety of alternative or additional factors to explain the slowdown – ranging from energy prices to changes in leadership in China to the impact of Obamacare to government procurement policies.

Explaining the character of the M&A activity that is occurring, one respondent points to the activity of forward-looking



## Letters of Intent “Critical”

Almost 70% of respondents see Letters of Intent as mission critical, agreeing that “most of the major business issues are won or lost at this stage.” As for their composition, 82% of respondents believe they should contain a timeline and terms. Still, 67% say those terms should not be binding, with the exception of terms related to exclusivity or confidentiality. As one respondent writes, “These are extremely important documents, and lawyers should be involved. With instructions from their clients not to be deal killers. AND there must always be flexibility. That’s the key to creativity, too.”

## Exclusivity Agreements Change the Playing Field

More than 61% of respondents agree that exclusivity (no shop) agreements immediately tilt the playing field in favor of the buyer. One respondent went so far as to comment that he or she has seen “WAY too many deals where the bidder drags things along until the target has no other alternative other than to roll over and give up.” Adding nuance to the analysis, only a quarter of respondents say targets should not agree to an exclusivity agreement at all, while more than three quarters (82%) believe targets should not agree to a no-shop clause until the buyer has committed to a price and positions on most of the material terms of the deal.

buyers. “In our view, uncertainty has produced somewhat countervailing results,” says this respondent. “Some enterprises have seized the choppiness of the recovery in the United States opportunistically and are pursuing aggressive acquisition plans to position themselves for future growth.”

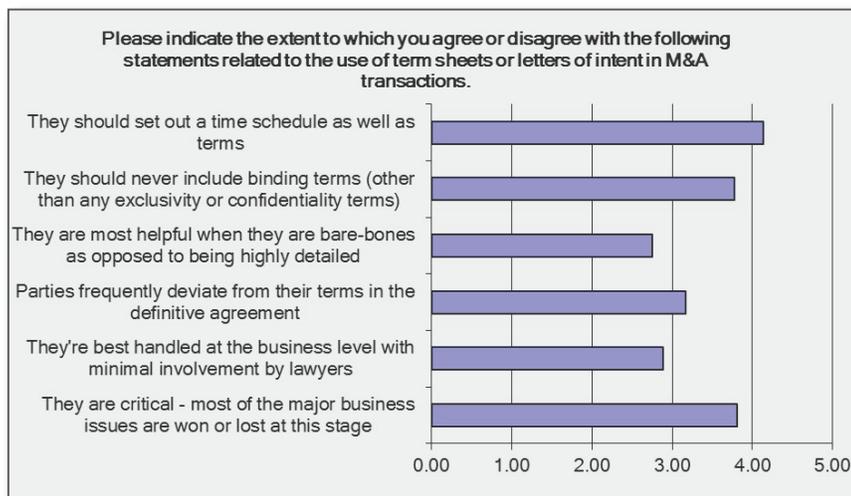
A few other respondents note in written comments appended to their survey responses that while overall activity may be down, there is an increased focus on companies with “unique niche positions and growth.”

At the microeconomic level, the overwhelming response is that the prices of targets are too high, with 66% rating this as a factor inhibiting activity. Other significant factors are a lack of qualified targets (45%) and due diligence issues at targets (36%). Respondents only rarely cited insufficiency of cash reserves (18%), target companies’ complex capital structures (14%), and competition with IPOs (12%) as deal inhibitors. So much for the Facebook effect.

Comments about microeconomic factors affecting deal flow run the gamut, with one respondent highlighting the importance of “the transformation of the software market towards the [everything as a service] model, and a huge re-calibration of performance indicators, plus a fairly consolidated traditional enterprise software market,” while another says, “The valuations paid for recent large [software as a service] acquisitions are just plain ridiculous and shareholder value is being hurt. Somebody needs to hit the reset button.”

## II. Deal Structure

The M&A Leaders Survey also seeks the views of tech dealmakers and their advisors on certain “inside baseball” aspects of the tech deal market. These include questions about term sheets/letters of intent, exclusivity (“no shop”) agreements, and post-closing indemnity agreements.



## Post-closing Indemnity Agreements Rarely Triggered

Interestingly, it seems that the amount of time and attention devoted to post-closing indemnity agreements – most of which (70%) are between 6% and 15% of the deal value – may be out of sync with how often the agreements are actually triggered. More than 60% of the respondents indicate that such agreements were triggered in 5% or fewer of their deals over the past two years, including 40% who report that such agreements were not been triggered at all.

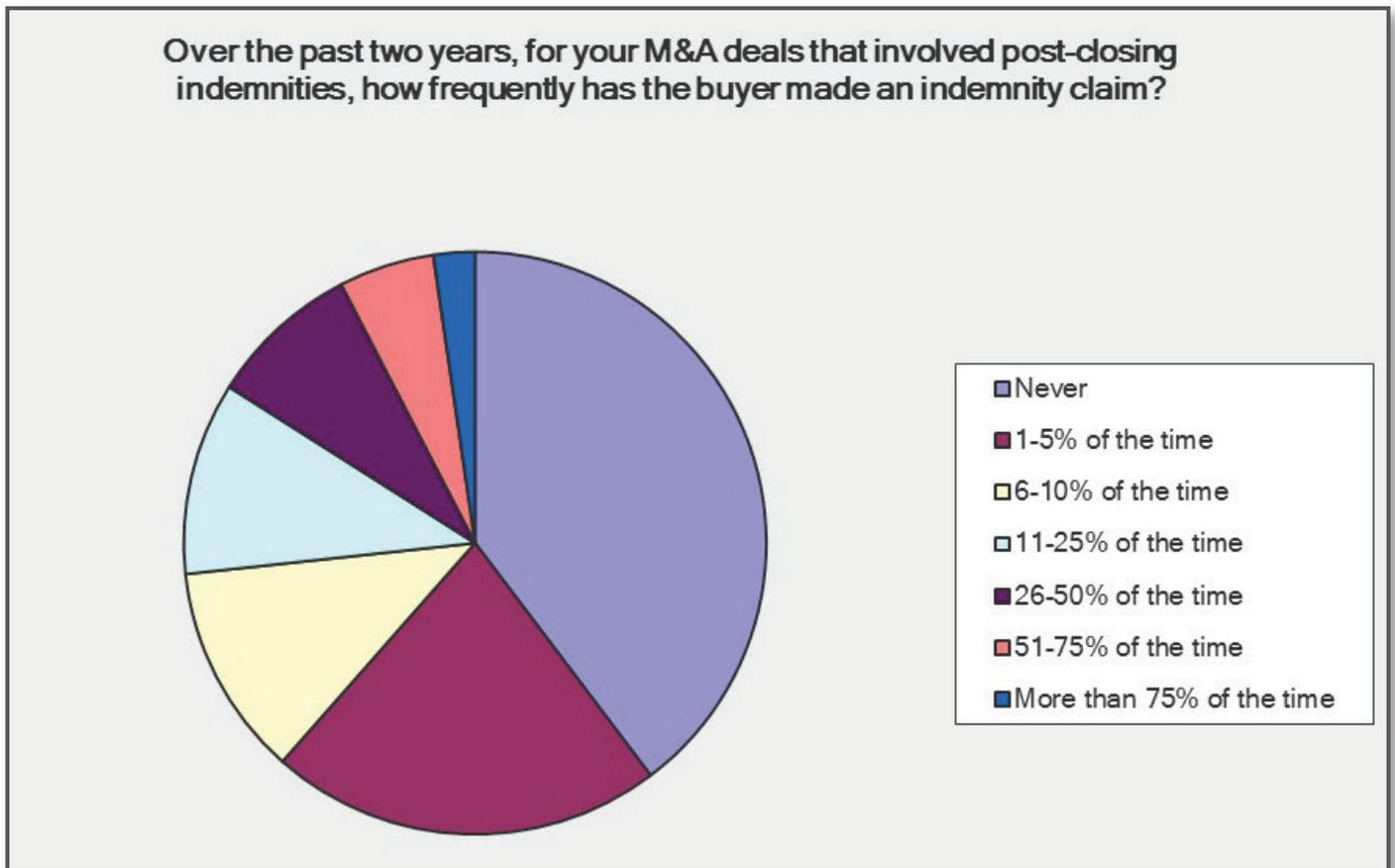
More than 77% of the dealmakers say a buyer has never sought or threatened a claim “beyond the escrow” or “beyond the holdback” directly against former shareholders of the target company. Similarly, almost 75% report that, in cases involving third-party litigation that led to an indemnity claim against the escrow, the representative of the former shareholders of the target company never controlled the litigation. For the two litigation-related questions, however, the comments indicate that respondents may have lacked experience with claims against escrow in the first place.

This includes 40% working for public companies, 34% working at investment banks and in other financial advisory roles, 25% in business development and other corporate positions, and 19% who indicate they are C-level executives.

Investment bankers are well-represented in the survey (34% of respondents), as are those who tag IT as their business type, including business segments such as infrastructure software, applications software, and semiconductors.

### III. Respondent Demographics

The second edition of the MoFo-451 M&A Leaders Survey enjoyed a strong response rate – more than 300 tech dealmakers and advisors from a variety of company types and sectors weighed in with their sentiments and predictions.



## About Morrison & Foerster:

Morrison & Foerster ([www.mofo.com](http://www.mofo.com)) is one of the world's premiere advisors on mergers and acquisitions, with a strong expertise in technology-related deals. The firm's global corporate group has played a lead role in many of the largest technology M&A transactions of the past two years. Recent advisory assignments included:

- Softbank in its announced \$20.1 billion investment for a 70% interest in Sprint-Nextel (announced Oct. 2012)
- Softbank in its \$2.3 billion acquisition of wireless carrier eAccess (announced Oct. 2012)
- Hitachi in the \$4.8 billion sale of its hard disk drive and data storage business, Hitachi Global Storage Technologies, to Western Digital (closed Mar. 2012)
- Intel in its \$7.7 billion acquisition of McAfee, its \$4.1 billion investment in Dutch chip-maker ASML, and its \$1.4 billion acquisition of the Wireless Solutions Business of Infineon Technologies AG
- Novellus Systems, Inc. in its \$3.3 billion sale to Lam Research Corp, the largest announced stock-for-stock tech deal in 2011
- Terumo Corporation in its \$2.6 billion acquisition of CaridianBCT (closed April 2011)
- Tokyo-based DRAM chip-maker Elpida in its proposed \$2.5 billion acquisition by Micron Technologies, one of Japan's largest inbound M&A deals ever
- Toshiba Corporation in its \$2.3 billion acquisition of Landis+Gyr AG (closed July 2011)
- Toshiba Tec in its acquisition of IBM's Retail Store Solutions business for approximately \$850 million (announced April 2012)

## About 451 Research:

451 Research ([www.451research.com](http://www.451research.com)), a division of The 451 Group, is focused on enterprise IT innovation. The company's analysts provide insight into the competitive dynamics of emerging technology segments, with a deep focus on mergers and acquisitions. Business value is delivered via daily published research, periodic deeper-dive reports, data tools, market-sizing research, analyst advisory, and conferences and events.

The company's clients – including vendor, investor, service-provider and end-user organizations – rely on 451 Research to support both strategic and tactical decision-making. 451 Research is headquartered in New York, with offices in key technology and financial markets, including San Francisco, Washington, D.C., London, Boston, Seattle, and Denver.

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