M&A Report

2022

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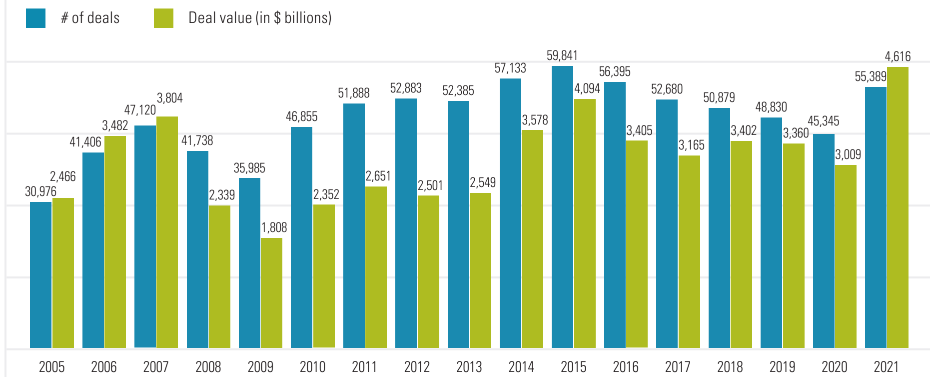
2022 M&A Report—What's Inside

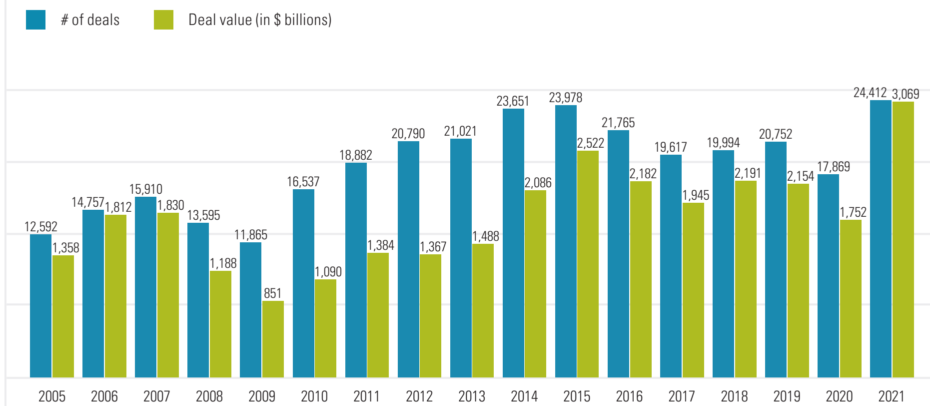
Market Review and Outlook

Global M&A Activity—2005 to 2021



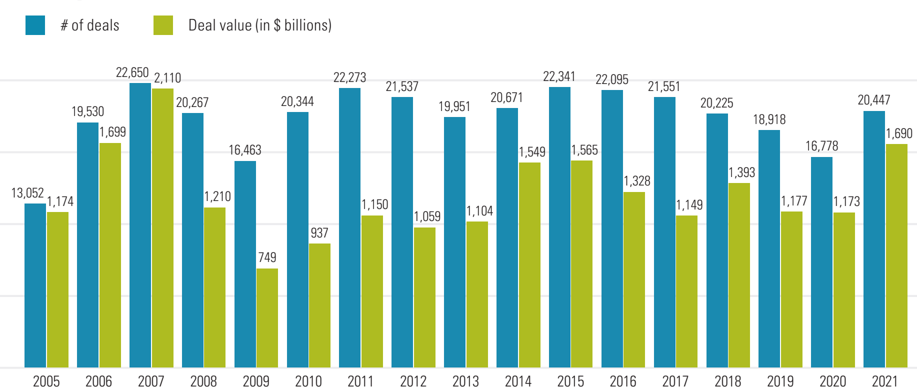
Source: S&P Global Market Intelligence

US M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

European M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

Despite the tumult and uncertainty caused by COVID-19, M&A activity surged in 2021, buoyed by companies eager to augment organic growth in a low interest rate environment and those seeking to respond to changes in business practices resulting from the pandemic.

The number of M&A transactions worldwide increased by 22%, from 45,345 deals in 2020 to 55,389 in 2021. Global M&A deal value grew 53%, from $3.01 trillion to a record high of $4.62 trillion. The average deal size in 2021 was $83.3 million, up 26% from the $66.4 million in 2020.

GEOGRAPHIC RESULTS

Deal volume and value increased across all major geographic regions in 2021.

— ***United States***: Deal volume grew by 37%, from 17,869 transactions in 2020 to 24,412 in 2021. US deal value soared by 75%, from $1.75 trillion to $3.07 trillion. Average deal size increased by 28%, from $98.0 million to $125.7 million. The number of billion-dollar transactions involving US companies more than doubled, from 280 in 2020 to 590 in 2021, while their total value surged by 83%, from $1.28 trillion to $2.33 trillion.

— ***Europe***: After declining for five consecutive years, the number of transactions in Europe rose by 22%, from 16,778 in 2020 to 20,447 in 2021. Total deal value increased by 44%, from $1.17 trillion to $1.69 trillion. Average deal size increased by 18%, from $69.9 million to $82.6 million. The number of billion-dollar transactions involving European companies grew by 79%, from 187 in 2020 to 334 in 2021, while their total value increased by 50%, from $825.4 billion to $1.24 trillion.

— ***Asia-Pacific***: The Asia-Pacific region saw deal volume grow by 10%, from 10,903 transactions in 2020 to 12,008 in 2021. Total deal value in the region increased by 20%, from $906.1 billion to $1.09 trillion, while average deal size increased by 9%, from $83.1 million to $90.6 million. The number of billion-dollar transactions involving Asia-Pacific companies jumped by 45%, from 128 in 2020 to 186 in 2021, while their total value increased by 25%, from $529.9 billion to $664.3 billion.

SECTOR RESULTS

M&A transaction volume and value increased across all primary industry sectors in 2021.

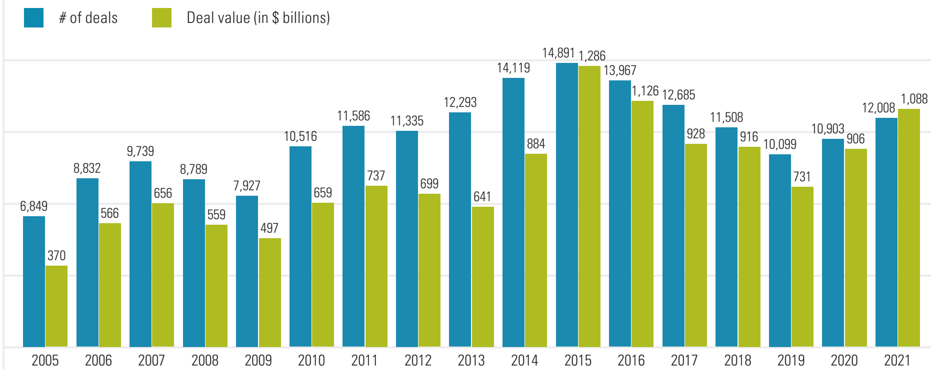
— ***Technology***: Global transaction volume in the technology sector increased by 31%, from 7,745 deals in 2020 to 10,169 deals in 2021. Global deal value grew by 41%, from $517.4 billion to $732.1 billion. Average deal size rose by 8%, from $66.8 million to $72.0 million. US technology deal volume grew by 38%, from 3,170 to 4,725 transactions, while total US technology deal value leapt by 57%, from $376.0 billion to $589.1 billion, resulting in a 5% increase in average deal size, from $118.6 million to $124.7 million.

— *Life Sciences*: Global transaction volume in the life sciences sector increased by 20%, from 1,539 deals in 2020 to 1,844 deals in 2021, while global deal value grew by 46%, from $200.1 billion to $291.2 billion. Average deal size grew by 21%, from $130.0 million to $157.9 million. In the United States, deal volume rose by 18%, from 718 to 959 transactions, while deal value jumped by 42%, from $165.8 billion to $234.9 billion, resulting in a 6% increase in average deal size, from $230.9 million to $245.0 million.

— *Financial Services*: Global M&A activity in the financial services sector increased by 17%, from 2,564 deals in 2020 to 3,005 deals in 2021. Global deal value was up 37%, from $265.7 billion to $363.2 billion, resulting in a 17% increase in average deal size, from $103.6 million to $120.9 million. In the United States, financial services sector deal volume rose by 21%, from 1,239 to 1,610 transactions, while total deal value surged by 68%, from $121.5 billion to $204.7 billion. Average US deal size grew by 30%, from $98.1 million to $127.1 million.

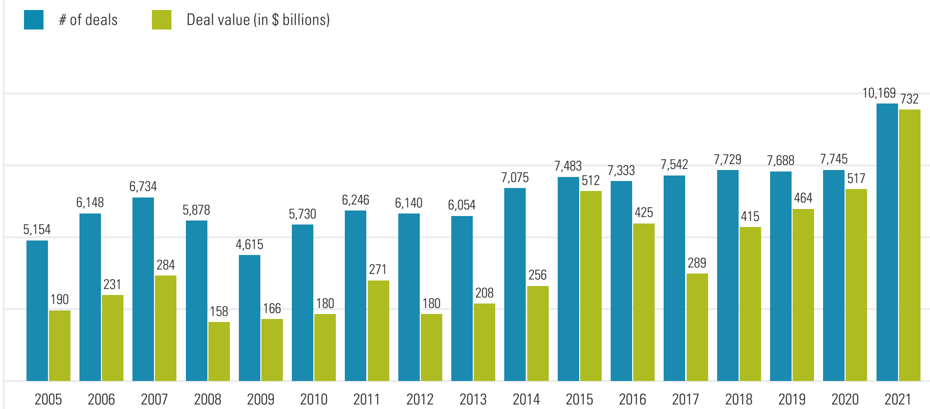
— *Telecommunications*: Global transaction volume in the telecommunications sector grew modestly, from 734 deals in 2020 to 793 deals in 2021. Deal value rose by 43%, from $220.4 billion to $314.5 billion, resulting in a 32% increase in average deal size, from $300.3 million to $396.6 million. US telecommunications deal volume increased 7%, from 189 to 223 transactions, while deal value more than doubled, from $112.4 billion to $229.9 billion. The average US telecommunications deal size grew by 73%, from $594.7 million to $1.03 billion.

Asia-Pacific M&A Activity—2005 to 2021



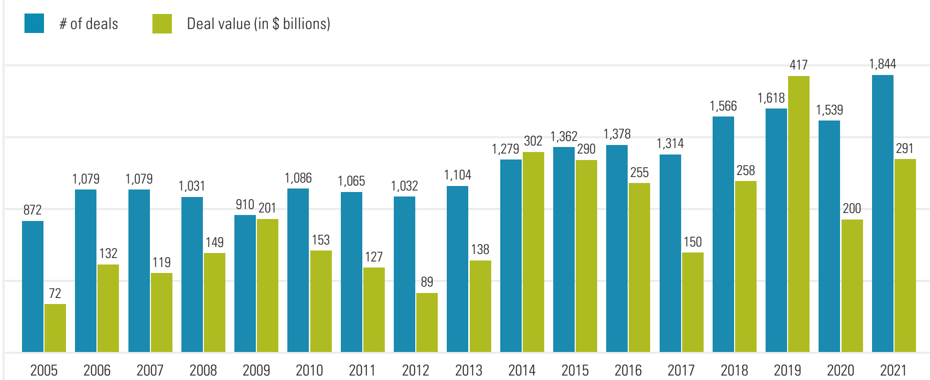
Source: S&P Global Market Intelligence

Technology M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

Life Sciences M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

OUTLOOK

Expectations that the COVID-19 pandemic would be under control by some point in 2021, conquered by vaccinations or simply having run its course, proved to be misguided. With new mutations of the virus emerging periodically and swaths of the world largely unvaccinated, the "new normal" seems much more likely to prevail in 2022 than an unconditional return to a pre-pandemic economy and everyday life.

The strength of the M&A market in 2021 was nothing short of remarkable. Entering 2022, the market faces the continuing shadow of the pandemic and other headwinds, which are likely to test its resilience. Some companies will continue to see opportunities, while others are likely to struggle with the consequences of the pandemic and forgo dealmaking. For all M&A participants, macroeconomic factors appear more challenging than they have for several years.

Important factors that will affect M&A activity over the coming year include the following:

— ***Macroeconomic Conditions***: With strong GDP growth forecast to continue into 2022, one of the biggest concerns in the coming year will be whether the Federal Reserve will be able to ease inflationary pressures without jeopardizing economic growth. In January, the Fed indicated that it plans to raise interest rates "soon" to tamp down inflation, and, more recently, signaled an openness to raising interest rates more rapidly later this year if inflation does not moderate. The emergence of new COVID-19 variants has the potential to slow the reopening of the economy and could also lead to further disruption in the global supply chain, especially in China.

— ***Valuations***: While the pandemic has cast a pall over some sectors of the economy, others have experienced unprecedented growth. Disparate changes in business metrics and prospects across companies, combined with the Fed's massive infusion of liquidity into the financial system since the start of the pandemic, have contributed to sharp shifts in valuations among companies and even entire sectors. Whether interest rate hikes can rein in speculative fervor and moderate increases in valuations, especially for privately held targets, remains unclear.

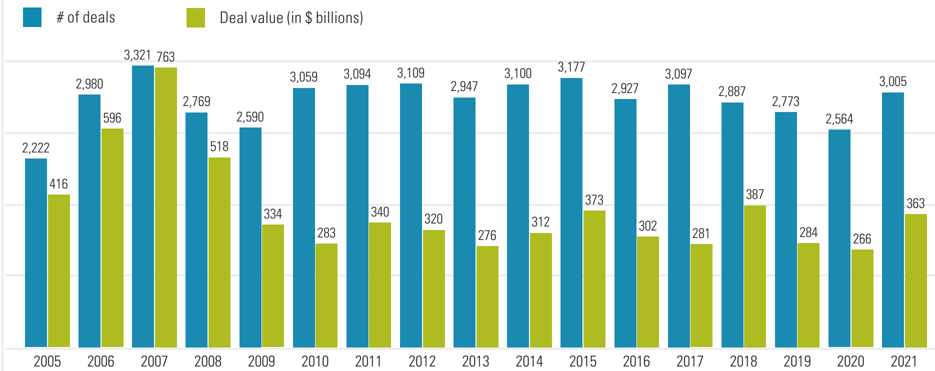
— ***Private Equity Activity***: On the buy side, private equity firms continue to hold record levels of "dry powder" to deploy, but the explosion of special purpose acquisition companies (SPACs) since 2020—more than 850 IPOs raising an aggregate of more than $225 billion—is likely to heighten competition for deals and drive up prices in some cases. On the sell side, PE firms face pressure to exit investments and return capital to investors, even if returns are dampened by higher prices and increases in the level of equity invested in acquisitions.

— ***VC-Backed Companies***: The number of reported US acquisitions of VC-backed companies increased by 40%, from 979 in 2020 to 1,373 in 2021, while reported proceeds rose by 8%, from $90.80 billion to $98.05 billion. VC-backed companies and their investors often prefer the relative ease and certainty of a company acquisition to the lengthier and more uncertain IPO process. In the coming year, the volume of VC-backed company sales will depend in part on their valuations (which, in 2021, reached a record high for the second consecutive year), the performance of recent VC-backed IPOs, and the overall health of the IPO market.

— ***SPAC Mergers***: Mergers involving SPACs more than tripled in 2021, reaching 199 completed transactions compared to 64 in the prior year. At the end of 2021, there were 574 SPACs searching for a business combination target, each of which must complete a business combination within a prescribed time frame or return funds to investors. Based on the large and growing number of SPACs in this position, SPAC transactions should play an even more significant role in 2022 M&A activity.

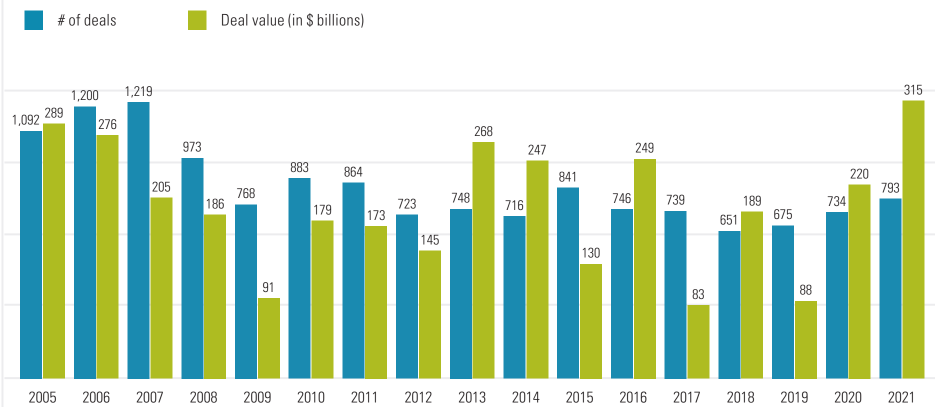
On balance, the M&A market is likely to remain active in the coming year, although growth rates that rival those achieved in 2021 seem unlikely. The fourth quarter of 2021 produced 13,816 transactions with a total deal value of $1.07 trillion, down from 14,370 transactions with a total deal value of $1.22 trillion in the fourth quarter of 2020 (although that quarter reflected the surge in deal activity following lockdowns earlier in the year).

Financial Services M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

Telecommunications M&A Activity—2005 to 2021



Source: S&P Global Market Intelligence

Set forth below is a summary of common takeover defenses available to public companies and some of the questions to be considered by a board in evaluating these defenses.

CLASSIFIED BOARDS

Should the entire board stand for re-election at each annual meeting or should directors serve staggered three-year terms?

Supporters of classified, or "staggered," boards believe that classified boards enhance the knowledge, experience and expertise of boards by helping ensure that, at any given time, a majority of the directors will have experience and familiarity with the company's business. These supporters believe classified boards promote continuity and stability, which in turn allow companies to focus on long-term strategic planning, ultimately leading to a better competitive position and maximizing stockholder value. Opponents of classified boards, on the other hand, believe that annual elections increase director accountability to stockholders, which in turn improves director performance, and that classified boards entrench directors and foster insularity.

SUPERMAJORITY VOTING REQUIREMENTS

What stockholder vote should be required to approve mergers or amend the corporate charter or bylaws?

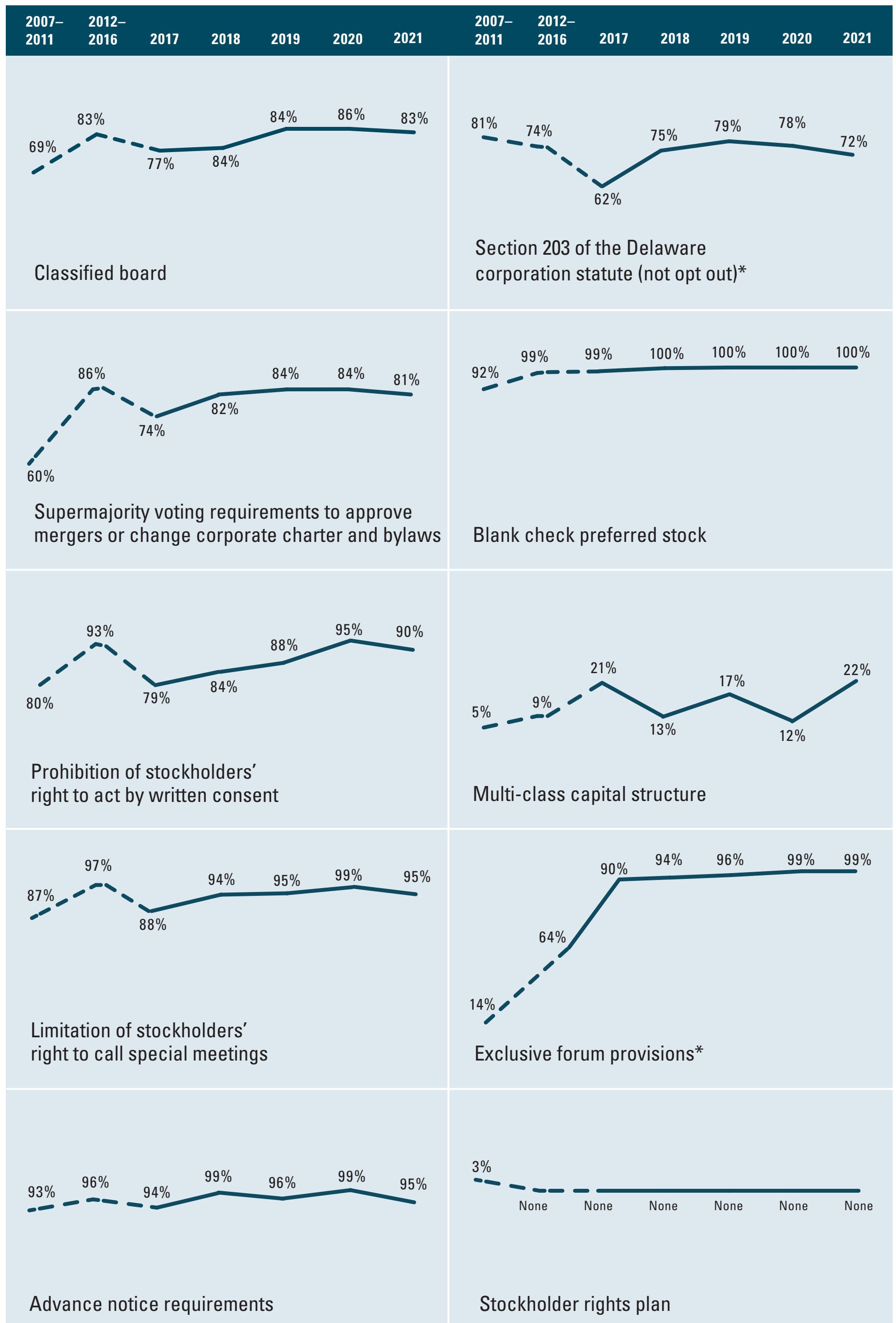
Advocates for supermajority vote requirements claim that these provisions help preserve and maximize the value of the company by ensuring that important corporate actions are taken only when it is the clear will of the stockholders. Proponents of a majority-vote standard believe it makes the company more accountable to stockholders and that improved accountability leads to better company performance. Supermajority requirements are also viewed by their detractors as entrenchment devices used to block initiatives that are supported by holders of a majority of the company's stock but opposed by management and the board. In practice, supermajority requirements can be almost impossible to satisfy.

PROHIBITION OF STOCKHOLDERS' RIGHT TO ACT BY WRITTEN CONSENT

Should stockholders have the right to act by written consent?

Written consents of stockholders can be an efficient means to obtain stockholder approvals without the need for convening a formal meeting, but can result in a single stockholder or small number of stockholders being able to take action without prior notice or any opportunity for other stockholders to be heard. If stockholders are not permitted to act by written consent, all stockholder action must be taken at a duly called stockholders'

TRENDS IN TAKEOVER DEFENSES AMONG IPO COMPANIES



*Delaware corporations only

Source: WilmerHale analysis of SEC filings from 2007 to 2021 (2011–2021 only for exclusive forum provisions) for US issuers.

meeting for which stockholders have been provided detailed information about the matters to be voted on, and at which there is an opportunity to ask questions about proposed business.

LIMITATION OF STOCKHOLDERS' RIGHT TO CALL SPECIAL MEETINGS

Should stockholders have the right to call special meetings, or should they be required to wait until the next annual meeting of stockholders to present matters for action?

If stockholders have the right to call special meetings of stockholders, one or a few stockholders may be able to call a special meeting, which can result in abrupt changes in board composition, interfere with the board's ability to maximize stockholder value, or result in significant expense and disruption to ongoing corporate focus. A requirement that only the board or specified officers or directors are authorized to call special meetings of stockholders could, however, have the effect of delaying until the next annual meeting actions that are favored by the holders of a majority of the company's stock.

ADVANCE NOTICE REQUIREMENTS

Should stockholders be required to notify the company in advance of director nominations or other matters that the stockholders would like to act upon at a stockholders' meeting?

Advance notice requirements provide that stockholders at a meeting may only consider and act upon director nominations or other proposals that have been specified in the notice of meeting and brought before the meeting by or at the direction of the board, or by a stockholder who has delivered timely written notice to the company. Advance notice requirements afford the board ample time to consider the desirability of stockholder proposals and ensure that they are consistent with the company's objectives and, in the case of director nominations, provide important information about the experience and suitability of board candidates. These provisions could also have the effect of delaying until the next stockholder meeting actions that are favored by the holders of a majority of the company's stock.

PREVALENCE OF TAKEOVER DEFENSES

	IPO COMPANIES	ESTABLISHED PUBLIC COMPANIES	
		S&P 500	RUSSELL 3000
Classified board	83%	13%	43%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	81%	18% to 36%, depending on type of action	15% to 55%, depending on type of action
Prohibition of stockholders' right to act by written consent	88%	68%	74%
Limitation of stockholders' right to call special meetings	95%	33%	53%
Advance notice requirements	97%	99%	96%
Section 203 of the Delaware corporation statute (not opt out)*	73%	91%	81%
Blank check preferred stock	100%	95%	96%
Multi-class capital structure	18%	8%	10%
Exclusive forum provisions*	97%	63%	73%
Stockholder rights plan	None	1%	2%

*Delaware corporations only

Source: IPO company data is based on WilmerHale analysis of SEC filings from 2017 to 2021 for US issuers. Established public company data is from FactSet's SharkRepellent database at year-end 2021.

STATE ANTI-TAKEOVER LAWS

Should the company opt out of any state anti-takeover laws to which it is subject, such as Section 203 of the Delaware corporation statute?

Section 203 prevents a public company incorporated in Delaware from engaging in a "business combination" with any "interested stockholder" for three years following the time that the person became an interested stockholder, unless, among other exceptions, the interested stockholder attained such status with the approval of the board. In general, an interested stockholder is any stockholder that, together with its affiliates, beneficially owns 15% or more of the company's stock. A public company incorporated in Delaware is automatically subject to Section 203, unless it opts out in its original corporate charter or pursuant to a subsequent charter or bylaw amendment approved by stockholders. Remaining subject to Section 203 helps eliminate the ability of an insurgent to accumulate and/or exercise control without paying a control premium, but could prevent stockholders from accepting an attractive acquisition offer that is opposed by an entrenched board.

BLANK CHECK PREFERRED STOCK

Should the board be authorized to issue preferred stock without obtaining stockholder approval?

When blank check preferred stock is authorized, the board has the right to issue preferred stock in one or more series without stockholder approval under state corporate law (but subject to stock exchange rules), and has the discretion to determine the voting, dividend, conversion and redemption rights and liquidation preferences of each such series of preferred stock. The availability of blank check preferred stock can eliminate delays associated with a stockholder vote on specific issuances, thereby facilitating financings and strategic alliances. The board's ability, without further stockholder action, to issue preferred stock or rights to purchase preferred stock can also be used as an anti-takeover device.

DIFFERENCES IN ANTI-TAKEOVER PRACTICES AMONG TYPES OF IPO COMPANIES

	ALL IPO COMPANIES	VC-BACKED COMPANIES	PE-BACKED COMPANIES	OTHER IPO COMPANIES
Classified board	83%	91%	88%	52%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	81%	92%	82%	45%
Prohibition of stockholders' right to act by written consent	88%	95%	93%	60%
Limitation of stockholders' right to call special meetings	95%	98%	98%	80%
Advance notice requirements	97%	98%	99%	87%
Section 203 of the Delaware corporation statute (not opt out)*	73%	94%	29%	58%
Blank check preferred stock	100%	100%	100%	98%
Multi-class capital structure	18%	18%	19%	16%
Exclusive forum provisions*	97%	98%	99%	86%
Stockholder rights plan	None	None	None	None

*Delaware corporations only

Source: WilmerHale analysis of SEC filings from 2017 to 2021 for US issuers.

MULTI-CLASS CAPITAL STRUCTURES

Should the company sell to the public a class of common stock with less voting power than the voting rights of the class of common stock owned by the company's founders or other pre-IPO stockholders?

While the majority of companies go public with a single class of common stock that provides the same voting and economic rights to every stockholder, some companies go public with a multi-class capital structure under which the company's founders or other pre-IPO stockholders hold shares of common stock that are entitled to multiple votes per share, while the public is issued a separate class of common stock that is entitled to only one vote per share, or no voting rights at all. Use of a multi-class capital structure facilitates the ability of the holders of the high-vote stock to retain voting control of the company and to pursue strategies to maximize long-term stockholder value. Critics believe that a multi-class capital structure entrenches the holders of the high-vote stock, insulating them from takeover attempts and the will of public stockholders, and that the mismatch between voting power and economic interest may increase the possibility that the holders of the high-vote stock will pursue a riskier business strategy.

EXCLUSIVE FORUM PROVISIONS

Should the company's corporate charter or bylaws provide that the Court of Chancery of Delaware is the exclusive forum in which stockholders may bring state law claims against the company and its directors?

Exclusive forum provisions typically stipulate that the Court of Chancery of the State of Delaware is the exclusive forum in which internal corporate claims may be brought by stockholders against the company and its directors. Proponents of exclusive forum provisions are motivated by a desire to adjudicate state law stockholder claims in a single jurisdiction that has a well-developed and predictable body of corporate case law and an experienced judiciary. Opponents argue that these provisions deny aggrieved stockholders the ability to bring litigation in a court or jurisdiction of their choosing.

STOCKHOLDER RIGHTS PLANS

Should the company establish a poison pill?

A traditional stockholder rights plan (often referred to as a "poison pill") is a contractual right that allows all stockholders—other than those who acquire more than a specified percentage of the company's stock—to purchase additional securities of the company or a successor entity at a discounted price if a stockholder accumulates shares of common stock in excess of the specified threshold, thereby significantly diluting that stockholder's economic and voting power. Supporters believe rights plans are an important planning and strategic device because they give the board time to evaluate unsolicited offers and to consider alternatives. Rights plans can also deter a change in control without the payment of a control premium to all stockholders, as well as partial offers and "two-tier" tender offers. Opponents view rights plans, which can generally be adopted by board action at any time and without stockholder approval, as an entrenchment device and believe that they improperly give the board, rather than stockholders, the power to decide whether and on what terms the company is to be sold. When combined with a classified board, a traditional rights plan makes an unfriendly takeover particularly difficult. ■

NOL PLANS

In contrast to a traditional stockholder rights plan, the objective of a net operating loss (NOL) plan is to preserve the value of a company's NOLs by reducing the risk of triggering an "ownership change" under Section 382 of the Internal Revenue Code that would limit the company's ability to use its pre-change NOLs. Consequently, the plan's definition of beneficial ownership, ownership trigger, exemptions and duration generally differ from the comparable provisions of traditional rights plans. Whether a company should implement an NOL plan depends on a number of factors, including the amount (and potential value) of the company's NOLs, the likelihood of a Section 382 ownership change occurring due to public market trading or the company's own actions (such as equity offerings), and anticipated investor reaction. There are significantly fewer active NOL plans than traditional rights plans.

Multi-Track Process Can Increase Flexibility and Optimize Outcome

Private companies seeking liquidity often weigh the relative ease and certainty of being acquired against the equity upside of an IPO. A company in this circumstance may find that the optimal route is a "dual track." In a traditional dual-track process, a company simultaneously pursues an IPO while entertaining—or even courting—acquisition offers. The company's sale efforts on a dual track can range from contacting a small number of likely buyers to a more formal and extensive process, similar to an auction. Even if a company does not deliberately embark upon a dual track, an IPO filing can have a similar effect, by showcasing the company and enticing potential buyers to inquire about acquisition interest.

In addition to preserving flexibility when a company is uncertain which path to pursue, a dual track can serve as a strategy to maximize the price received in a company sale. The core of this approach is to increase the sense of urgency among bidders and to emphasize that the target has a compelling alternative to being acquired. The stronger the IPO market and the more attractive the company, the more likely this strategy will pay off. The emergence of two additional paths to liquidity—SPAC mergers and direct listings—has created the possibility of a "multi-track" process that can further strengthen the hand of a company in this situation.

SPAC MERGERS

A special purpose acquisition company (SPAC) is a "blank check" company formed for the purpose of engaging in a merger or other business combination with a to-be-identified operating company. A SPAC raises capital in an IPO and uses the proceeds, often together with additional private financing, to complete a business combination with a suitable target. The public stockholders of the SPAC typically have the right to approve the business combination and the right to redeem their shares at the IPO price plus interest, regardless of how they vote on the transaction. In most cases, the target's stockholders own a majority of the combined company's shares following the transaction closing. From the perspective of the target, a SPAC business combination represents an alternative way to go public. If a SPAC does not consummate a business combination within a prescribed period of time after its IPO (generally 18–24 months, unless extended with stockholder approval), the SPAC is dissolved and its assets are distributed to IPO investors.

Although not new, the SPAC IPO market has grown dramatically in the past two years. In 2021, there were 613 SPAC IPOs with gross proceeds of nearly $145 billion, more than double the 2020 tally of 248 SPAC IPOs with gross proceeds of about $76 billion, and more than 10 times the size of the market in 2019. The surge in SPAC IPOs has resulted in a large pool of well-funded companies competing with traditional strategic and private equity acquirers for attractive targets.

DIRECT LISTINGS

A "direct listing," in which a private company files a registration statement with the SEC to register the resale of outstanding shares and concurrently lists its shares on a stock exchange, provides another path to public ownership and liquidity. There were six direct listings in 2021, up from three in 2020, two in 2019, and one—the first direct listing—in 2018. Although the technique remains in its infancy, a direct listing may be attractive to private companies that are of sufficient value and investor interest to qualify for stock exchange listing and enjoy meaningful trading liquidity without the aftermarket support provided by underwriters in a conventional IPO.

CHALLENGES AND IMPLICATIONS

Historically, outright sales have been the predominant means of liquidity for private companies—outnumbering IPOs by a wide margin—but the decision has become more complicated as SPAC mergers and direct listings have joined the mix. Each path presents advantages and disadvantages, often resulting in a fluid process. Public company preparations are largely the same for an IPO, SPAC merger and direct listing, enabling a company to retain the flexibility to pivot among alternatives late in the process.

In addition to the considerations that are present in the sale of any private company, a multi-track strategy—regardless of its components—can present various challenges that must be navigated carefully:

— ***Importance of Confidentiality***: Even more so than usual, the M&A process—whether involving a traditional acquirer or a SPAC—must be kept under wraps, to minimize the risk of premature disclosure and avoid disruption to the effort and focus demanded by the IPO or direct listing process.

— ***Disclosure Issues***: Absent a leak, the sale process usually need not be publicly disclosed prior to an acquisition announcement. A multi-track strategy can, however, result in thorny disclosure issues if the company opts for an IPO or direct listing rather than a sale or SPAC merger. For example, if the company passes on an M&A opportunity and then is acquired shortly after an IPO or direct listing, it could be vulnerable to claims that it failed to disclose its intentions.

— ***Selection of Financial Advisors***: The company will ordinarily want financial advisors to handle the M&A aspects of a multi-track process. The IPO managing underwriters will know the company well and be obvious choices for the M&A engagement, but may be more skilled as underwriters than as M&A advisors. Or, the company may prefer one of the managing underwriters over the others, leading to the potential for turf battles among underwriters. The company can also select an M&A advisor that is not involved with the IPO, although doing so introduces additional complications.

— ***Potential for Conflicted Motivations***: The company's management may have financial incentives to prefer one alternative over others. A company sale often results in the replacement of top management, but may also trigger equity acceleration and change-in-control and severance payments. An IPO, direct listing or (usually) SPAC merger offers management continued employment and the potential for market appreciation, but without the immediate realization of change-in-control benefits. Similarly, the economic outcomes may be different for financial advisors in a company sale, SPAC merger or direct listing than for underwriters in an IPO.

— ***Board Duties***: The board's fiduciary duties to stockholders apply when evaluating acquisition offers and other liquidity opportunities. Do its fiduciary duties compel a board to accept an offer that is within the estimated IPO price range established by the company and managing underwriters, or in excess of the anticipated market price following an IPO or direct listing? No, but the board should follow an appropriate process when evaluating multiple liquidity alternatives, as it would in any sale transaction.

— ***Valuation Impact***: A multi-track process can create tricky valuation issues. For example, if the company pursues an IPO or direct listing after receiving offers for a sale or SPAC transaction, it must consider the impact of these offers on its subsequent determinations of fair market value for equity grants made prior to the completion of the IPO or direct listing. The offers may also cause the company to revisit the operating model it uses to develop financial forecasts, or may otherwise have an impact on the estimated IPO price range. The weight accorded to each offer will depend on various factors, such as how advanced the proposed transaction was before its abandonment, the extent of the information made available to the bidder before it made its offer, the formality of the offer, and changes in market conditions or the company's circumstances since the offer was received.

— ***Timing Considerations***: Although a company can pursue multiple tracks for a long time, eventually it must select one course. If the company's process includes IPO preparations, the day of reckoning can, in theory, be delayed until after the road show and moments before inking the underwriting agreement. In practice, the choice is usually made earlier, because a road show is expensive and time-consuming, and underwriters are leery of irritating fund managers with meaningless company presentations. If an attractive acquisition offer does not seem imminent, the sale process is ordinarily shut down when the road show begins.

— ***Contractual Arrangements with Bidders***: The company should sign confidentiality agreements with every potential acquirer or SPAC merger partner before substantive discussions or due diligence begin. Companies contemplating a multi-track process should consider "standstill" provisions pursuant to which bidders agree for a specified period of time (typically 12–18 months) not to seek or participate in any efforts to acquire the company without its consent. They should also consider requiring bidders to commit not to solicit or hire any of the company's employees—perhaps limited to the company employees involved with the proposed transaction—for a specified period of time. Although a private company ordinarily would not need the protection of a standstill agreement, if the company subsequently completes an IPO it may be vulnerable to unsolicited takeover bids from parties who were given access to material nonpublic information about the company prior to the IPO.

— ***M&A Terms***: If an acceptable acquisition offer or SPAC proposal emerges, the focus will shift to M&A negotiations. With a strategic or private equity acquirer, negotiations will likely result in a conventional acquisition agreement for a transaction of this nature. By contrast, a SPAC merger combines elements of a public company M&A transaction and an IPO, so a variety of topics not typically arising in a traditional sale transaction must be addressed, such as any PIPE (private investment in public equity) or other pre-closing financing, SPAC stockholder approval and redemption matters, and post-closing public company arrangements.

— ***Public Filing v. Confidential Submission***: An emerging growth company (EGC) can elect to submit a draft Form S-1 for confidential SEC review but must publicly file the Form S-1 no later than 15 days before the commencement of the road show. With a confidential submission, the company is not on full display until the subsequent public filing is made. Although an EGC may announce the confidential submission of a draft Form S-1, the information permitted in the announcement is very limited. An EGC that wishes to maximize its visibility to potential suitors may want to opt for public filing rather than confidential submission of its initial Form S-1.

— ***Unwinding the IPO***: Assuming an acquisition or SPAC merger agreement is signed after a Form S-1 for an IPO or direct listing has been filed, the Form S-1 needs to be withdrawn prior to closing the transaction. Since a deal can come undone for many reasons, it is usually advisable to keep the Form S-1 alive until shortly before the closing, while alerting the SEC examiner to the company's plans. Following the closing, a strategic or private equity acquirer will probably undo some of the public company infrastructure that the target had established in anticipation of its IPO or direct listing, such as governance policies or new stock plans.

— ***Extra Effort and Expense***: A multi-track process combines the rigors of each path being pursued. A few key participants, including the CEO, CFO, general counsel and outside company counsel, usually bear the brunt of the extra burden. Although the company will not pay both an IPO underwriting discount and an M&A success fee, the total transaction expenses in a multi-track process usually exceed the expenses of any one path.

OUTLOOK

A multi-track process can maximize a company's flexibility and produce a more favorable outcome than pursuing any single liquidity path alone. Anecdotal evidence suggests that dual tracks had already become more common in recent years. With SPAC mergers and direct listings providing additional alternatives and the success of a multi-track approach in various transactions, multi-track strategies are likely to become increasingly prevalent. ■

Counsel of Choice for Mergers and Acquisitions

Serving market leaders in technology, life sciences, financial services and a wide variety of other industries

PerkinElmer
Acquisition of
BioLegend
$5,250,000,000
September 2021

TECAN
Acquisition of
Paramit
$1,000,000,000
August 2021

ALTIOSTAR
Acquisition by
Rakuten
$1,000,000,000
August 2021

Grab
Merger with
Altimeter Growth
$39,600,000,000
(pro forma equity value)
(counsel to Altimeter Capital Management)
December 2021

WEX
Acquisition of
benefitexpress
$275,000,000
June 2021

AMPLITUDE Healthcare Acquisition Corporation
Combination with
Jasper Therapeutics
$475,000,000
September 2021

ZAIUS
Acquisition by
Optimizel
Undisclosed
March 2021

ThermoFisher SCIENTIFIC
Acquisition of
PPD
$20,900,000,000
(debt financing counsel)
December 2021

Akamai
Acquisition of
Linode
$900,000,000
Pending
(as of February 28, 2022)

LeveL Alternative Trading System
Merger with
Luminex Trading & Analytics
Undisclosed
Pending
(as of February 28, 2022)

HARMONIX
Acquisition by
Epic Games
Undisclosed
November 2021

PETILLO COMPANIES
Acquisition by
Sterling Construction
$195,000,000
December 2021

Eaton Vance
Acquisition by
Morgan Stanley
$7,000,000,000
March 2021

spectris
Acquisition of
Concurrent Real-Time
$166,700,000
July 2021

General Catalyst Partners
Acquisition of Clarabridge by
Qualtrics
$1,125,000,000
(counsel to General Catalyst)
October 2021

Houghton Mifflin Harcourt
Sale of consumer publishing business to
HarperCollins Publishers
$349,000,000
May 2021

ENDURANCE International Group
Acquisition by
Clearlake Capital Group
$3,000,000,000
February 2021

NOVUS
Acquisition by
SEI Investments Company
Undisclosed
November 2021

FORENDO PHARMA
Acquisition by
Organon
$954,000,000
(including contingent payments)
December 2021

Lookout
Acquisition of
CipherCloud
Undisclosed
March 2021

zebiAI
Acquisition by
Relay Therapeutics
$270,000,000
(including contingent payments)
April 2021

EVERQUOTE
Acquisition of
PolicyFuel
Undisclosed
August 2021

PRIORITY
Acquisition of
Finxera Holdings
$407,000,000
March 2021

Progress
Acquisition of
Kemp
$258,000,000
October 2021

ACACIA Communications, Inc.
Acquisition by
Cisco Systems
$4,500,000,000
March 2021

Bottomline Technologies
Acquisition by
Thoma Bravo
$2,600,000,000
(co-counsel)
Pending
(as of February 28, 2022)

LION Semiconductor
Acquisition by
Cirrus Logic
$335,000,000
July 2021

casella waste systems, inc.
Acquisition of
Willimantic Waste Paper Co.
Undisclosed
July 2021

Cloud9
Acquisition by
Symphony Communication Services
Undisclosed
June 2021

SLDLASER
Acquisition by
Kyocera
Undisclosed
January 2021

catabasis
Acquisition of
Quellis Biosciences
$170,700,000
January 2021

UKG
Acquisition of
Great Place to Work Institute
Undisclosed
August 2021

TIDAL THERAPEUTICS
Acquisition by
Sanofi
$470,000,000
(including contingent payments)
April 2021

FORTIVE
Acquisition of
ServiceChannel
$1,200,000,000
August 2021

WILMERHALE®

SPACs, or special purpose acquisition companies, took the capital markets by storm in 2020 and early 2021, dwarfing the conventional IPO market over the past two years. There were 613 SPAC IPOs with gross proceeds of nearly $145 billion in 2021, more than double the 2020 tally of 248 SPAC IPOs, which in turn accounted for more than three times the number of SPAC IPOs completed in any prior year and produced gross proceeds of about $76 billion.

At the same time, SPAC business combinations helped drive record levels of M&A activity. In a SPAC business combination (commonly referred to as a "de-SPAC" transaction), a publicly traded SPAC merges or otherwise combines with a target company, turning the target into a publicly traded company. According to SPAC Track, 199 de-SPAC transactions were completed in 2021. At year-end, according to SPAC Analytics, 118 de-SPAC transactions were pending and 574 SPACs (with IPO proceeds of approximately $155 billion) were searching for a business combination.

The large number of SPACs seeking targets presents private companies wishing to become public with a meaningful alternative to a traditional IPO. However, despite the extremely strong headline numbers for SPAC IPO and de-SPAC activity in 2021, the current market faces several headwinds. While the SPAC pathway continues to be an attractive option for many private companies, those considering this alternative should review the market and legal factors that can pose challenges to successful execution of a SPAC business combination.

SPAC IPOS—RECENT DEVELOPMENTS

The SPAC IPO market was a rollercoaster ride in 2021. Following unprecedented deal flow in the first quarter, the market declined sharply in the next two quarters. Market factors behind the decline included a change in investor sentiment; a tightening in the market for PIPE (private investment in public equity) financings in conjunction with de-SPAC transactions; and a decline in the trading price of many SPAC stocks below their IPO price. On the legal and accounting side, there was significant disruption when the SEC staff began to question the accounting treatment historically applied to SPAC warrants. The SPAC IPO market rebounded in the fourth quarter, albeit at significantly lower levels than in early 2021, as SPACs worked to address the accounting issues and SPAC IPO terms evolved to accommodate market factors.

As a result of the shift in market conditions, the terms of SPAC IPOs have generally become more investor-friendly than they were in 2020 and early 2021. These include:

— Increased warrant coverage;

— Shorter timelines to complete an initial business combination (typically 18 months or less, and in some cases as little as 12 months or less, compared to 24 months); and

— Overfunded trusts, which increase the likelihood of a positive return to investors in redemption and unwind scenarios, and the potential of greater proceeds to targets in de-SPAC transactions.

The shorter timelines and the negative impact of greater warrant overhang, among other changes, may make it more difficult for some SPACs to execute de-SPAC transactions.

Other factors affecting the SPAC IPO market include a significant increase in the cost of directors' and officers' liability insurance, as well as the potential for higher IPO transaction expenses and post-IPO reporting and compliance costs. Increased transaction costs and trust overfunding obligations can require sponsors to provide more "at-risk" capital to new SPACs.

Entering 2022, the SPAC IPO market is facing new storm clouds. The number of SPAC IPOs, like the number of IPOs generally, has dropped significantly in early 2022, due to market volatility and concerns regarding rising interest rates, inflation and SPAC market saturation. A significant number of SPAC IPO filings have recently been withdrawn (including SPAC IPOs that were contemplated by repeat SPAC sponsors).

DE-SPAC TRANSACTIONS—CURRENT HEADWINDS

Soft PIPE Market

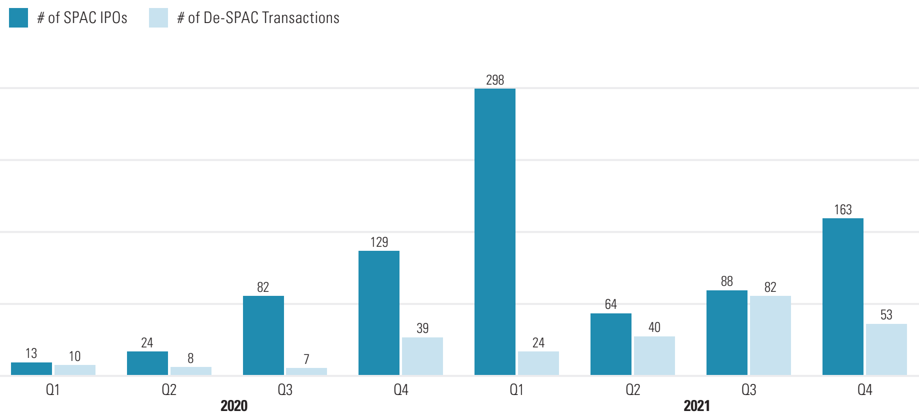
In most cases, a SPAC will seek to arrange for PIPE financing in connection with its initial business combination. The PIPE capital helps offset redemptions and provides additional operating capital following completion of the de-SPAC transaction. The participation of well-known investors in the PIPE can also help validate the target and the proposed business combination.

The SPAC PIPE market, however, significantly weakened during 2021 and has remained very challenging into early 2022. SPACs and targets must now spend significantly more time on PIPE marketing, and sponsors, third parties and existing target investors may need to commit significant levels of funding to help execute PIPE transactions. Now, SPAC PIPE deals are often smaller than the PIPEs that prevailed during the peak of the SPAC market, and deals more frequently incorporate convertible preferred or debt securities, secured debt, warrants or other complex structures. Backstop financing from sponsors and third parties may also be necessary. In some cases, de-SPAC transactions are being announced without any committed PIPE financing.

High Redemption Levels

In a de-SPAC transaction, the SPAC's public stockholders have the right to redeem their shares for the pro rata per-share amount of proceeds in the SPAC's trust account. The target typically negotiates for the right to terminate the business combination agreement if it does not receive a minimum amount of cash proceeds at closing after giving effect to redemptions. The level of stockholder redemptions is generally a function of how well the proposed transaction is received in the marketplace

Number of SPAC IPOs and De-SPAC Transactions by Quarter—2020 to 2021



Source: SEC filings and SPAC Track

and the market price of the SPAC's stock relative to the redemption price.

During the second half of 2021, SPACs increasingly saw higher redemption levels than in the first half of the year. Redemption levels in the third and fourth quarters reportedly averaged between 50% to 60%, with several transactions drawing much higher redemption rates (including many above 90%). High redemption levels have continued into early 2022. In addition to significantly reducing the amount of capital available to the post-closing combined company, high redemption levels can cause deals to fail. When proposed de-SPAC transactions encounter high redemption rates, terms may need to be renegotiated to provide for a lower valuation and/or modified terms, and transaction parties may need to raise additional outside capital to complete the transaction.

Increased Litigation

The de-SPAC transaction process is increasingly a litigation target. It has become very common for plaintiffs' law firms to make demands or file complaints alleging breaches of fiduciary duties and disclosure violations once a de-SPAC transaction is announced. Post–de-SPAC litigation has also increased significantly, often following large stock price declines. SPACS also are becoming the focus of other litigation, including claims alleging that they are investment companies that need to comply with the Investment Company Act of 1940.

Regulatory Activity

The SPAC market attracted significant regulatory interest and enforcement activity in 2021, a trend that is expected to continue. For example:

— Several SEC communications in the spring of 2021 signaled the agency's intensifying focus on SPACs:
  - An alert cautioned investors about risks relating to celebrity involvement in SPACs.
  - A statement from the then–Acting Director of the SEC's Division of Corporation of Finance discussed potential SPAC-related liability issues, including around the use of projections, and questioned the applicability of the Private Securities Litigation Reform Act of 1995 safe harbor to projections and other forward-looking information used in de-SPAC transactions.
  - A joint statement from the Office of the Chief Accountant and the Division of Corporation Finance addressed SPAC warrant accounting, indicating that warrants in many cases may need to be accounted for using liability accounting, and that, in their view, many SPACs had been accounting for their warrants incorrectly.

— SEC Chair Gary Gensler publicly stated that SPAC-related rulemaking is on the SEC's agenda for 2022, with potential areas of focus including disclosure reforms; rulemaking directed at conflicts of interest, gatekeeper responsibility and liability; the use of projections and other aspects of the de-SPAC marketing process; and other actions directed at trying to level the playing field between SPACs and conventional IPOs.

— SEC enforcement actions included high-profile cases brought against SPACs and their sponsors, merger partners and CEOs.

— The Financial Industry Regulatory Authority (FINRA) launched an examination of investment banking firms' SPAC-related activities.

Post-Deal Performance, Deal Terminations and SPAC Liquidations

While there have been some success stories, many companies that went public in 2020 and 2021 through de-SPAC transactions are trading below $10.00 per share (the typical SPAC IPO unit price, and the price at which a target's shares are usually valued in connection with a de-SPAC transaction). In addition, as de-SPAC transactions have become more challenging to execute, the number of de-SPAC deal restructurings and deal terminations has increased. Given these developments, and the large number of SPACs looking for targets, it is likely that the number of SPAC liquidations—in which a SPAC returns funds to its investors without completing a de-SPAC transaction—may also increase.

THE ROAD AHEAD

In recent years, SPACs have established themselves as a formidable alternative to conventional IPOs. Their long-term staying power, however, will depend on many factors, including the performance of the combined companies resulting from de-SPAC transactions. With current headwinds making the SPAC pathway to the public markets more challenging, private companies considering a SPAC should continue to monitor the developments that have accompanied the slowing of the SPAC boom. ■

Public and private company M&A transactions share many characteristics, but also involve different rules and conventions. (Business combinations involving special purpose acquisition companies (SPACs) are subject to additional considerations, as discussed on pages 12–13.)

GENERAL CONSIDERATIONS

Public and private company acquisitions differ in various fundamental respects:

— ***Structure***: An acquisition of a private company may be structured as an asset purchase, a stock purchase or a merger. A public company acquisition is generally structured as a merger, often in combination with a tender offer for all-cash acquisitions.

— ***Letter of Intent***: If a public company is the target in an acquisition, there is usually no letter of intent. The parties typically go straight to a definitive agreement, due in part to concerns over creating a premature disclosure obligation. Sometimes an unsigned term sheet is also prepared.

— ***Timetable***: The timetable before signing the definitive agreement is often more compressed in an acquisition of a public company. However, more time may be required between signing and closing to prepare and circulate a proxy statement for stockholder approval (unless a tender offer structure is used), comply with notice and timing requirements, and obtain antitrust clearances that may be unnecessary (or easier to obtain) in smaller, private company acquisitions.

— ***Confidentiality***: The potential damage from a leak is much greater in an M&A transaction involving a public company, and accordingly rigorous confidentiality precautions are taken.

— ***Litigation Risk***: Litigation against the target, its board of directors and/or the acquirer is much more common in acquisitions of public targets than private targets. The board of a public target almost always (and the board of the acquirer sometimes) obtains a fairness opinion from an investment banking firm.

— ***R&W Insurance***: The use of representation and warranty insurance in the sale of a private company influences the negotiated outcomes of various provisions in the acquisition agreement, most notably the seller's representations and warranties and liability provisions.

DUE DILIGENCE

When a public company is acquired, the due diligence process differs from the process followed in a private company acquisition:

— ***Availability of SEC Filings***: Due diligence typically starts with the target's SEC filings, enabling a potential acquirer to investigate in stealth mode until it wishes to engage the target in discussions.

— ***Speed***: The due diligence process is often quicker in an acquisition of a public company because of the availability of SEC filings, thereby allowing the parties to focus quickly on the key transaction points.

MERGER AGREEMENT

The merger agreement for an acquisition of a public company reflects a number of differences from its private company counterpart:

— ***Representations***: In general, the representations and warranties from a public company are less extensive than those from a private company, are tied in some respects to the public company's SEC filings, may have higher materiality thresholds, and do not survive the closing.

— ***Exclusivity***: The exclusivity provisions are subject to a "fiduciary exception" permitting the target to negotiate with a third party making an offer that may be deemed superior and, in certain circumstances, to change the target board's recommendation to stockholders.

— ***Closing Conditions***: The "no material adverse change" and other closing conditions are generally drafted so as to limit the target's closing risk and give the acquirer little room to refuse to complete the transaction if regulatory and stockholder approvals are obtained.

— ***Post-Closing Obligations***: Post-closing escrow or indemnification arrangements are extremely rare.

— ***Earnouts***: Earnouts are unusual, although a form of earnout arrangement called a "contingent value right" is not uncommon in the life sciences sector.

— ***Deal Certainty and Protection***: The negotiation battlegrounds are the provisions addressing deal certainty (principally the closing conditions) and deal protection (exclusivity, voting agreement, termination and breakup fees).

SEC INVOLVEMENT

The SEC plays a significant role in acquisitions involving a public company:

— ***Form S-4***: In a public acquisition, if the acquirer is issuing stock to the target's stockholders, the acquirer must register the issuance on a Form S-4 registration statement that is filed with (and possibly reviewed by) the SEC.

— ***Proxy Statement:*** Absent a tender offer, the target's stockholders, and sometimes the acquirer's stockholders, must approve the transaction. Stockholder approval is sought pursuant to a proxy statement that is filed with (and often reviewed by) the SEC. Public targets generally must provide for a separate, non-binding stockholder vote with respect to all compensation each named executive officer will receive in the transaction.

— ***Tender Offer Filings***: In a tender offer for a public target, the acquirer must file a Schedule TO and the target must file a Schedule 14D-9. The SEC staff reviews and often comments on these filings.

— ***Other SEC Filings***: Many Form 8-Ks and other SEC filings are often required by public companies engaged in M&A transactions.

— ***Public Communications***: Elaborate SEC regulations govern public communications in the period between the first public announcement of the transaction and the closing of the transaction. Most written communications in connection with a business combination transaction must be filed with the SEC.

Set forth below is a comparison of selected deal terms in public target and private target acquisitions based on data from the MarketStandard database of SRS Acquiom (a provider of post-closing transaction management services) and the most recent deal points studies available from the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section. The SRS Acquiom data is for acquisitions of private targets by US public companies with purchase prices ranging from $25–$750 million in which SRS Acquiom served as shareholder representative and that closed between mid-2020 and early 2022. The ABA private target study is based on publicly available agreements for acquisitions of private targets by public companies with purchase prices ranging from $30–$750 million which were completed (or for which definitive agreements were executed) in 2020 and the first quarter of 2021. The ABA public target study is based on public target merger agreements for transactions with total deal consideration in excess of $200 million that were completed in 2021 (excluding acquisitions by private equity buyers).

COMPARISON OF SELECTED DEAL TERMS

The accompanying chart compares the following deal terms in acquisitions of public and private targets:

— *"10b-5" Representation*: A representation to the effect that no representation or warranty by the target contained in the acquisition agreement, and no statement contained in any document, certificate or instrument delivered by the target pursuant to the acquisition agreement, contains any untrue statement of a material fact or fails to state any material fact necessary, in light of the circumstances, to make the statements in the acquisition agreement not misleading.

— *Standard for Accuracy of Target Representations at Closing*: The general standard that will be applied to assess the accuracy of the target's representations and warranties set forth in the acquisition agreement for purposes of the acquirer's closing conditions:

- A "MAC/MAE" standard provides that each of the representations and warranties of the target must be true and correct in all respects as of the closing, except where the failure of such representations and warranties to be true and correct will not have or result in a *material adverse change/effect on the target*.
- An "in all material respects" standard provides that the representations and warranties of the target must be true and correct *in all material respects* as of the closing.
- An "in all respects" standard provides that each of the representations and warranties of the target must be true and correct *in all respects* as of the closing.

— *Inclusion of "Prospects" in MAC/MAE Definition*: Whether the "material adverse change/effect" definition in the acquisition agreement includes "prospects" along with other target metrics, such as the business, assets, properties, financial condition and results of operations of the target.

— *Fiduciary Exception to "No-Shop/No-Talk" Covenant*: Whether the "no-shop/no-talk" covenant prohibiting the target from seeking an alternative acquirer includes an exception permitting the target to consider an unsolicited superior proposal if required to do so by its fiduciary duties.

— *Opinion of Target's Counsel as Closing Condition*: Whether the acquisition agreement contains a closing condition requiring the target to provide an opinion of counsel (excluding opinions regarding the tax consequences of the transaction).

— *Appraisal Rights Closing Condition*: Whether the acquisition agreement contains a closing condition providing that appraisal rights must not have been sought by target stockholders holding more than a specified percentage of the target's outstanding capital stock. (Under Delaware law, appraisal rights generally are not available to stockholders of a public target when the merger consideration consists solely of publicly traded stock.)

— *Acquirer MAC/MAE Closing Condition*: Whether the acquisition agreement contains a closing condition excusing the acquirer from closing if an event

"10b-5" Representation	
PUBLIC (ABA)	Not reported
PRIVATE (ABA)	7%
PRIVATE (SRS ACQUIOM)	30%

Standard for Accuracy of Target Representations at Closing	
PUBLIC (ABA)	
"MAC/MAE"	95%
"In all respects"	2%
Other standard	2%
PRIVATE (ABA)	
"MAC/MAE"	77%
"In all material respects"	21%
"In all respects"	2%
PRIVATE (SRS ACQUIOM)	
"MAC/MAE"	41%
"In all material respects"	57%
"In all respects"	2%

Inclusion of "Prospects" in MAC/MAE Definition	
PUBLIC (ABA)	2%
PRIVATE (ABA)	7%
PRIVATE (SRS ACQUIOM)	11%

Fiduciary Exception to "No-Shop/No-Talk" Covenant	
PUBLIC (ABA)	100%
PRIVATE (ABA)	13%
PRIVATE (SRS ACQUIOM)	3%

Opinion (Non-Tax) of Target's Counsel as Closing Condition	
PUBLIC (ABA)	Not reported
PRIVATE (ABA)	1%
PRIVATE (SRS ACQUIOM)	8%

Appraisal Rights Closing Condition	
PUBLIC (ABA)	3%
PRIVATE (ABA)	70%
PRIVATE (SRS ACQUIOM)	66%

Acquirer MAC/MAE Closing Condition	
PUBLIC (ABA)	100%
PRIVATE (ABA)	96%
PRIVATE (SRS ACQUIOM)	100%

had, or could reasonably be expected to have, a "material adverse change/effect" on the target. Requiring the target's representations to be "brought down" to closing has the same effect.

TRENDS IN SELECTED DEAL TERMS

The ABA deal-term studies have been published periodically since 2004. A review of past ABA studies identifies the following trends in acquisitions of public company targets (excluding private equity buyers) and acquisitions of private company targets by public buyers:

In acquisitions of *public* company targets:

— ***"10b-5" Representations***: Once appearing with some regularity, these representations have essentially disappeared from public target deals.

— ***Accuracy of Target Reps at Closing***: The MAC/MAE standard remains almost universal in acquisitions of public targets, present in 95% of deals completed in 2021. In practice, this standard has been eroded to some extent by the use of lower standards for specific representations, such as those relating to capitalization and authority.

— ***Inclusion of "Prospects" in MAC/MAE Definition***: The target's "prospects" were included in the MAC/MAE definition in only 2% of public target acquisitions completed in 2021, similar to its frequency for more than a decade.

— ***Fiduciary Exception to "No-Shop/No-Talk" Covenant***: In 94% of acquisitions completed in 2021, the fiduciary exception was based on the existence of "an acquisition proposal reasonably expected to result in a superior offer" or an actual "superior offer." These standards have been dominant in public target deals for many years, although in practice they have been partly offset by an increase in "back-door" fiduciary exceptions, such as the "whenever fiduciary duties require" standard.

— ***"Go-Shop" Provisions***: "Go-shop" provisions, granting the target a specified period of time to seek a better deal after signing an acquisition agreement, remain relatively unusual in public target deals, appearing in only 2% of acquisitions completed in 2021, although this metric has ranged as high as 11% within the past decade.

— ***Appraisal Rights Closing Condition***: The frequency of an appraisal rights closing condition in acquisitions of public targets dropped to 3% of deals completed in 2021, continuing its long-term decline from a level that once topped 40%.

In acquisitions of *private* company targets:

— ***"10b-5" Representations***: The incidence of these representations in private target deals has declined from levels that once topped 60% to just 7% of acquisitions completed in 2020/2021 (deals completed in 2020 and the first quarter of 2021).

— ***Accuracy of Target Reps at Closing***: The MAC/MAE standard has gained much wider acceptance in private target acquisitions, appearing in 77% of deals completed in 2020/2021, more than double the rate of 15 years ago.

— ***Inclusion of "Prospects" in MAC/MAE Definition***: Once found in more than a third of private target acquisitions, the target's "prospects" was included in the MAC/MAE definition of only 7% of deals completed in 2020/2021.

— ***Fiduciary Exception to "No-Shop/No-Talk" Covenant***: Fiduciary exceptions were present in 13% of private target acquisitions completed in 2020/2021, up from recent years but modestly below the level of a decade ago.

— ***Opinion of Target Counsel***: Legal opinions (excluding tax matters) of the target's counsel have plummeted in frequency, from more than 70% of private target acquisitions 15 years ago to just 1% of deals completed in 2020/2021.

— ***Appraisal Rights Closing Condition***: An appraisal rights closing condition was included in 70% of private target acquisitions completed in 2020/2021, up significantly from recent years and representing the highest reported figure since the ABA private target studies began. ■

DISPUTE RESOLUTION

Litigate, arbitrate, mediate, cogitate—thinking about how to address dispute resolution in the acquisition agreement for your next transaction? Here's some insight on market practices from SRS Acquiom's MarketStandard database for acquisitions of private targets that were completed between mid-2020 and early 2022:

— **ADR Provisions**: An alternative dispute resolution (ADR) provision obligates the parties to arbitrate or mediate disputes in lieu of litigation.

- Among all transactions, 15% included an ADR provision, all of which specified binding arbitration (rather than mediation or another form of ADR).
- Deals involving targets in the technology industry were more likely to include ADR provisions than deals involving targets in the life sciences industry, by a margin of 18% to 11%.
- ADR provisions were present in 18% of transactions with US public buyers. No transactions with US financial buyers included an ADR provision.
- Among transactions with a value of $750 million or less, 16% had ADR provisions. No transactions valued in excess of $750 million included an ADR provision.

— **Expense Funds**: An expense fund is a portion of the closing purchase price set aside to pay for the post-closing expenses of the shareholder representative acting on behalf of the target's shareholders following the closing.

- There was an expense fund in 95% of all transactions, with a median size of $150,000 (0.22% of transaction value).
- Expense funds were present in 100% of deals involving targets in the life sciences industry, with a median size of $250,000 (0.24% of transaction value). Among deals involving targets in the technology industry, 95% had an expense fund, with a median size of $150,000 (0.21% of transaction value).
- There were expense funds in 98% of transactions with US public buyers, with a median size of $200,000 (0.20% of transaction value), and in 94% of transactions with US financial buyers, with a median size of $150,000 (0.18% of transaction value).
- Among transactions with a value of $100 million or less, 92% had expense funds, with a median size of $100,000 (0.39% of transaction value). All transactions valued in excess of $100 million had expense funds, with a median size of $250,000 (0.11% of transaction value).

The Foreign Corrupt Practices Act (FCPA) is a criminal and securities statute that is jointly enforced by the US Department of Justice (DOJ) and the SEC. The FCPA has two components:

- The statute prohibits any company, whether private or public, as well as its officers, directors, employees, stockholders and agents, from making or offering corrupt payments to foreign government officials.

- The statute requires every public company to maintain accurate books and records and to implement adequate internal accounting controls. This requirement is in addition to the internal control requirements imposed by the Sarbanes-Oxley Act.

Investigations and enforcement proceedings under the FCPA have been instituted in record numbers over the past several years, resulting in the payment of billions of dollars in fines and penalties. Many of these proceedings have arisen in the M&A context. Other countries around the world have anti-corruption laws similar to the FCPA, and enforcement authorities in many countries have pursued penalties similar to those imposed in the United States.

US enforcement authorities have made clear their expectation that purchasers of transnational businesses will conduct pre-acquisition FCPA due diligence and will, post-closing, promptly implement appropriate FCPA remediation and compliance integration steps. The joint FCPA Resource Guide issued by the DOJ and SEC, as well as the DOJ's Evaluation of Corporate Compliance Programs guidance, describe pre-acquisition due diligence and post-acquisition integration as among the hallmarks of an effective compliance program.

This guidance from US authorities, coupled with the results of recent enforcement proceedings around the world, underscore the need for both purchasers and sellers to evaluate anti-corruption risks and pursue related risk-mitigation strategies when undertaking transactions.

There are generally three types of FCPA risks for a purchaser in an M&A transaction:

- ***Legal Risks***: A purchaser may acquire legacy as well as prospective legal liability, depending on the circumstances of the acquisition. For example, a purchaser who fails to detect ongoing bribery by the target may inherit the target's liability for past misconduct, as well as incur liability for misconduct after the purchase.

- ***Financial Risks***: A target may not be properly valued if FCPA issues are not identified. For example, a purchaser may discover after the closing that it faces civil and criminal financial penalties, the loss of government contracts that have been obtained through corrupt conduct, or the need to terminate unlawful business practices and/or the employment of key personnel who have been involved in misconduct.

- ***Reputational Risks***: Misconduct by a target may tarnish a purchaser's compliance record.

To manage these risks, purchasers in M&A transactions should take affirmative steps to address FCPA issues both pre- and post-closing. While there may be impediments to conducting extensive diligence in some types of transactions (such as auctions or hostile takeovers), purchasers should resist pressures to "get the deal done" without appropriate diligence. The key steps purchasers should take include the following:

- ***Due Diligence***: Before entering into an acquisition agreement, the purchaser should interview key employees and review basic documentation of the target to develop a profile of the geographic regions in which the target operates; the target's industry and business operations, including its interactions with government officials; the target's past business practices; the target's corporate structure; the target's relationships with its third-party business partners, such as agents, consultants and distributors; and the target's anti-corruption compliance program.

  The depth of follow-up diligence may vary depending on the level of anti-corruption risk that results from this profile. If the anti-corruption risk appears relatively high, site visits, forensic transaction review, detailed interviews of employees of the target and interviews with the target's third-party representatives may be warranted. If adequate pre-closing diligence is not possible, these measures should be completed soon after closing.

- ***Transaction Documents***: The negotiation of acquisition documents provides the purchaser with an opportunity to mitigate anti-corruption risk from the transaction. If diligence has revealed (or the purchaser suspects diligence will reveal) potential liability, the purchaser should consider provisions such as representations that the target has not engaged in corrupt conduct; a closing condition that the purchaser shall have completed anti-corruption diligence to the purchaser's satisfaction; indemnities from the seller for penalties and investigation costs; and provisions governing the joint investigation and possible disclosure of potential FCPA liabilities to the government.

- ***Post-Closing Actions***: Once the purchaser assumes control of the target, the purchaser should quickly ensure that anti-corruption issues identified in due diligence are fully addressed; improper conduct detected through diligence is stopped; appropriate remediation steps are implemented; and an effective compliance program is instituted.

Sellers also face FCPA-related risks in M&A transactions. A purchaser's FCPA due diligence may uncover questionable payments or call into question the adequacy of the seller's internal controls. Purchasers are increasingly incentivized to push sellers to disclose FCPA issues to the government before an acquisition is completed, potentially leading to government investigations or enforcement proceedings. These factors could affect whether the transaction can be consummated and, if so, on what terms. In addition, the seller may be liable to the purchaser if its anti-corruption representations and warranties are inaccurate. By conducting their own due diligence prior to embarking on an M&A transaction, sellers may be able to identify and address many of these risks in advance. ■

We reviewed all merger transactions between 2017 and 2021 involving VC-backed targets (as reported in PitchBook after 2019, in Dow Jones VentureSource or Pitchbook for 2019, and in Dow Jones VentureSource prior to 2019) in which the merger documentation was publicly available and the deal value was $25 million or more. Based on this review, we have compiled the following deal data:[1]

Characteristics of Deals Reviewed		2017	2018	2019	2020	2021
The number of deals we reviewed and the type of consideration paid in each	Sample Size	18	37	20	25	45
	Cash	56%	84%	60%	60%	24%
	Stock	0%	3%	0%	8%	18%
	Cash and Stock	44%	13%	40%	32%	58%
Deals With Earnout		**2017**	**2018**	**2019**	**2020**	**2021**
Deals that provided contingent consideration based upon post-closing performance of the target (other than balance sheet adjustments)	With Earnout	22%	32%	40%	28%	42%
	Without Earnout	78%	68%	60%	72%	58%
Deals With Indemnification		**2017**	**2018**	**2019**	**2020**	**2021**
Deals where the target's shareholders or the buyer indemnified the other post-closing for breaches of representations, warranties and covenants	With Indemnification					
	By Target's Shareholders	94%[2]	84%	80%	88%	76%[3]
	By Buyer	61%	39%	45%	32%	29%
Deals With Representation and Warranty Insurance		**2017**	**2018**	**2019**	**2020**	**2021**
Deals that expressly contemplate representation and warranty insurance	With Representation and Warranty Insurance	Not Tracked	41%	25%	68%	47%
Survival of Representations and Warranties		**2017**	**2018**	**2019**	**2020**	**2021**
Length of time that representations and warranties survived the closing for indemnification purposes (subset: deals where representations and warranties survived the closing for indemnification purposes)[4]	Shortest	9 Mos.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	24 Mos.	24 Mos.	24 Mos.	18 Mos.	24 Mos.
	Most Frequent	12 Mos.	18 Mos.	18 Mos.	12 Mos.	12 Mos.
Caps on Indemnification Obligations		**2017**	**2018**	**2019**	**2020**	**2021**
Upper limits on indemnification obligations where representations and warranties survived the closing for indemnification purposes	With Cap	100%	100%	100%	100%	100%
	Limited to Escrow	94%[6]	79%	86%	81%	90%[6]
	Limited to Purchase Price	0%	0%	0%	0%	0%
	Exceptions to Limits[5]	94%	100%	100%	95%	100%
	Without Cap	0%	0%	0%	0%	0%

1 For certain transactions, certain deal terms have been redacted from the publicly available documentation and are not reflected in the data compiled below.

2 Includes one transaction where the only representations that survive for purposes of indemnification are those concerning capitalization, financial statements and undisclosed liabilities, but excludes one transaction where indemnification was provided for breaches of covenants prior to the closing but representations did not survive for purposes of indemnification.

3 Excludes two transactions that do not provide for idemnification but permit setoff against contingent consideration.

4 Measured for representations and warranties generally; specified representations and warranties may survive longer.

5 Generally, exceptions were for fraud, willful misrepresentation and certain "fundamental" representations commonly including capitalization, authority and validity. In a limited number of transactions, exceptions also included intellectual property representations.

6 Includes two transactions where the limit was below the escrow amount.

Escrows		2017	2018	2019	2020	2021
Deals having escrows securing indemnification obligations of the target's shareholders (subset: deals with indemnification obligations of the target shareholders)	With Escrow	100%	90%[7]	94%	90%	91%
	% of Deal Value					
	Lowest[8]	4%	3%	10%	8%	5%
	Highest	13%	15%	13%	15%	18%
	Most Frequent	5%	10%	12%	15%	10%
	Length of Time[9]					
	Shortest	9 Mos.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	24 Mos.	36 Mos.	36 Mos.	24 Mos.	36 Mos.
	Most Frequent	12 & 18 Mos. (tie)	18 Mos.	12 Mos.	12 Mos.	12 Mos.
	Exclusive Remedy	71%	72%	64%	68%	53%
	Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[5]	92%	100%	100%	92%	100%

Baskets for Indemnification		2017	2018	2019	2020	2021
Deals with indemnification only for amounts above a specified "deductible" or only after a specified "threshold" amount is reached	Deductible	63%	47%	56%	52%[10]	71%[11]
	Threshold	37%	53%	44%	29%[10]	26%[11]

MAE Closing Condition		2017	2018	2019	2020	2021
Deals with closing condition for the absence of a "material adverse effect" with respect to the other party, either explicitly or through representation brought down to closing	Condition in Favor of Buyer	94%	100%	100%	100%	97%
	Condition in Favor of Target	22%	12%	35%	24%	37%

Exceptions to MAE		2017	2018	2019	2020	2021
Deals where the definition of "material adverse effect" for the target contained specified exceptions	With Exception[12]	100%	97%[13]	100%	100%	95%[13]

[7] One transaction not including an escrow at closing did require funding of escrow with proceeds of earnout payments.

[8] Excludes transactions which also specifically referred to representation and warranty insurance as recourse for the buyer.

[9] Length of time does not include transactions where such time period cannot be ascertained from publicly available documentation.

[10] A "hybrid" approach with both a deductible and a threshold was used in another 10% of these transactions in 2020.

[11] A 50/50 cost sharing approach was used in another 3% of these transactions in 2021.

[12] Generally, exceptions were for general economic and industry conditions.

[13] The only transaction(s) not including such exceptions provided for a closing on the same day the definitive agreement was signed.

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www.wilmerhale.com/2022MAreport.

Data Sources: Data Sources: M&A data is sourced from S&P Global Market Intelligence. WilmerHale compiled the data for sales of VC-backed companies from PitchBook.

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