M&A Report

2021

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REVIEW

The outbreak of COVID-19 in the first quarter of 2020 inflicted an unprecedented shock on the global economy. In the first half of the year, growth stalled, the US unemployment rate reached its highest level since the Great Depression, and economic uncertainty spiked. M&A activity largely followed suit, with transaction volume and value plunging from the first to the second quarters of 2020 before recovering in the second half of the year, as companies identified strategic acquisition opportunities to augment organic growth and respond to changes in business practices resulting from the pandemic.

The number of M&A transactions worldwide declined by 6%, from 48,613 deals in 2019 to 45,507 in 2020. Global M&A deal value decreased by 15%, from \$3.35 trillion to \$2.83 trillion. The average deal size in 2020 was \$62.3 million, down 10% from the \$68.9 million in 2019.

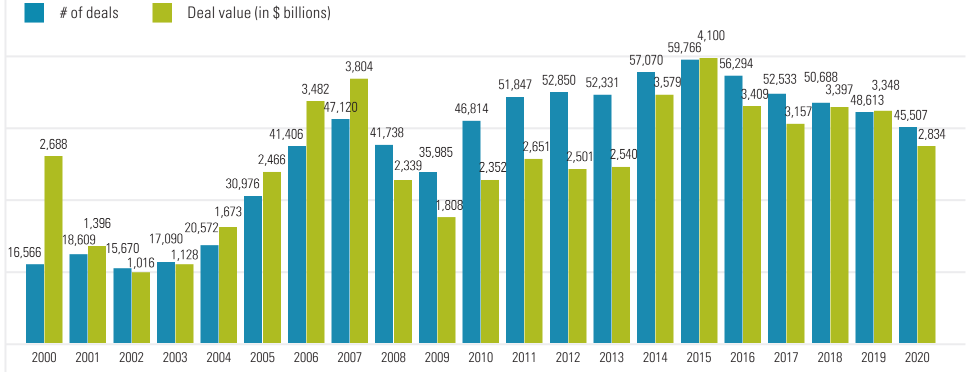
GEOGRAPHIC RESULTS

M&A results varied across geographic regions in 2020, with deal volume and value growing in the Asia-Pacific region while declining in the United States and Europe.

— *United States*: Deal volume decreased by 14%, from 20,603 transactions in 2019 to 17,748 in 2020. US deal value declined by 26%, from \$2.14 trillion to \$1.58 trillion. Average deal size dropped by 14%, from \$104.0 million to \$89.1 million. The number of billion-dollar transactions involving US companies decreased by 11%, from 296 in 2019 to 234 in 2020, while their total value fell by 27%, from \$1.57 trillion to \$1.15 trillion.

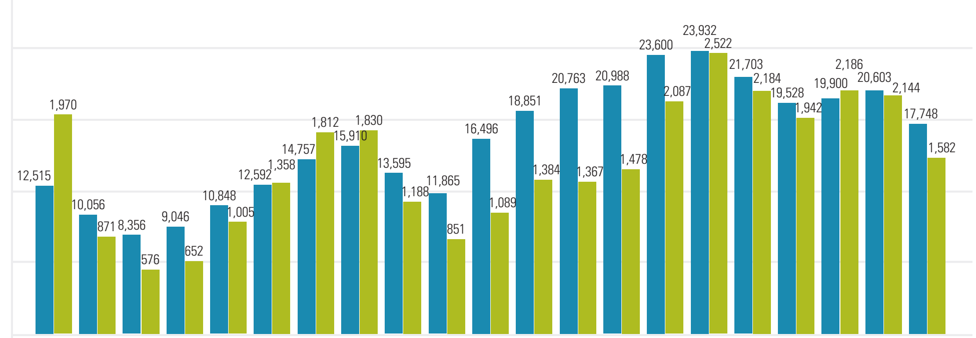
— *Europe*: The number of transactions in Europe declined for the fifth consecutive year, falling 11%, from 18,844 in 2019 to 16,738 in 2020. Total deal value dipped by 3%, from \$1.18 trillion to \$1.15 trillion. Average deal size increased by 9%, from \$62.7 million to \$68.5 million. The number of billion-dollar transactions involving European companies decreased by 15%, from 205 in 2019 to 175 in 2020, while their total value increased by 2%, from \$792.1 billion to \$809.5 billion.

Global M&A Activity – 2000 to 2020



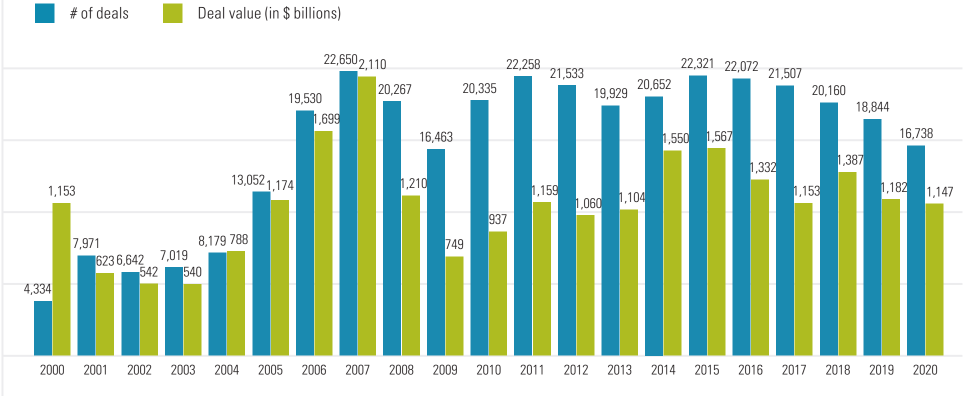
Source: S&P Global Market Intelligence

US M&A Activity – 2000 to 2020



Source: S&P Global Market Intelligence

European M&A Activity – 2000 to 2020



Source: S&P Global Market Intelligence

— *Asia-Pacific*: The Asia-Pacific region saw deal volume increase by 11%, from 10,092 transactions in 2019 to 11,241 in 2020. Total deal value in the region grew by 26%, from \$721.1 billion to \$911.6 billion, while average deal size increased by 14%, from \$71.4 million to \$81.1 million. The number of billion-dollar transactions

involving Asia-Pacific companies dropped by 8%, from 134 in 2019 to 123 in 2020, while their total value jumped by 47%, from $364.5 billion to $536.2 billion.

SECTOR RESULTS

Trends in M&A transaction volume and value varied across industry sectors in 2020. Global deal volume and value increased slightly in the technology sector, while the telecommunications sector enjoyed more significant gains, particularly in deal value. The life sciences and financial services sectors saw declines in both global deal volume and value, with deal value among life sciences companies hit especially hard.

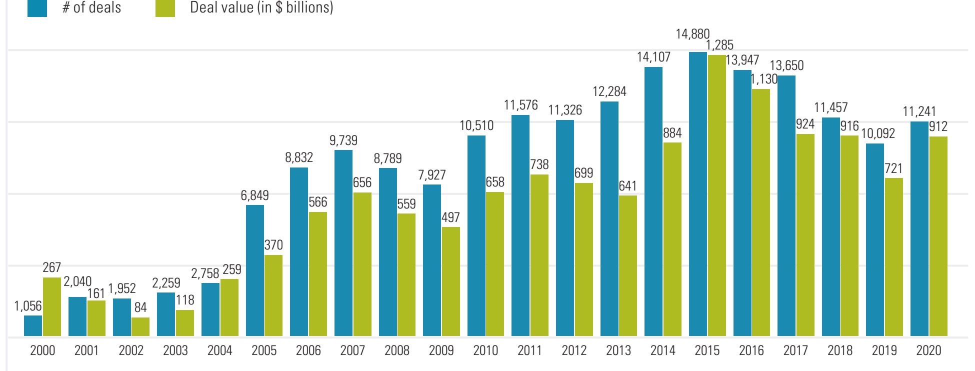
M&A deal volume was down across all sectors in the United States in 2020. Telecommunications was the only sector to see an increase in deal value, with robust growth. Deal value in the life sciences and financial services sectors plummeted, while technology deal value decreased modestly.

— *Technology*: Global transaction volume in the technology sector increased by 2%, from 7,628 deals in 2019 to 7,768 deals in 2020. Global deal value also grew by 2%, from $479.8 billion to $491.2 billion. Average deal size increased by less than 1%, from $62.9 million to $63.2 million. US technology deal volume fell by 7%, from 3,410 to 3,162 transactions. Total US technology deal value decreased by 8%, from $392.8 billion to $361.9 billion, resulting in a 1% decline in average deal size, from $115.2 million to $114.4 million.

— *Life Sciences*: Global transaction volume in the life sciences sector declined by 3%, from 1,606 deals in 2019 to 1,559 deals in 2020, while global deal value fell by 53%, from $404.8 billion to $188.8 billion. Average deal size decreased by 52%, from $252.0 million to $121.1 million. In the United States, deal volume declined by 10%, from 796 to 721 transactions, while deal value dropped by 58%, from $370.1 billion to $154.4 billion, resulting in a 54% decline in average deal size, from $464.9 million to $214.1 million.

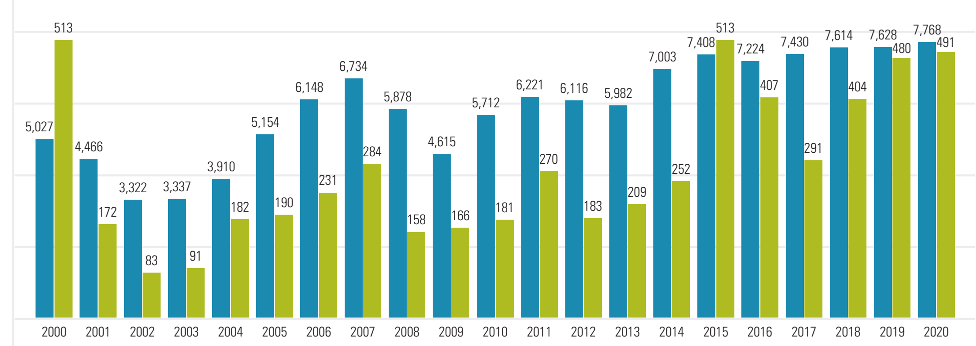
— *Financial Services*: Global M&A activity in the financial services sector declined by 7%, from 2,760 deals in 2019 to 2,565 deals in 2020. Global deal value decreased by 4%, from $283.2 billion to $270.5 billion, resulting in a 3% increase in average deal size, from $102.6 million to $105.5 million. In the United States, financial services sector deal volume declined by 7%, from 1,317 to 1,219 transactions, while total deal value fell by 42%, from $166.6 billion to $97.1 billion. Average US deal size dropped by 37%, from $126.5 million to $79.7 million.

Asia-Pacific M&A Activity – 2000 to 2020



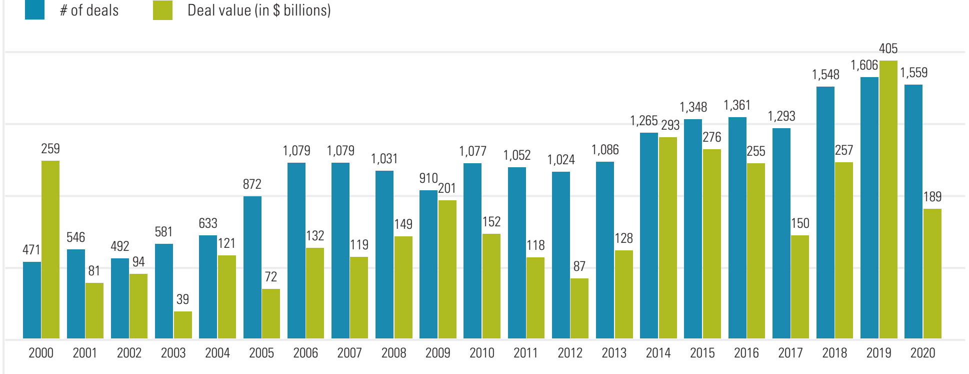
Source: S&P Global Market Intelligence

Technology M&A Activity – 2000 to 2020



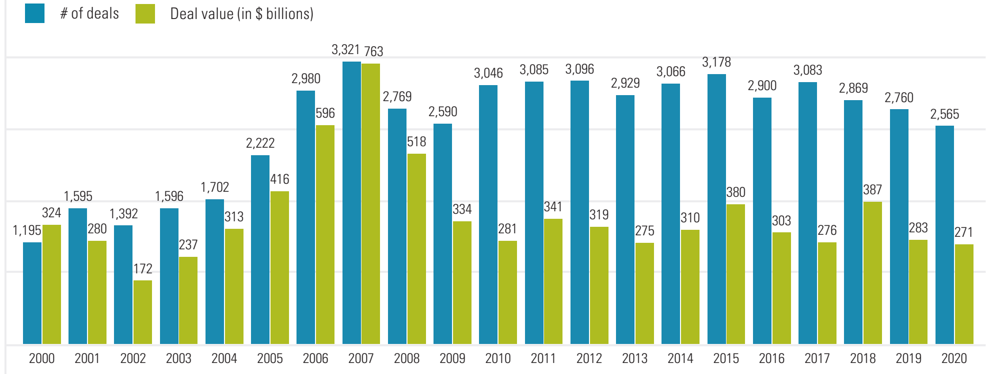
Source: S&P Global Market Intelligence

Life Sciences M&A Activity – 2000 to 2020



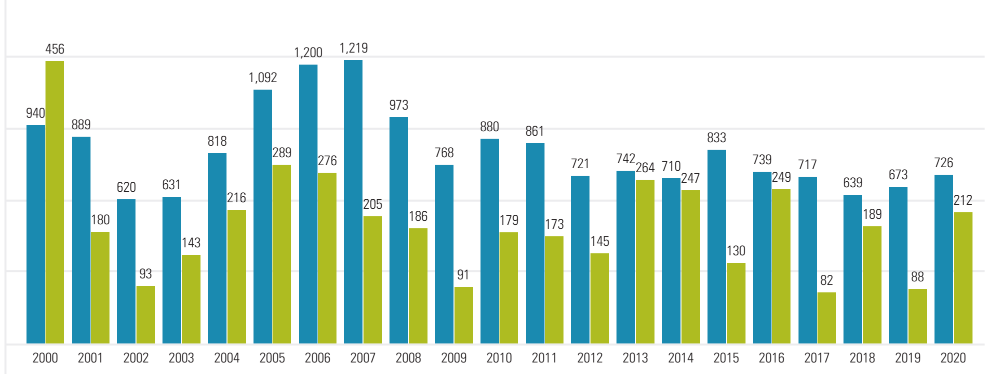
Source: S&P Global Market Intelligence

Financial Services M&A Activity – 2000 to 2020



Source: S&P Global Market Intelligence

Telecommunications M&A Activity – 2000 to 2020



Source: S&P Global Market Intelligence

— *Telecommunications*: Global transaction volume in the telecommunications sector increased by 8%, from 673 deals in 2019 to 726 deals in 2020. Deal value more than doubled, from $88.33 billion to $211.6 billion, resulting in a 122% increase in average deal size, from $131.1 million to $291.4 million. US telecommunications deal volume declined 12%, from 208 to 184 transactions, while deal value increased 150%, from $44.6 billion to $111.6 billion. The average US telecommunications deal size surged by 183%, from $214.4 million to $606.7 million.

OUTLOOK

Despite the long shadow of the COVID-19 pandemic, the M&A market shows signs of recovery in the coming year. While some companies will continue to struggle with the consequences of the pandemic and eschew acquisitions, others will see opportunities. Important factors that will affect M&A activity over the coming year include the following:

— *Macroeconomic Conditions*: Monetary and fiscal intervention by governments and central banks worldwide, along with the widening availability of coronavirus vaccines and modest economic growth in the fourth quarter of 2020, suggest the economy is poised to rebound. Fiscal stimulus actions, however, raise the specter of increasing inflation and pressure on interest rates, which could chill some debt-financed deal activity.

— *Valuations*: The pandemic has punished valuations in sectors bearing the brunt of consumer lockdowns, while richly rewarding companies in other sectors. This disparity in valuations is likely to boost M&A activity, as companies seek acquisitions to meet the pandemic's challenges or supplement organic growth. Prices in some sectors are likely to be driven up by intensifying competition for privately held targets, due to record levels of acquisition capital.

— *Private Equity Activity*: On the buy side, private equity firms continue to hold record levels of "dry powder" to deploy. Private equity firms should find attractive targets among companies capitalizing on pandemic-related opportunities. On the sell side, PE firms are facing 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 declined by 9%, from 1,018 in 2019 to 930 in 2020, while reported proceeds decreased by 5%, from $92.8 billion to $88.1 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 reached a record high in 2020), the performance of recent VC-backed IPOs, and the overall health of the IPO market.

— *SPAC Mergers*: Mergers involving special purpose acquisition companies (SPACs) did not represent a significant portion of the M&A market in 2020. Based on the large and growing number of SPACs seeking business combination targets, SPAC transactions should play a more significant role in 2021. For example, in April 2021, Grab Holdings, Southeast Asia's leading superapp, announced its planned combination with Altimeter Growth in a SPAC transaction with a pro forma equity value of $39.6 billion.

Between the fourth quarter of 2020 and the first quarter of 2021, global M&A activity contracted by 6%, from 14,175 transactions to 13,285, while global deal value fell by 16%, from $1.13 trillion to $951.8 billion. Despite these dips, deal volume in the first quarter of 2021 was still 14% higher than in the first quarter of 2020, and deal value was up by 75%. ■

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?

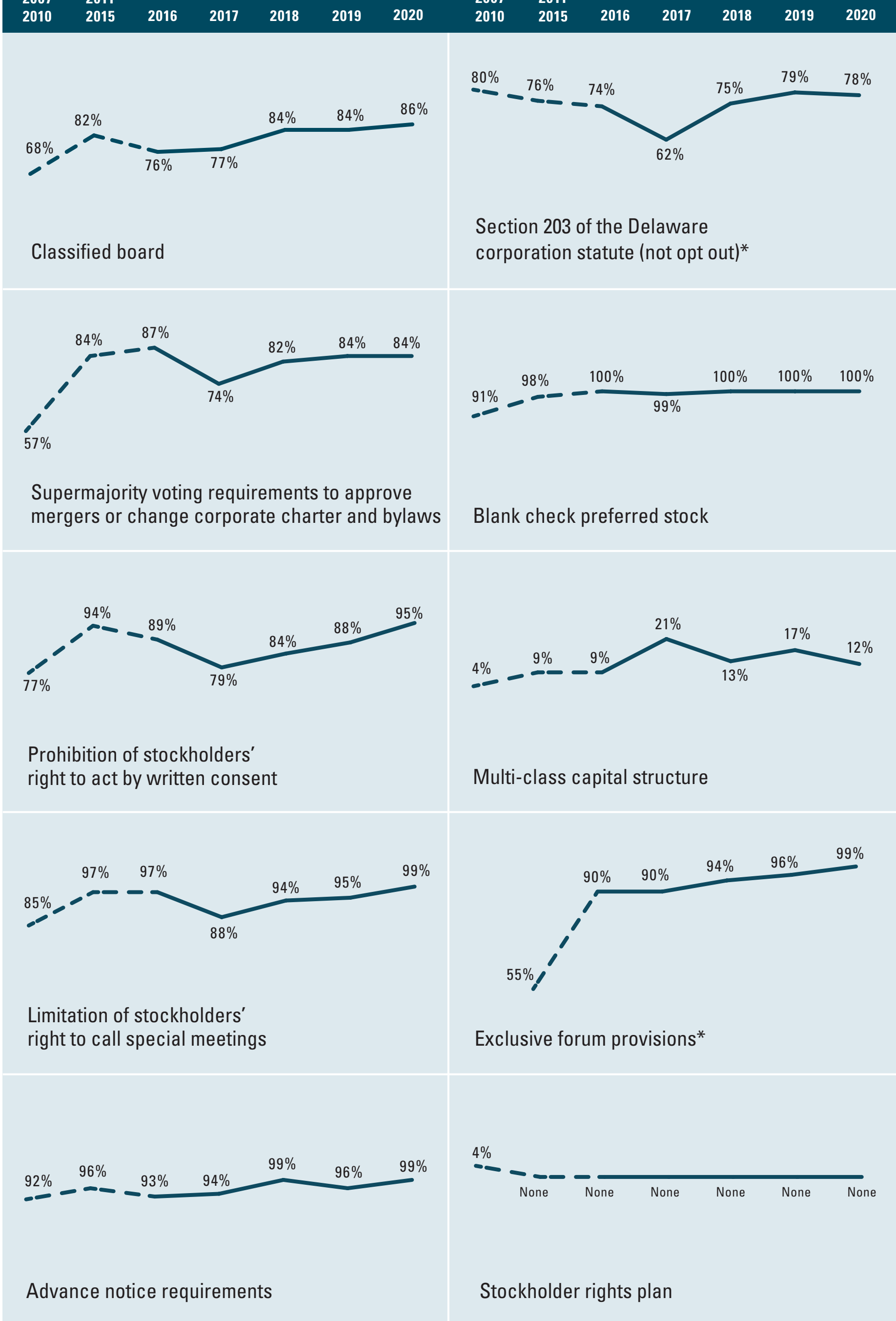
Advocates for supermajority vote requirements claim that these provisions help preserve and maximize the value of the company by ensuring that important corporate actions are taken only when it is the clear will of the stockholders. Proponents of a majority-vote standard believe it makes the company more accountable to stockholders and that improved accountability leads to better 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 2020 (2011–2020 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	82%	12%	41%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	82%	19% to 38%, depending on type of action	17% to 55%, depending on type of action
Prohibition of stockholders' right to act by written consent	88%	69%	74%
Limitation of stockholders' right to call special meetings	95%	34%	51%
Advance notice requirements	97%	99%	95%
Section 203 of the Delaware corporation statute (not opt out)*	74%	91%	83%
Blank check preferred stock	100%	95%	95%
Multi-class capital structure	14%	8%	10%
Exclusive forum provisions*	94%	60%	68%
Stockholder rights plan	None	2%	4%

*Delaware corporations only

Source: IPO company data is based on WilmerHale analysis of SEC filings from 2016 to 2020 for US issuers. Established public company data is from FactSet's SharkRepellent database at year-end 2020.

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	82%	91%	88%	53%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	82%	93%	82%	53%
Prohibition of stockholders' right to act by written consent	88%	96%	90%	62%
Limitation of stockholders' right to call special meetings	95%	98%	97%	83%
Advance notice requirements	97%	99%	99%	90%
Section 203 of the Delaware corporation statute (not opt out)*	74%	93%	31%	54%
Blank check preferred stock	100%	100%	100%	99%
Multi-class capital structure	14%	14%	15%	15%
Exclusive forum provisions*	94%	97%	97%	81%
Stockholder rights plan	None	None	None	None

*Delaware corporations only

Source: WilmerHale analysis of SEC filings from 2016 to 2020 for US issuers.

MULTI-CLASS CAPITAL STRUCTURES

Should the company sell to the public a class of common stock whose voting rights are different from those 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 perhaps all 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 terms in 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.

Checking Out Corporate Books and Records in Delaware

BOARDS CAN TAKE STEPS TO LIMIT IMPACT OF SHAREHOLDER DEMANDS

Shareholder demands to inspect corporate books and records are on the rise, and not just in support of invigorated claims that directors violated their duty of oversight under the seminal *Caremark* decision of the Delaware Supreme Court. These demands are also infiltrating the world of M&A. In recent years, disgruntled shareholders have increasingly used these demands to shore up post-closing damages claims. At the same time, a series of Delaware cases have made it more difficult to dispose of these demands. Directors would be wise to view this trend as a warning to observe board formalities and prepare to negotiate a reasonable outcome when a demand arrives.

A BRIEF HISTORY OF BOOKS AND RECORDS DEMANDS IN DELAWARE

Over the last several years, Delaware courts have erected hurdles for M&A plaintiffs to bring their claims to the front door of the courthouse, most notably by the decisions in *Corwin v. KKR Financial Holdings LLC* and *Kahn v. M & F Worldwide Corporation*. But, at the same time, the courts have removed hurdles to the back door by expanding access to companies' books and records. In this new legal landscape, once-routine objections to shareholder demands are becoming more difficult to raise successfully.

REQUIREMENTS FOR BOOKS AND RECORDS DEMAND

Under Section 220 of the Delaware General Corporation Law (DGCL), a shareholder can demand inspection of a company's books and records by demonstrating that:

- the shareholder is, in fact, a shareholder of the company;
- the shareholder has complied with the procedural requirements of the law; and
- the inspection is for a "proper purpose," such as to investigate wrongdoing by the board.

If a shareholder satisfies these requirements, the shareholder must also show that the requested books and records are essential to meet the proper purpose. The scope of the demand cannot be broader than is necessary.

Historically, when shareholders demanded access to corporate books and records, the company objected on the basis that the shareholders had not met one or more of the requirements specified under Section 220 of the DGCL. In a typical defense to a claim of wrongdoing, the company would claim that the shareholder had not put forth an actionable claim, often because the claim lacked merit or because the board was exculpated from liability under charter provisions permitted by Section 102(b)(7) of the DGCL. Today, challenges to the first two requirements—shareholder status and procedural compliance—remain persuasive and potent objections. But recent cases in Delaware have made it more challenging to dispose of Section 220 demands by objecting to the shareholder's proper purpose or to the breadth of the demand.

TRENDS IN DELAWARE BOOKS AND RECORDS LAW

Shareholder Purposes Are More Likely to Be Found Proper

As recently as December 2020, the Delaware Supreme Court considered the issue of what constitutes a "proper purpose." In *AmerisourceBergen v. Lebanon County Employees' Retirement Fund*, Amerisource faced several government investigations arising out of its failure to prevent rogue pharmacies from filling suspicious opioid prescriptions. The shareholders claimed that they were entitled to inspect the company's books and records because the company had potentially engaged in wrongdoing, as evidenced by the investigations. But the company objected, claiming that the shareholders had not stated a proper purpose. Specifically, they raised two traditional objections: the shareholders had failed to provide sufficient evidence of actionable wrongdoing and any *Caremark* claim against the board was exculpated and thus not actionable.

The court ruled for the shareholders, finding that they had offered sufficient evidence of wrongdoing and thus a proper purpose to inspect the company's books and records. More broadly (and more importantly for corporate decisionmakers), the court held that when demanding books and records on the basis of wrongdoing, shareholders do not need to identify the ultimate objectives of their investigation or establish that the wrongdoing would be actionable. In other words, the historically successful defense arguing that the shareholders had not put forth an actionable claim was no longer sufficient to defeat the demand. In fact, the court held that a company may only deny a Section 220 demand outright on improper purpose grounds in the rare case where the shareholder's only reason for making the demand was to pursue litigation that a procedural defense, such as lack of standing or the statute of limitations expiring, would foreclose.

Amerisource thus lowered the bar for shareholder demands of corporate books and records. Indeed, a shareholder need only assert a credible basis of possible wrongdoing—"the lowest possible burden of proof"—to raise a successful Section 220 demand. Facing this lowered bar and fewer defensive tools in their toolbox, corporate decisionmakers must think strategically about how to limit the impact of these demands on their businesses.

The Scope of Books and Records Access May Be Broadening

Another common objection to books and records demands—that the scope of the demand is too broad—is also at risk of judicial pruning.

Traditionally, Delaware courts place books and records into three categories: formal board materials, like board minutes and resolutions; informal board materials, such as emails and text messages between board members; and officer-level documents.

The Delaware Supreme Court has said that if a company observes traditional formalities by documenting minutes, resolutions, presentations and similar materials, then the company may be able to satisfy a Section 220 demand by producing formal documents without having to provide informal communications (*KT4 Partners LLC v. Palantir Techs. Inc.*). Courts also consider whether the requested documents are necessary and essential to the shareholder's purpose. If formal board materials address shareholders' needs, then shareholders may not have a

right to more informal communications (*Woods v. Sahara Enterprises, Inc.*).

But, in recent years, Delaware courts have shown an increasing willingness to allow shareholders to access informal materials. For example, in *Bucks County Employees Retirement Board v. CBS Corp.*, the Chancery Court permitted shareholders to access emails between a controlling shareholder and certain directors before and after a critical committee meeting. Similarly, the court in *Schnatter v. Papa John's* permitted an ousted director to access the emails of other directors discussing the change in the company's relationship with him. And, in February 2021, in *Employees' Retirement System of Rhode Island v. Facebook*, the same court ordered Facebook to produce emails and text messages between board members concerning a settlement with the FTC over data privacy breaches. In response to a Section 220 demand, Facebook had sought to limit its production to formal board materials. But the court found that the formal materials only revealed surface-level facts about Facebook's negotiations, and because a privilege log suggested that the board regularly used informal communication methods to discuss the settlement, it required the company to produce emails and text messages to convey the substance of those discussions as well.

While the Chancery Court in *Pettry v. Gilead Sciences* refused to order the production of emails, it did find that "wide-ranging mismanagement or waste" might require a "more wide-ranging inspection" and that "if non-email books and records are insufficient, then the court should order emails to be produced." In other words, the scope of the allegation may affect the scope of the production.

Companies that are required to produce books and records may also face depositions by shareholders to determine the type and location of documents available. For example, in *Amerisource*, after finding that shareholders had a right to access books and records, the court permitted the shareholders to depose company personnel to determine what records were available and how they were kept because of the company's refusal to provide any documents from the outset. This type of pretrial discovery may open up a board's recordkeeping processes to scrutiny before litigation and complicate any subsequent claims.

This series of cases suggests a shift: there is no longer a bright-line rule protecting companies that observe traditional board formalities from having to produce informal communications. Instead, the scope of books and records required to be produced will depend on the particular facts alleged. Now, if formal documents prove insufficient to demonstrate the board's decision-making and to satisfy the shareholders' proper purpose in investigating the books and records, the company may need to produce informal communications.

In practice, this does not mean that boards are helpless to prevent intrusions into emails and text messages. Board members would be well advised to observe all board formalities, including documenting minutes and resolutions, as this may assist a court in determining whether formal materials are sufficient to meet shareholders' needs. Companies may also have to provide a wider scope of documents up front, including management projections and board presentations, in order to curtail shareholders' claims that additional materials are necessary for their investigations.

Courts Are More Willing to Consider Fee Shifting

Beginning this past year, the Delaware Chancery Court expressed an openness to consider awarding legal fees to shareholders when companies refuse to produce documents based on a lack of proper purpose without any reasonable basis to dispute the proper purpose element. In *Gilead Sciences*, for example, the court permitted plaintiffs to move for their fees and expenses because of the alleged meritless obstacles imposed by the company in the "apparent belief that there [was] no real downside to doing so."

This newfound willingness to consider fee shifting comes in response to the perceived growing problem of baseless objections to Section 220 demands. Thus, even companies that regard shareholder claims as meritless should refrain from blanket refusals to cooperate. Instead, companies should focus their efforts on putting forward good faith legal arguments and negotiations over the production of documents, assuming shareholders satisfy the statutory procedural requirements for a demand. ■

IMPLICATIONS FOR BOARD MEMBERS

What does it mean for board members that shareholders have easier access to more powerful tools for inspecting corporate documents in the form of Section 220 demands? Boards should expect increasing demands (that are also increasingly difficult to dispose of) for books and records following the announcement of a merger or other corporate transaction. Indeed, a Section 220 demand should signal to board members that post-closing litigation may be on the horizon. These trends should serve as a warning to directors to be more vigilant about how they conduct deliberations and deal processes.

Board members can take several steps to limit the extent of the interference that books and records demands have on business operations:

- Directors should scrupulously observe board formalities by documenting and maintaining formal minutes, resolutions, presentations and other board materials. Boards should also ensure that these records are kept up to date.
- Board members should avoid using emails or text messages for substantive board communications. Instead, these informal methods of communication should only be used for administrative purposes, like scheduling meetings. Reserving substantive business for formal board settings will make courts less likely to find that informal emails and text messages are necessary and essential to shareholders' investigative purposes.
- Board members should also be aware of the need to negotiate a reasonable production of documents following a Section 220 demand. By remaining willing to engage in these negotiations at the outset, companies can avoid a protracted and costly battle in the Delaware Chancery Court. Perhaps more importantly in light of recent trends, initial negotiations can head off court orders for even broader document production or even the awarding of legal fees to shareholders.

Representation and warranty insurance (R&W insurance) is increasingly common in sales of private companies, especially when acquirors are in the financial, industrial and information technology industries. R&W insurance remains relatively rare in sales of life sciences companies.

The presence of R&W insurance influences the negotiated outcomes of various provisions in the acquisition agreement, most notably the seller's representations and warranties and liability provisions. Below is a summary of the principal effects of buy-side R&W insurance on transaction terms, based on an SRS Acquiom analysis of 681 private-target acquisitions that closed between January 1, 2018, and June 30, 2020, in which SRS Acquiom provided professional and financial services. The study, called the *2020 Buy-Side Representations and Warranties Insurance (RWI) Deal Terms Update*, updates a similar study of older transactions published by SRS Acquiom in 2019.

DEAL CHARACTERISTICS

— Buy-side R&W insurance is more common in larger deals. In the study's sample, the median size of transactions with buy-side R&W insurance was $122 million, compared to $60 million in other transactions.

— Among deals involving publicly held buyers, the less leverage the buyer has relative to the seller (measured by the ratio of the buyer's market capitalization to the transaction value), the higher the probability that the buyer will purchase R&W insurance.

WHAT IS R&W INSURANCE?

R&W insurance provides coverage for indemnification claims arising from misrepresentations by the seller in the sale of a company. The use of R&W insurance continues to grow, particularly in sales of privately held companies backed by venture capital or private equity investors. As with other forms of insurance, R&W insurance policies have deductibles, coverage limits, exclusions and policy periods. Premiums typically range from 2% to 4% of the coverage limit.

FINANCIAL TERMS

— Indemnification escrows are significantly smaller (or eliminated entirely) when buy-side R&W insurance is present, with a median size of just 0.5%, compared to 10% in other deals.

— Among transactions involving purchase price adjustments, deals with buy-side R&W insurance are more likely than other deals to contain a separate escrow to secure the purchase price adjustment (by a margin of 78% to 34%).

REPRESENTATIONS AND WARRANTIES

— A "10b-5" or "full disclosure" representation—to the effect that the seller's representations and warranties are complete, accurate and not misleading—is absent from 92% of deals with buy-side R&W insurance, compared to 67% of other deals. Similarly, provisions to the effect that the seller is making no representations except as set forth in the acquisition agreement are more likely to be present in deals with buy-side R&W insurance than in other deals (by a margin of 92% to 72%).

— "Pro-sandbagging" (or "benefit of the bargain") provisions, allowing a party to seek indemnification for the other party's misrepresentations even if the non-breaching party knew of the misrepresentations prior to closing, are present in 32% of deals involving buy-side R&W insurance, compared to 61% of other deals.

— "Materiality scrapes" appear in 93% of deals with buy-side R&W insurance and 90% of other deals, but deals with buy-side R&W insurance are twice as likely to provide that materiality qualifications in representations and warranties are disregarded for purposes of determining both breaches and damages.

— The acquisition agreement is less likely to require the seller to notify the buyer of pre-closing breaches of representations and warranties when buy-side R&W insurance is present (55%) than in other deals (80%).

LIABILITY PROVISIONS

— When buy-side R&W insurance is present, the acquisition agreement is more likely than in other deals to require the buyer to mitigate losses (by a margin of 77% to 49%).

— In deals with buy-side R&W insurance, the seller's indemnification obligations are more likely to be structured as a "deductible basket," in which the seller is liable only for damages in excess of a specified threshold amount (69% of deals), than as a "tipping basket," in which the seller is liable for all damages once the threshold amount has been reached (12% of deals). By contrast, in other deals, the seller's indemnification obligations are structured as a "deductible basket" in 40% of deals and as a "tipping basket" in 53% of deals.

OTHER EFFECTS OF R&W INSURANCE

SRS Acquiom's 2019 study also reported the following data points:

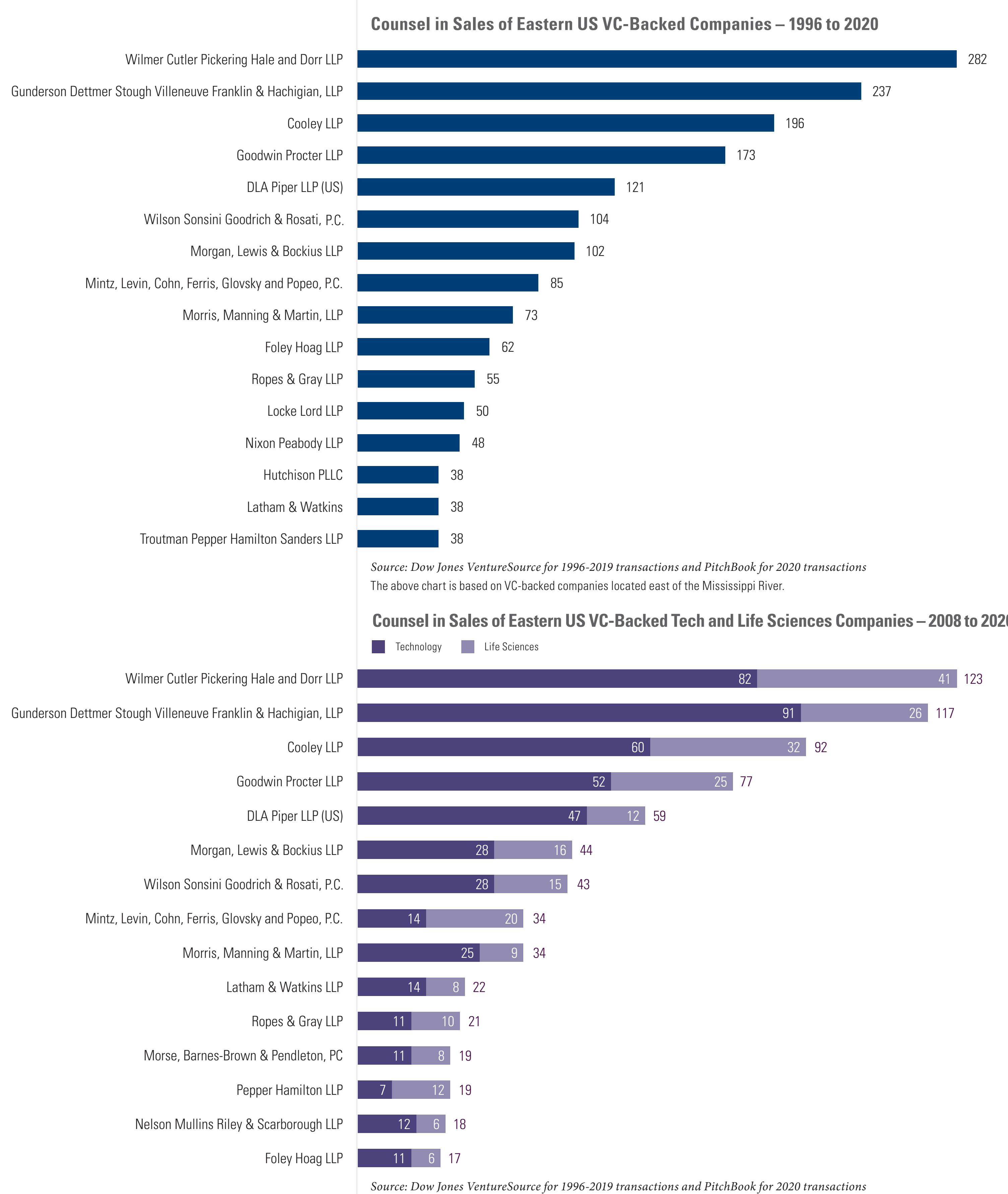
— In deals with buy-side R&W insurance, the forward-looking language in the definition of material adverse change/effect is the seller-favorable "would be" formulation in 85% of deals and the "could be" formulation in 13% of deals. Among other deals, 71% use the "would be" formulation and 18% use the "could be" formulation.

— The presence of buy-side R&W insurance makes it more likely that the acquisition agreement requires the buyer to offset losses against any recovery from insurance (by a margin of 90% to 86%) or tax benefits (by a margin of 46% to 31%).

— Among deals with earnouts, 59% that involve buy-side R&W insurance expressly permit buyers to offset indemnification claims against future earnout payments, compared to 83% of other deals, and 27% of deals with buy-side R&W insurance expressly prohibit such offsets, compared to only 3% of other deals.

— The parties specify an alternative dispute resolution mechanism in only 13% of deals with buy-side R&W insurance, compared to 28% of other deals. ■

Law Firm Rankings



WilmerHale provides corporate, securities, tax and regulatory advice in M&A deals ranging from VC-backed company sales to multibillion-dollar global mergers.

We have advised clients in more than 90 mergers and acquisitions with a combined value of nearly $85 billion since the beginning of 2020, adding to a record that, over the past decade, has included more than 800 M&A deals with total proceeds in excess of $415 billion.

Acquisition by
Cisco Systems
$4,500,000,000
March 2021

Acquisition of health savings account (HSA) assets from
HealthcareBank
$250,000,000
(excluding contingent payments)
April 2021

Acquisition by
Trimble
$201,100,000
January 2020

Acquisition of
Asavie
$155,100,000
October 2020

Acquisition of
Galileo Financial Technologies
$1,200,000,000
May 2020

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

Eaton Vance

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

Acquisition of Grab by Altimeter Growth
$39,600,000,000
(pro forma equity value)
(counsel to Altimeter Capital Management)
Pending
(as of April 15, 2021)

Acquisition of
Oxford Immunotec
$591,000,000
March 2021

Acquisition by
Zywave
Undisclosed
November 2020

Acquisition by
VMware
$38,000,000
February 2020

Sale of royalty rights on IDHIFA® worldwide net sales and outstanding regulatory milestone payments to
Royalty Pharma
$255,000,000
June 2020

wework

Acquisition and disposition transactions involving
Conductor, Flatiron School, Managed by Q, SpaceIQ and Teem Technologies
Undisclosed
Various dates 2020

Acquisition of
Peak Resorts
$264,000,000
September 2019

Acquisition by
Sandy Spring Bancorp
Undisclosed
January 2020

Acquisition of
CipherCloud
Undisclosed
March 2021

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

Medtronic

Acquisitions of
Rist Neurovascular and Avenu Medical
Undisclosed
August and November 2020

ThermoFisher SCIENTIFIC

Acquisition of cell sorting technology assets from
Propel Labs
Undisclosed
February 2021

SLD LASER

Acquisition by
Kyocera
Undisclosed
January 2021

TechTarget

Acquisition of
BrightTalk
$150,000,000
December 2020

Progress

Acquisition of
Chef Software
$220,000,000
October 2020

Lexicon pharmaceuticals

Sale of Lexicon's rights, title and interest in XERMELO® (telotristat ethyl) to
TerSera Therapeutics
$225,400,000
(including contingent payments)
September 2020

Acquisition by
La Jolla Pharmaceutical
$55,000,000
(including contingent payments)
July 2020

Emisphere

Acquisition by
Novo Nordisk
$1,350,000,000
(counsel to special committee)
December 2020

EVERQUOTE

Acquisition of
Crosspointe Insurance & Financial Services
Undisclosed
September 2020

Alkermes

Acquisition of
Rodin Therapeutics
$950,000,000
(including contingent payments)
November 2019

Acquisition by
Microsoft
Undisclosed
April 2020

Sale of consumer publishing business to
HarperCollins Publishers
$349,000,000
Pending
(as of April 15, 2021)

catabasis

Acquisition of
Quellis Biosciences
Undisclosed
January 2021

Acquisition of
Electro Scientific Industries
$1,000,000,000
February 2019

WorldAware®

Acquisition by
GardaWorld
Undisclosed
July 2020

Acquisition of Livongo by Teladoc Health
$18,500,000,000
(counsel to General Catalyst)
October 2020

Merger with
Sprint
$26,500,000,000
(regulatory counsel to T-Mobile)
April 2020

Effective January 1, 2021, the SEC amended the disclosure requirements for business acquisitions and dispositions. The amendments modernize the regulatory framework and alleviate some of the burdens registrants face in assembling required financial statements with respect to acquisitions and dispositions.

BASIC FRAMEWORK

Regulation S-X Rule 3-05 establishes the basic requirements that apply to a registrant's provision of financial statements of businesses they have acquired or are to acquire, including audited annual and unaudited interim pre-acquisition financial statements. Whether acquiree financial statements are required and the number of years of financial statements to be provided are determined by the "significance" to the registrant of the business acquired or to be acquired (referred to as the "tested entity") based on any one of three significance tests set forth in the definition of "significant subsidiary" in Regulation S-X Rule 1-02(w). In addition, Regulation S-X Article 11 requires registrants to provide pro forma financial information for certain acquisitions and dispositions, disclosures that are intended to show how the registrant's historical financial statements may have been affected had the transaction occurred at an earlier time.

AMENDMENTS TO SIGNIFICANCE TESTS

Among the most important changes in the amendments are modifications to the three significance tests set out in Rule 1-02(w):

— ***Investment Test.*** The prior investment test compared the registrant's and its subsidiaries' "investments in and advances to the tested entity" to the total assets of the registrant and its subsidiaries in the registrant's most recent annual financial statements required to be filed at or prior to the acquisition date. Among other revisions, the amendments made the following changes to this test:

- *Aggregate Worldwide Market Value.* The registrant's investments in and advances to the tested entity are now compared to the aggregate worldwide market value of the registrant's voting and non-voting common equity, *when available*. For this purpose, "aggregate worldwide market value" is the average of aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date for the acquisition or disposition.
- *Contingent Consideration.* For purposes of the analysis, "investments in and advances to the tested entity" now include the consideration transferred, less the registrant's and its subsidiaries' proportionate interest in the carrying value of assets transferred to the tested entity that remain in the combined entity post-acquisition. In addition, "investments in" the tested entity include the fair value of contingent consideration (such as sales-based milestones or royalties) *if* required to be recognized in the registrant's financial statements at fair value under US GAAP or IFRS as of the acquisition date. Even if not required to be recognized under US GAAP or IFRS, contingent consideration must be counted unless the likelihood of payment is remote.

— ***Income Test.*** The prior income test compared the registrant's and its subsidiaries' equity in the tested entity's income from continuing operations before income taxes (excluding any amounts attributable to any noncontrolling interests) to such income of the registrant and its subsidiaries for the most recently completed fiscal year. In addition to a handful of clarifications and simplifications, the amendments revised this test to provide as follows:

- *Revenue Component.* To reduce irregular results, particularly for registrants with nominal or break-even net income or loss in a recent fiscal year, the amendments added a new revenue component to the income test. The tested entity must now meet both the revenue and net income components of the test to be "significant." The revenue component compares the registrant's and its subsidiaries' proportionate share of the tested entity's consolidated revenues from continuing operations (after intercompany eliminations) to such revenues of the registrant for the most recently completed fiscal year. The revenue component does not apply if either the registrant or the tested entity did not have material revenue in each of the two most recently completed fiscal years. For purposes of determining significance and the required financial statements to be provided pursuant to Rule 3-05, the registrant may use the lower of the percentage calculated using the revenue component or the net income component.
- *Absolute Values.* To avoid potential misinterpretations that could result from the inclusion of negative amounts in the computation (such as in loss scenarios), the net income portion of the test is now based on absolute values.
- *Income Averaging.* Computational Note 2 to Rule 1-02(w) previously provided that if a registrant's income exclusive of amounts attributable to noncontrolling interests for the most recent fiscal year was at least 10% lower than the average of its income for the last five fiscal years, such average amount should be used for purposes of the calculation. The amendments clarified that if the new revenue test does not apply and the existing 10% threshold test in the Computational Note is triggered, then the income of the registrant for purposes of the income test shall be the average of the absolute value of such income for the last five fiscal years.

— ***Asset Test.*** The prior asset test compared the registrant's and its subsidiaries' share of the tested entity's assets (after intercompany eliminations) to the registrant's and its subsidiaries' total assets. The amendments to this test were modest and mostly clarified that total assets means "consolidated total assets."

REDUCTION IN NUMBER OF YEARS OF REQUIRED FINANCIAL STATEMENTS

Critical to alleviating the burden on some registrants, the amendments also

Summary of Required Rule 3-05 Financial Statements

Highest Level of Significance	Pre-Amended Rules	Amended Rules
None exceed 20%	None	None
Between 20% and 40%	Most recent fiscal year and interims for the current YTD period and prior year comparative period	Most recent fiscal year and interims for only the current YTD period
Between 40% and 50%	Two most recent fiscal years and interims for the most recent YTD period and prior year comparative period	Two most recent fiscal years and interims for the most recent YTD and prior year comparative period
Over 50%	Three most recent fiscal years and any required interims (unless net revenue of acquired business is less than $100M in the most recent fiscal year)	
Individually insignificant acquisitions in the aggregate exceeds 50%	Most recent fiscal year and any required interims for a mathematical majority of the businesses acquired	— Pro forma financial information that depicts the aggregate effect in all material respects of the acquired businesses required for all such individually insignificant acquisitions — For acquired businesses with individual significance greater than 20%, include historical financial statements for at least the most recent fiscal year

reduced the number of years of audited historical and unaudited interim financial statements that must be provided for acquired businesses under Rule 3-05. Under the new rules, no more than the two most recent fiscal years are required regardless of significance, as summarized in the accompanying chart.

OTHER AMENDMENTS

The amendments also included a number of other changes, some highlights of which include:

- ***Individually Insignificant Acquisitions.*** The amendments eliminated the requirement to provide historical financial statements for individually insignificant acquisitions. Historical financial statements are now required only for businesses counted as "individually insignificant" when their individual significance exceeds the 20% threshold but such historical financials have not been filed yet because of an allowable grace period under Form 8-K Item 9.01 and Rule 3-05.
- ***Pro Forma Adjustments.*** The amendments included several changes intended to improve the relevance of information included in the pro forma financial information under Article 11. Some of the new pro forma adjustment criteria include "transaction accounting adjustments" that only reflect required accounting to the transaction, "autonomous entity adjustments" for registrants that were formerly part of another entity to reflect the operations and financial position of the registrant on a standalone basis, and "management's adjustments" that enhance an understanding of the effects of a transaction that result from synergies and dis-synergies.
- ***Smaller Asset Acquisitions/Liability Assumptions.*** The amendments permit abbreviated financial statements if an acquired "business" meets a number of qualifying conditions, including that the total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20% or less of the seller and its subsidiaries as of the most recently completed fiscal year.
- ***Foreign Private Issuers/Foreign Businesses.*** The amendments aligned potential disconnects between the basis of accounting to be used for Rule 3-05 financial statements by acquired businesses and foreign private issuers (FPIs). Notably, FPIs may now reconcile Rule 3-05 financial statements of acquired "foreign businesses" that use home country GAAP to IFRS, rather than reconciling to US GAAP. In addition, Rule 3-05 financial statements may now be prepared under IFRS without reconciliation to US GAAP if the acquired business would qualify as an FPI if it were a registrant.
- ***Measuring Significance on a Pro Forma Basis.*** The amendments permit the use of pro forma financial information to measure significance in filings that require Rule 3-05 financial statements where the registrant has filed (1) the Rule 3-05 financial statements for any such acquired business and (2) the pro forma financial information required by Article 11 for any such acquired or disposed business.
- ***Significance Threshold for Dispositions.*** The amendments increased the significance threshold from 10% to 20% for purposes of analyzing business dispositions under the pro forma financial statement requirements in Article 11.
- ***Post-Acquisition Presentation.*** The amendments provide that separate acquired business financial statements are no longer required once a business has been included in the registrant's post-acquisition financial statements for nine months or a complete fiscal year, depending on significance, even in instances when the Rule 3-05 financial statements have been previously filed and the acquired business is of major significance to the registrant.

The amendments became effective January 1, 2021 and, except for a few exceptions, must be applied even when evaluating the significance of acquisitions and dispositions consummated prior to that date. ■

Public and private company M&A transactions share many characteristics, but also involve different rules and conventions.

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 file disclosure documents with the SEC, 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 obtains a fairness opinion from an investment banking firm and, depending on the circumstances, the board of the acquirer may choose to obtain a fairness opinion from its 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.

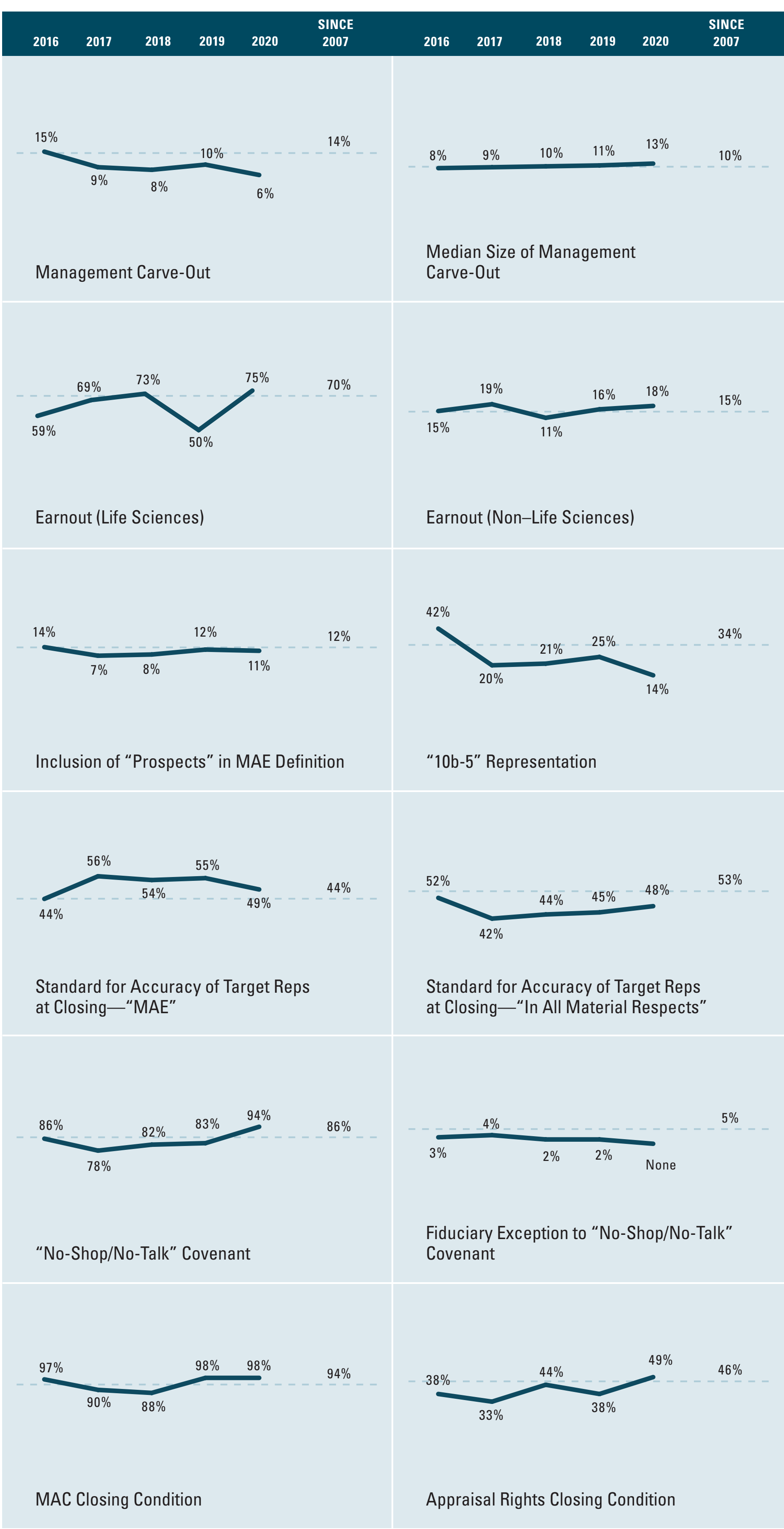
— ***Other SEC Filings:*** Many Form 8-Ks and other SEC filings are often required by public companies engaged in M&A transactions.

— ***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.

SELECTED ISSUES IN PRIVATE COMPANY ACQUISITIONS

Summarized below are selected issues that often arise in acquisitions of private companies:

- ***Management Carve-Out:*** Does the target have in place (or does it plan to establish) management carve-out arrangements that allocate a portion of the purchase price to the target's management or other employees?
- ***Earnout:*** Will the acquisition agreement include provisions providing that the target's stockholders will receive additional consideration based on post-closing financial metrics or the achievement of other milestones (such as regulatory approval in the case of life sciences companies)?
- ***Inclusion of "Prospects" in MAE Definition:*** Will the "material adverse effect" definition in the acquisition agreement include "prospects" along with other target metrics, such as the business, assets, properties, financial condition and results of operations of the target?
- ***"10b-5" Representation:*** Will the acquisition agreement include a "10b5-1" representation from the target? A "10b5-1" representation provides 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:*** What general standard will be applied to assess the accuracy of the target's representations and warranties for purposes of the acquirer's closing conditions?
  - An "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 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.

— ***"No-Shop/No-Talk" Covenant:*** Will the acquisition agreement include a "no-shop/no-talk" covenant prohibiting the target from seeking an alternative acquirer?

— ***Fiduciary Exception to "No-Shop/No-Talk" Covenant:*** If the acquisition agreement includes a "no-shop/no-talk" covenant, will this covenant have an exception permitting the target to consider an unsolicited superior proposal if required to do so by its fiduciary duties?

— ***"MAC" Closing Condition:*** Will the acquisition agreement contain a closing condition excusing the acquirer from closing if an event or development has occurred that has had, or could reasonably be expected to have, a "material adverse change" to the target? Requiring the target's representations to be "brought down" to closing has the same effect.

— ***Appraisal Rights Closing Condition:*** Will there be a closing condition to the effect that appraisal rights must not have been sought by target stockholders holding more than a specified percentage of the target's outstanding capital stock?

TRENDS IN PRIVATE COMPANY DEAL TERMS

SRS Acquiom, a provider of post-closing transaction management services, collects data on deal terms from private company acquisitions in which it served as shareholder representative. The accompanying chart presents the incidence of selected deal terms as reported in SRS Acquiom's MarketStandard database covering more than 2,400 transactions since 2007. Key trends in reported deal terms include the following:

Management Carve-Outs

— *Prevalence:* A management carve-out was included in 6% of transactions in 2020, down from 15% in 2016 (likely due to a substantial increase in valuations and acquisition prices), and in 13% of all transactions since 2007.

— *Median Size:* As a percentage of deal proceeds, the median size of management carve-outs increased from 8% in 2016 to 13% in 2020, and was equal to 10% in all transactions since 2007.

Earnouts

— *Life Sciences Deals:* Earnouts were present in 75% of all life sciences acquisitions in 2020, up from 59% in 2016, and appeared in 70% of all deals in the sector since 2007.

— *Non–Life Sciences Deals:* Among acquisitions of non–life sciences companies, earnouts were present in 18% of deals in 2020 compared to 15% in 2016. Overall, 15% of non–life sciences deals since 2007 included an earnout.

Representations and Warranties

— *Inclusion of "Prospects":* The target's "prospects" appeared in the definition of "material adverse effect" in 11% of transactions in 2020, consistent with the overall figure of 12% since 2007 but down modestly from 14% in 2016.

— *"10b-5" Representations:* The frequency of these representations has dropped sharply, from 42% of deals in 2016 to 14% in 2020. Overall, 34% of acquisitions since 2007 included a 10b-5 representation.

— *Accuracy of Target Reps at Closing:* In 2020, the "no material adverse effect" standard appeared in 49% of deals, while the "in all material respects" standard was used in 48% of deals, largely consistent with overall trends since 2007.

"No-Shop/No-Talk" Covenants

— *Inclusion of Covenant:* A "no-shop/no-talk" covenant was present in 94% of deals in 2020, up from 86% in 2016, and was included in 86% of all acquisitions since 2007.

— *Fiduciary Exception:* No deals in 2020 included a fiduciary exception to the "no-shop/no talk" covenant. Overall, this exception was present in only 5% of all acquisitions since 2007.

Closing Conditions

— *MAC Condition:* Present in 98% of deals in 2020 and 94% of all deals since 2007, a "material adverse change" closing condition has become ubiquitous.

— *Appraisal Rights:* The prevalence of appraisal rights closing conditions grew from 38% of deals in 2016 to 49% in 2020 (46% of all acquisitions since 2007). ■

POST-CLOSING CLAIMS

Based on an SRS Acquiom study analyzing post-closing claim activity in approximately 575 private target acquisitions from the third quarter of 2018 through the third quarter of 2020:

— **Frequency of Claims:** 38% of all transactions had at least one post-closing indemnification claim against the escrow. At 28%, claim frequency was lowest on deals valued at $50 million or less. Claims were most likely in deals with US public buyers (50% of transactions) and least likely in deals with US private buyers (35% of transactions).

— **Size of Claims:** Median claim size (excluding purchase price adjustments) as a percentage of the escrow ranged from a high of 294% for fraud claims to less than 1% for capitalization and appraisal rights claims. On average, claim size as a percentage of the escrow was highest on deals valued at $50 million or less and on deals with US private buyers, and lowest on deals valued in excess of $500 million and on deals with US public buyers.

— **Subject Matter of Claims:** Among all claims, the subject matter consisted of breaches of representations and warranties (40%), transaction fees/costs (16%), and appraisal rights, breaches of fiduciary and fraud (1% each).

— **Bases for Misrepresentation Claims:** Most frequently claimed misrepresentations involved tax (32%), employee-related (15%), undisclosed liabilities (13%), capitalization (8%), intellectual property (8%), financial statements (7%), customer contracts (5%) and regulatory compliance (4%).

— **Resolution of Claims:** Disputed claims (including purchase price adjustments) were resolved in a median of 5.4 months. Regulatory compliance claims took the most time to be resolved (median of 15.8 months), while purchase price adjustments were resolved the quickest (median of 0.9 months). 1.2% of deals had one or more claims litigated or arbitrated through judgment.

— **Purchase Price Adjustments:** 81% of all transactions had mechanisms for purchase price adjustments. Of the 79% of deals that had a purchase price adjustment, 63% of adjustments were favorable to the buyer and 37% were favorable to target stockholders.

— **Expense Fund:** 95% of all transactions without earnouts had an expense fund with an average size of $275,000 (0.31% of transaction value)s.

Private companies often make acquisitions before pursuing an IPO. Some deals occur before a company has given much thought to the possibility of an IPO, while others may be specifically intended to achieve critical mass in the company's revenues or to fill a gap in its product line or technology base in anticipation of going public.

In the context of an IPO, many of the challenges associated with M&A transactions are exacerbated:

— ***Management Distraction:*** An acquisition demands significant attention from the acquirer's management. Thoughtful allocation of management's time is needed to avoid doing a disservice to both the acquisition and the IPO, not to mention the company's business. Even with careful planning, pursuing a significant acquisition and an IPO concurrently is likely to slow down the IPO process.

— ***Integration:*** Business integration takes on a heightened importance in the crucible of an IPO. Many IPO companies are already in the midst of rapid organic growth. The additional challenge of simultaneously integrating a separate organization will increase the strain on the company—even more if entry into new markets, product integration, facility closings or employee layoffs are involved. A pre-IPO acquisition may also create additional risk during the first quarters following completion of the IPO, when the company must crisply execute its business plan to maintain market credibility and minimize the risk of securities litigation.

— ***Structuring:*** The issuance of private company stock as part of an acquisition purchase price can influence the manner in which an acquisition is structured. For example, stock cannot be issued as part of the acquisition unless exemptions from registration are available under federal securities laws. If the target is a venture capital–backed company, additional challenges may arise.

The accounting aspects of any proposed acquisition are vital considerations in deal timing, structure, and even feasibility. Key accounting issues arising in pre-IPO acquisitions include:

— ***Financial Statements:*** SEC rules may require a company going public to include in its Form S-1 additional financial information for completed and probable acquisitions. Depending on the significance of an acquisition, the required financial information may include audited historical financial statements for the target, as well as pro forma combined financial information for the acquirer and the target. If concurrent M&A activity is underway, the unavailability of all required financial information of the target could lead to significant delays in the company's IPO plans.

— ***Acquisition Accounting:*** The "fair value" acquisition accounting standard has a number of implications for companies engaging in M&A activity, including P&L charges for transaction expenses and the possibility of additional and unpredictable P&L charges associated with earnouts or goodwill impairment in future periods. Companies going public must be attentive to these matters, because of the need (at least outside of the life sciences industry) to demonstrate strong earnings at the time of an IPO and the desire to produce steady earnings growth in the period following the completion of the IPO. As a result, more extensive due diligence, by both the acquirer and the underwriters, is often required.

— ***SOX 404:*** Section 404 of the Sarbanes-Oxley Act poses several challenges in the pre-IPO M&A context. After the transaction is completed, the acquirer—once it becomes subject to Section 404 (generally upon filing its second Form 10-K after the IPO)—will have to evaluate its internal control over financial reporting (ICFR), report on the results, and have its ICFR audited (unless it qualifies for an exemption from the audit requirement). If the combined company's system of controls is not fully integrated, it may be prone to a material weakness in ICFR that must be disclosed. For a private acquirer that does not yet possess a fully developed internal control system, integration may require the acquirer not only to convert the target's systems but also to design or upgrade to new systems.

REGULATION S-X

Regulation S-X specifies the financial statement requirements for the Form S-1 and other SEC filings, including requirements arising from M&A transactions. In May 2020, the SEC adopted rule amendments that make significant changes to the financial disclosure requirements of Regulation S-X for financial statements of businesses acquired or to be acquired, and for business dispositions. These amendments are discussed on pages 14–15.

M&A activity has several other potential consequences for the IPO process:

— ***Disclosure to Target:*** The company's IPO plans may constitute material information, requiring disclosure to the target's stockholders, or the company may wish to share this information—in a balanced manner—to make its stock more attractive to the target stockholders. The company's disclosure of its upcoming IPO to an acquisition target poses at least some risk of premature public dissemination of the company's IPO plans.

— ***Form S-1 Disclosure:*** The company will be obligated to disclose its acquisition activity in the Form S-1 if a completed or probable acquisition triggers a requirement for separate target financial statements or prompts MD&A disclosure, a significant portion of the IPO proceeds will be used to finance an acquisition, or a large potential transaction is otherwise material for securities law purposes.

— ***Due Diligence:*** M&A transactions during the IPO process will result in additional due diligence by the underwriters and their counsel and can affect the timing of the IPO.

Pre-IPO acquisitions can present significant complications for the going-public process. The company must balance the strategic benefits of a proposed acquisition against its potentially detrimental impact on the IPO. Although proceeding with both plans at the same time is usually feasible and sometimes necessary, the company must be prepared for the possibility that doing so will require extra effort and create incremental risk or delay for each. ■

M&A transactions involving a party incorporated or based in California potentially raise a number of special issues and opportunities. Some of these issues primarily affect deal matters, while others apply broadly to companies and employees located in California.

DEAL LOCKUPS

Because of the Delaware Supreme Court's *Omnicare* decision limiting the ability of an acquirer to guarantee deal approval by means of voting agreements, private company acquisitions of Delaware corporations routinely employ simultaneous "sign-and-close" and "sign-and-vote" transaction structures. In the former, the closing occurs concurrently with the signing of the acquisition agreement. In the latter, stockholders provide their approval by written consent immediately after the acquisition agreement is signed.

Although California courts have not considered deal lockups and it is unclear whether California would follow *Omnicare* at all, California law does provide more flexibility than Delaware law in the protocol for obtaining merger approval from shareholders. Instead of requiring shareholder adoption of a signed merger agreement, California law only requires shareholder approval of the "principal terms" of the merger, which can occur before or after board approval of the merger and the signing of the merger agreement. By contrast, Delaware law requires the signed merger agreement to be adopted by stockholders (but permits prospective execution of stockholder consents that can eliminate the delay between signing the merger agreement and obtaining stockholder approval).

BUSINESS COMBINATIONS

The California Corporations Code contains a number of provisions that may affect M&A transactions:

— Section 1101 requires that, in a merger involving a California corporation, all shares of the same class or series of any constituent corporation be "treated equally with respect to any distribution of cash, rights, securities, or other property" unless all holders of the class or series consent otherwise. This requirement is potentially stricter than the comparable rules in Delaware, which have been interpreted—at least in some cases—to allow different forms of payment to be made to different holders of the same class of stock, as long as equivalent value is paid and minority shareholders are not disadvantaged.

— Section 1101 also limits the ability of an acquirer in a "two-step" acquisition transaction (such as a tender offer followed by a second-step merger) to cash out untendered minority shares. If an acquirer holds between 50% and 90% of a California target's shares, the target's non-redeemable common shares and non-redeemable equity securities may be converted only into non-redeemable common shares of the surviving or acquiring corporation unless all holders of the class consent otherwise. This means that, in all-cash or part-cash two-step acquisitions of California corporations, the minimum tender condition needs to be 90%, which can be a difficult threshold to reach.

— With limited exceptions, Section 1201 requires that the principal terms of a merger be approved by the holders of a majority of each class of outstanding shares (unless a higher percentage is specified in the corporate charter). Therefore, the holders of any class of outstanding shares—including common stock—can block a merger transaction. By contrast, Delaware law requires a merger to be approved by the affirmative vote of the holders of a majority of the outstanding stock entitled to vote on the matter; no class or series voting is mandated by statute.

— Section 1203 requires an "affirmative opinion in writing as to the fairness of the consideration to the shareholders" of the subject corporation in transactions with an "interested party." The statute is not confined to an opinion as to the fairness of the consideration "from a financial point of view"—the normal formulation in an investment banking fairness opinion—and it is unclear whether, and in what circumstances, a more extensive opinion may be required in a transaction subject to the statute. Section 1203 does not apply in acquisitions where the subject corporation has fewer than 100 shareholders, or in which the issuance of securities is qualified after a fairness hearing under California law, as discussed below.

"QUASI-CALIFORNIA" CORPORATIONS

Section 2115 of the California Corporations Code—the "quasi-California" corporation statute—purports to impose various California corporate law requirements on corporations incorporated in other states, including Delaware, if specified tests are met. The law generally applies to any company (other than a public company with shares listed on Nasdaq or the NYSE) if that company:

— conducts a majority of its business in California (as measured by property, payroll and sales tests); and

— has a majority of its outstanding voting securities held of record by persons having California addresses.

If a corporation is subject to the quasi-California corporation statute, a number of California corporate law provisions apply—purportedly to the exclusion of the law of the corporation's jurisdiction of incorporation. These California provisions, and their counterparts under Delaware law, address:

— shareholder approval requirements in acquisitions (which are generally more extensive than the stockholder approval requirements under Delaware law);

— dissenters' rights (which differ from Delaware law in a number of respects);

— limitations on corporate distributions (which are more restrictive than under Delaware law);

— indemnification of directors and officers (which is more limited than in Delaware);

— mandatory cumulative voting in director elections (permitted but not required in Delaware); and

BOARDROOM DIVERSITY

In recent years, California has extended the reach of Section 2115 into corporate boardrooms. One law requires every public company headquartered in California and whose shares are listed on a "major United States stock exchange" to have at least one female director (initially required by the end of 2019) and to have at least two (if the company has five directors) or three (if the company has six or more directors) female directors by the end of 2021.

A second law similarly requires every public company headquartered in California to have at least one director from an "underrepresented community" by the end of 2021 and to have at least two (if the company has five to eight directors) or three (if the company has nine or more directors) directors from underrepresented communities by the end of 2022. Companies not in compliance with these requirements may be subject to substantial fines as well as potential harm to their reputations, employee recruitment and retention, and investor relations. Both laws are subject to pending legal challenges.

— the availability of the California fairness hearing procedure described below to approve the issuance of stock in an M&A transaction (an alternative to SEC registration that has no counterpart in Delaware law).

In 2005, the Delaware Supreme Court held that Section 2115 is invalid as applied to a Delaware corporation. Although existing California precedent upholds Section 2115, an appellate case in 2012 suggested that Section 2115 cannot compel California law to be applied when the matter falls within a corporation's internal affairs (for example, voting rights of shareholders, payment of dividends to shareholders, and the procedural requirements of shareholder derivative suits). However, no California appellate court has squarely ruled on the matter. Unless and until Section 2115 is invalidated by the California Supreme Court, a non-California corporation acts at its peril in ignoring this statute, since its application to out-of-state corporations may depend on forum shopping and a race to the courthouse. Careful transaction planning is required if a non-California corporation is deemed to be a "quasi-California" corporation.

FAIRNESS HEARINGS

In M&A transactions involving the issuance of stock, California law offers a relatively efficient and inexpensive alternative to SEC registration that still results in essentially freely tradable stock—a "fairness hearing" authorized by Section 3(a)(10) of the Securities Act of 1933.

The fairness hearing procedure is available where either party to the transaction is a California corporation, or a quasi-California corporation, as discussed above. Fairness hearings are also possible if a significant number of the target's shareholders are California residents, regardless of the parties' jurisdictions of incorporation, or if the issuer is physically located in California or conducts a significant portion of its business in California. There is no hard-and-fast rule as to how many target shareholders must reside in California before an acquisition can qualify for a California fairness hearing, but transactions have qualified when a significant minority of the target's shareholders have been California residents. There also is no definitive guidance on what constitutes conducting a significant portion of a company's business in California.

A fairness hearing is conducted before a hearing officer of the California Department of Business Oversight. The hearing officer reviews the disclosure documents, but there are few rules governing their content, and the documents—a notice to shareholders of the hearing, followed by an information statement—are much less extensive than a proxy statement or registration statement governed by SEC rules. At the conclusion of the hearing, and assuming that the hearing officer determines that the proposed transaction terms are fair, a permit is issued that "qualifies" the acquirer's securities for issuance in the transaction.

Fairness hearings are open to the public. It is possible, but unusual, for a competitor or another bidder to appear at the hearing and contest the fairness of the transaction—for example, by making a higher bid on the spot.

NON-COMPETITION AGREEMENTS

A California statute provides that non-competition agreements are unenforceable except in very limited circumstances, such as in connection with the sale of a business. In interpreting this statute, California courts have also invalidated agreements prohibiting former employees from soliciting customers or employees of a former employer.

California law prohibits employers from requiring employees, as a condition of employment, to agree to apply the governing law of a state other than California, unless that employee is represented by counsel in negotiating the applicable agreement. In addition, courts generally will not enforce a non-competition agreement that is governed by the laws of another state against an individual living or working in California unless the non-competition agreement would be enforceable under California law, even if the non-competition agreement was entered into when the employee resided in another state and even if the parties' contract expressly provided that the law of that state governed.

STOCK OPTIONS

If any California residents are to receive options or other equity incentives, then the stock option or other equity incentive plan must comply with California law. For example, an option must be exercisable (to the extent vested) for at least six months following termination of employment due to death or permanent and total disability and, unless the optionee is terminated for cause, for at least 30 days following termination of employment for any other reason.

If a company does not wish to provide these rights to all plan participants, it can use a separate form of agreement containing the required provisions for California participants. California option and equity incentive plan requirements do not apply to a public company to the extent that it registers option shares with the SEC on a Form S-8. ■

Trends in VC-Backed Company M&A Deal Terms

We reviewed all merger transactions between 2016 and 2020 involving VC-backed targets (as reported in PitchBook for 2020, 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		2016	2017	2018	2019	2020
The number of deals we reviewed and the type of consideration paid in each	Sample Size	19	18	37	20	25
	Cash	53%	56%	84%	60%	60%
	Stock	0%	0%	3%	0%	8%
	Cash and Stock	47%	44%	13%	40%	32%
Deals with Earnout		**2016**	**2017**	**2018**	**2019**	**2020**
Deals that provided contingent consideration based upon post-closing performance of the target (other than balance sheet adjustments)	With Earnout	37%	22%	32%	40%	28%
	Without Earnout	63%	78%	68%	60%	72%
Deals with Indemnification		**2016**	**2017**	**2018**	**2019**	**2020**
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	100%[2]	94%[3]	84%	80%	88%
	By Buyer	37%	61%	39%	45%	32%
Deals with Representation and Warranty Insurance		**2016**	**2017**	**2018**	**2019**	**2020**
Deals that expressly contemplate representation and warranty insurance	With Representation and Warranty Insurance	Not Tracked	Not Tracked	41%	25%	68%
Survival of Representations and Warranties		**2016**	**2017**	**2018**	**2019**	**2020**
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	12 Mos.	9 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	18 Mos.	24 Mos.	24 Mos.	24 Mos.	18 Mos.
	Most Frequent	18 Mos.	12 Mos.	18 Mos.	18 Mos.	12 Mos.
Caps on Indemnification Obligations		**2016**	**2017**	**2018**	**2019**	**2020**
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	83%	94%[6]	79%	86%	81%
	Limited to Purchase Price	0%	0%	0%	0%	0%
	Exceptions to Limits[5]	95%	94%	100%	100%	95%
	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 certain "fundamental" representations and representations concerning material contracts and intellectual property.

[3] 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.

[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		2016	2017	2018	2019	2020
Deals having escrows securing indemnification obligations of the target's shareholders (subset: deals with indemnification obligations of the target shareholders)	With Escrow	89%	100%	90%[7]	94%	90%
	% of Deal Value					
	Lowest[8]	5%	4%	3%	10%	8%
	Highest	15%	13%	15%	13%	15%
	Most Frequent	10%	5%	10%	12%	15%
	Length of Time[9]					
	Shortest	12 Mos.	9 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	24 Mos.	24 Mos.	36 Mos.	36 Mos.	24 Mos.
	Most Frequent	18 Mos.	12 & 18 Mos. (tie)	18 Mos.	12 Mos.	12 Mos.
	Exclusive Remedy	88%	71%	72%	64%	68%
	Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[5]	93%	92%	100%	100%	92%

Baskets for Indemnification		2016	2017	2018	2019	2020
Deals with indemnification only for amounts above a specified "deductible" or only after a specified "threshold" amount is reached	Deductible[10]	47%	63%	47%	56%	52%
	Threshold[10]	53%	37%	53%	44%	29%

MAE Closing Condition		2016	2017	2018	2019	2020
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	100%	94%	100%	100%	100%
	Condition in Favor of Target	39%	22%	12%	35%	24%

Exceptions to MAE		2016	2017	2018	2019	2020
Deals where the definition of "material adverse effect" for the target contained specified exceptions	With Exception[11]	100%	100%	97%[12]	100%	100%

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

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

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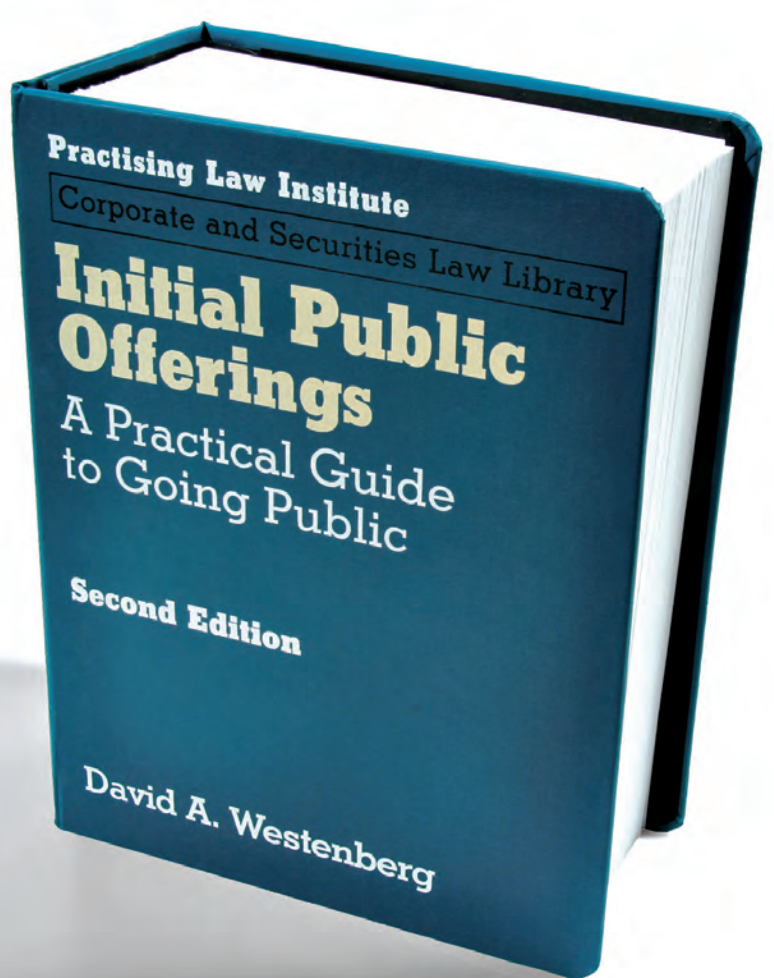

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More information at **IPOguidebook.com**
Book available from PLI.edu

Want to know more about the IPO and venture capital markets?

Our *2021 IPO Report* offers a detailed IPO market review and outlook, plus useful market metrics and need-to-know information for pre-IPO companies. We look at the resilience of the IPO market in the face of the COVID-19 pandemic, examine the JOBS Act's impact on capital formation almost 10 years on, and discuss direct listing as an IPO alternative gaining traction among high-profile private companies. We also analyze the SPAC IPO phenomenon, address recent trends in insider trading polices and Rule 10b5-1 plans, and look at factors IPO companies should consider in right-sizing their stock incentive and employee stock purchase plans.

See our *2021 Venture Capital Report* for an in-depth US venture capital market analysis and outlook, including industry and regional breakdowns. We provide insights into the use of management carve-out plans as retention incentives in private company sales, discuss recent SEC rule amendments that are expanding the financing toolkit for pre-IPO companies, and highlight the importance of transfer pricing compliance for early-stage companies. We also offer a roundup of deal term trends in VC-backed company M&A transactions and convertible note, SAFE and venture capital financings.

www.wilmerhale.com/2021MAreport

Data Sources: M&A data is sourced from S&P Global Market Intelligence. WilmerHale compiled the data for sales of VC-backed companies from Dow Jones VentureSource and PitchBook. For law firm rankings, sales of VC-backed companies are included under the current name of each law firm. Other data sources are as indicated in this report.

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