M&A Report

2025

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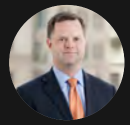
Note From the Editor

This year's M&A Report offers a detailed review of the M&A market and outlook, including a breakdown by various geographies and industry sectors. We examine what might be in store with antitrust and CFIUS under the Trump Administration, common purchase price adjustments in financial services transactions, and trends in common takeover defenses. We also look at considerations in conducting "dual track" M&A and IPO processes and the challenges associated with pursuing pre-IPO acquisitions. Finally, we review trends in VC-backed company M&A deal terms.

Thanks for reading. Please stay in touch with us by subscribing to **Material: WilmerHale's M&A blog** and our **mailing lists** so you can stay up to date on the latest developments related to M&A. And please check out WilmerHale's IPO and Venture Capital reports for a deep dive into those areas.



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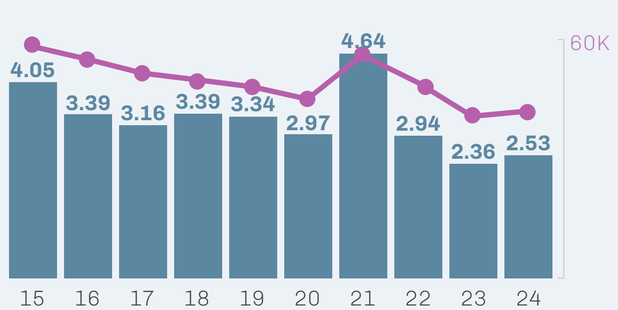
Market Review and Outlook

Entering 2024, the anticipation had been that the macroeconomic headwinds that prevailed since 2022 would begin to dissipate, and M&A activity would start to see a resurgence. Instead, continued high interest rates, economic uncertainty, heightened regulatory scrutiny, and the valuation gap between buyers and sellers prevailed throughout much of the year, resulting in only a modest M&A market recovery that fell meaningfully short of achieving recent historical levels.

The number of reported M&A transactions worldwide increased in 2024 by 3% to 42,631 compared with 2023. Global reported M&A deal value increased by 7% to $2.53 trillion. Average deal size was up 4% in 2024 to $59.4 million.

Global M&A Activity
2015 to 2024



42,631
M&A deals in 2024, a 3% increase

$2.53T
deal value in 2024, a 7% increase

GEOGRAPHIC RESULTS

United States

Deal volume increased by 5% to 17,430, and deal value grew by 9% to $1.64 trillion. Average deal size increased by 4% to $93.9 million, and the number of billion-dollar transactions jumped by 19% to 316, while their total value increased 10% to $1.23 trillion.

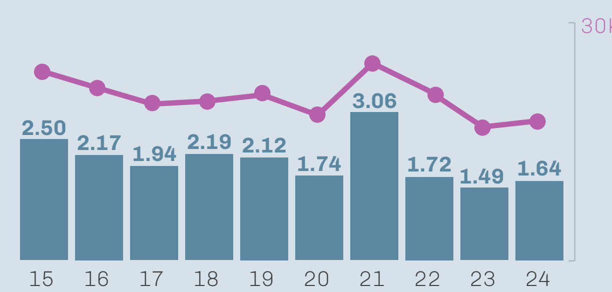
Europe

The number of transactions increased by less than 1% to 15,389. Total deal value increased by 8% to $844.4 billion, and average deal size increased by 7% to $54.9 million. The number of billion-dollar transactions involving European companies increased by 11% to 177, while their total value increased by 14% to $552.7 billion.

Asia-Pacific

Deal volume increased by 7% to 11,385. Total deal value increased by 16% to $726.7 billion, resulting in an average deal size that climbed 8% to $63.8 million. The number of billion-dollar transactions climbed by 19% to 125, while their total value jumped by 28% to $412.4 billion.

US M&A Activity
2015 to 2024

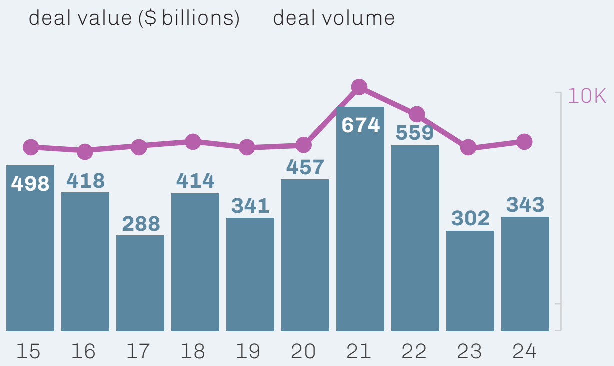


17,430
M&A deals in 2024, a 5% increase

$1.64T
deal value in 2024, a 9% increase

SECTOR RESULTS

Technology Global M&A Activity
2015 to 2024

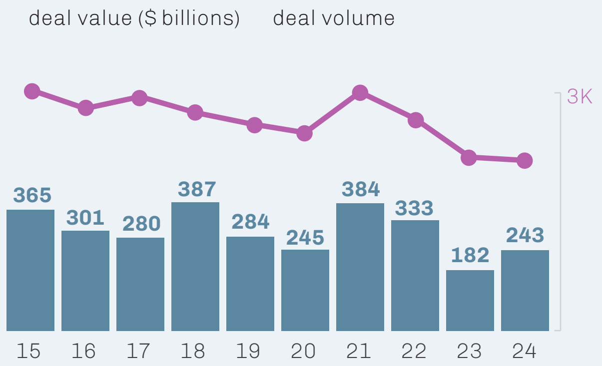


7,751
M&A deals in 2024,
a 4% increase

$343B
deal value in 2024,
a 14% increase

Global average technology deal size climbed by 9% to $44.3 million. US technology deal volume increased by 8% to 3,325 transactions, while total technology deal value jumped 41% to $274.4 billion, resulting in a 31% increase in average deal size to $82.5 million.

Financial Services Global M&A Activity
2015 to 2024

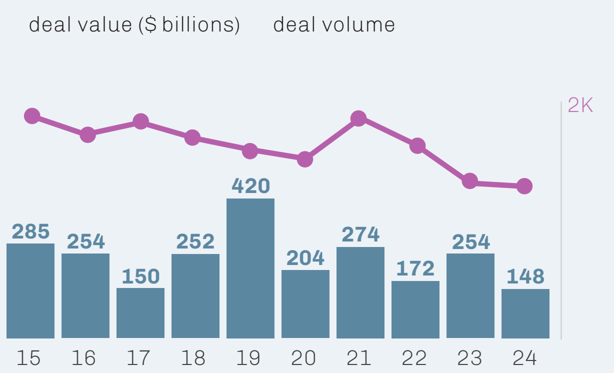


2,246
M&A deals in 2024,
a 2% decrease

$243B
deal value in 2024,
a 33% increase

Global M&A activity in the financial services sector saw a 36% increase in average deal size to $108.0 million. In the United States, financial services deal volume increased by less than 1% to 1,185 transactions, while total deal value more than doubled to $163.6 billion. The average US financial services deal size increased 103% to $138.1 million.

Life Sciences Global M&A Activity
2015 to 2024

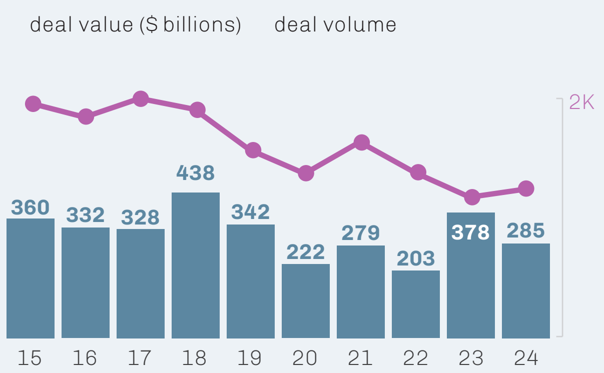


1,237
M&A deals in 2024,
a 2% decrease

$148B
deal value in 2024,
a 42% decrease

Global average life sciences deal size decreased by 41% to $119.3 million. In the United States, life sciences deal volume declined by less than 1% to 572 transactions, while life sciences deal value fell by 43% to $123.0 billion, resulting in a 43% decrease in average deal size to $215.0 million.

Energy Global M&A Activity
2015 to 2024



1,264
M&A deals in 2024,
a 6% increase

$285B
deal value in 2024,
a 24% decrease

Global deals in the energy sector saw a 29% decrease in average deal size to $225.8 million. US energy deal volume increased 11%, while deal value declined by 26% to $213.7 billion. The average US energy deal size fell by 33% to $424.0 million.

OUTLOOK

Given the lackluster deal conditions in 2024, the uptick in M&A activity is encouraging; however, the 2023 tallies set a low bar to clear, and overall activity remains at a level not seen since the late 2000s. Quarterly deal trends in 2024 were indistinct, making it difficult to predict 2025 activity.

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

- **Macroeconomic Conditions:** Global GDP growth has slowed marginally, increasing by 3.6% in 2022, 3.3% in 2023 and 3.2% in 2024, and is forecast to increase by 3.2% in 2025. Following growth of 2.5% in 2022 and 2.9% in 2023, the advance estimate of US GDP growth for 2024 is 2.8%, with a forecast of 2.0% for 2025. Despite the Federal Reserve having lowered interest rates three times since September, interest rates remain close to 20-year highs, and with lingering concern that inflation has yet to be fully tamed, the Federal Reserve has indicated they are in no hurry to reduce rates further and are now in a wait-and-see phase, despite hope that inflation will continue to slow in the months ahead.
- **Valuations:** Higher interest rates continue to pressure company valuations. Certain sectors, such as technology, that are heavily reliant on future growth expectations, have seen punishing valuation declines, while other sectors have seen a more moderate retrenchment. Depressed valuations create opportunities for strategic acquirors, especially when underwhelming macroeconomic fundamentals are likely to limit organic growth in many sectors; but the valuation gap between what buyers are willing to pay and what sellers are willing to accept remains a stumbling block to renewed M&A activity.
- **Regulatory Environment:** It is too early to predict the impact of the new US federal government administration on M&A activity. While the overall antitrust environment may be more pro-business and deal friendly, an "America First" stance may mean that national security concerns remain at a heightened level and acquisitions by foreign buyers may be heavily scrutinized. Optimism is also tempered by the concern that higher import tariffs will lead to inflationary pressures and retaliatory protectionist countermeasures from foreign governments. Parties should certainly expect that rigorous scrutiny of deals and longer closing timelines will prevail.
- **Private Equity Activity:** After perplexingly increasing, albeit very slightly, between 2022 and 2023, global private equity fundraising declined by 20%, from $594.7 billion in 2023 to $476.1 billion in 2024, the lowest annual level since 2018. Private equity deal activity remained suppressed for much of 2024, and "dry powder" remains at close to record levels. Private equity firms face pressure to deploy committed capital, but with the pool of attractive targets limited, continued high interest rates and tepid economic growth, deal activity may remain below historic levels.
- **VC-Backed Exits:** The number of reported US acquisitions of VC-backed companies was essentially flat between 2023 and 2024, with deal volume increasing from 1,063 in 2023 to 1,068 in 2024. Reported deal value increased 21%, from $45.5 billion in 2023 to $55.2 billion in 2024—which, despite the increase, represents the second-lowest annual tally in the past six years. 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. The volume of VC-backed company sales in the coming year will depend in part on whether founders expect the overall valuation environment to become more favorable and on capital availability should they desire to stay private. ■

Data compiled by Tim Gallagher, a senior corporate analyst in WilmerHale's Corporate Practice.

M&A data is sourced from S&P Global Market Intelligence. Data discussed in this report is based on announced transactions, excluding transactions that are subsequently terminated. Reported M&A data for a given year may be adjusted over time to reflect the removal of terminated transactions and the inclusion of previously unannounced transactions.

Antitrust and M&A: Is Everything Old New Again?

By Hartmut Schneider, Lauren Ige and John W. O'Toole

With every change in administration, businesses and practitioners wonder what the new administration will mean for antitrust enforcement in the United States. Speculation was at fever pitch four years ago, after Democratic officials expressed the view that antitrust enforcement had languished and needed revival. President Biden's antitrust triumvirate of Federal Trade Commission (FTC) Chair Lina Khan, Department of Justice (DOJ) Antitrust Division head Jonathan Kanter and White House Technology and Competition Policy Advisor Tim Wu promptly initiated aggressive policy proposals and enforcement steps. In the realm of M&A, a general sense that mergers were inherently "bad" seemed to prevail in the rhetoric of some antitrust officials.

What, then, should we expect for the antitrust review of mergers in the second Trump Administration? Will FTC and DOJ return to the relatively traditional enforcement approach of the first Trump Administration, or have the enforcement winds changed? To answer these questions, it is useful to consider (i) what the data tells us about enforcement changes during the first Trump and the Biden administrations and (ii) how personnel decisions and expected administration priorities give initial insight into probable initiatives over the next four years.

A. Looking Back: How Did Biden-Era M&A Enforcement Compare to Trump 1.0?

Although the new administration is Republican, a return to Bush-era enforcement—much less Reagan-era laissez-faire—is unlikely. Even a quick look at antitrust activity in the first Trump Administration reveals significant enforcement, including against mergers.[1] For example, DOJ sued to block AT&T's proposed acquisition of Time Warner based on concerns that it might foreclose access to Time Warner content—an ultimately unsuccessful "vertical" merger challenge.[2] Other prominent litigated mergers included Visa/Plaid,[3] Peabody/Arch Coal,[4] Evonik/PeroxyChem,[5] Altria/JUUL[6] and Axon/VieVu.[7]

By some counts, the first Trump Administration initiated more significant merger investigations than the Biden Administration, although comparisons of absolute enforcement activity are inherently fraught because of the lower level of M&A activity in recent years. A potentially more revealing statistic is the percentage of Hart-Scott-Rodino Act (HSR) reportable transactions that received "second requests" from DOJ or FTC, because a higher percentage of second requests—which initiate in-depth merger investigations, typically after one to two months of review—could indicate greater sensitivity to *potential* antitrust concerns. On this score, the data is unremarkable. Taking the government's fiscal year 2023 as an example, 37 of the 1,805 HSR filings (or roughly 2%) triggered second requests.[8] In 2022, second requests similarly accounted for approximately 1.5% of HSR filings.[9] This is consistent with the long-standing trend that about 2% of HSR filings result in in-depth reviews.[10]

Comparing M&A enforcement data in the first Trump and the Biden administrations nevertheless reveals two notable differences. *First*, the number of mergers ending in negotiated settlements between the parties and the antitrust agencies (typically in the form of divestiture remedies) declined dramatically during the Biden years, both in absolute terms and as a percentage of total cases.[11] This is consistent with statements from antitrust agency leaders early in the Biden Administration expressing concerns that divestitures often were ineffective because they did not replace the competition lost as a result of a merger.[12]

The *second* insight, a corollary of the first, is that abandoned transactions increased during the Biden Administration. *West Practical Law* counts 22 abandoned transactions between 2016 and 2020 in significant antitrust investigations, or roughly 18% of recorded matters. In the 2021–2024 period, 29 transactions were abandoned under these circumstances—a remarkable 35% of recorded deals that received significant scrutiny. Here again, the data is consistent both with the Biden-era agencies' greater reluctance to accept settlements and with greater reservations about M&A's impact on the American economy in general.

B. Looking Ahead: Likely Changes and Initiatives

Personnel decisions for agency leadership and known policy preferences suggest that it is reasonable to anticipate several changes in the second Trump Administration.

- **Less Hostility Toward Mergers**. Antitrust agency officials in the Biden Administration made clear that they were looking for ways to bring cases, including those based on more novel theories. That skeptical, anti-merger sentiment will likely change in the second Trump Administration. However, merger enforcement will not disappear. Many on the conservative-leaning side of antitrust policy circles are equally committed to enforcement, including in horizontal mergers and against large technology companies.

- **Return of Negotiated Settlements.** In contrast to the Biden era's skepticism of merger remedies, the first Trump Administration accepted divestiture remedies even in high-profile mergers such as CVS/Aetna[13] and Sprint/T-Mobile.[14] There is little indication that this approach has fallen out of favor among the likely Republican agency leadership—indeed, one of the two Republican FTC commissioners recently said that the antitrust agencies should be "pragmatic" with remedies in mergers.[15] We therefore will likely see a rise in the number of negotiated consent decrees in the new administration.

- **Restoration of Early Termination.** In 2021, the antitrust agencies abandoned early terminations of the HSR waiting period, meaning that parties had to wait at least 30 days to close a transaction, even if the agencies decided not to investigate. The FTC announced that it will lift this suspension following the final revised HSR rule coming into effect, likely in early 2025.[16]

- **Revisions to the 2023 Merger Guidelines.** The 2023 Merger Guidelines may be revised or rescinded under the new administration. These guidelines were a significant departure from prior guidelines, lowering concentration thresholds required for transactions to trigger a presumption of competitive harm and signaling a greater focus on serial acquisitions, potential competition and labor markets, among other concepts. Republican FTC Commissioner Melissa Holyoak has said that she would "strongly consider" revising the guidelines,[17] while Chair Andrew Ferguson has said that there were aspects of the guidelines he would be open to reforming.[18]

- **Abandonment of the FTC Non-Compete Ban.** The FTC's non-compete ban enacted in April 2024 is unpopular with many Republicans. The rule would have become effective in September 2024 but was challenged in multiple district courts. A Texas court enjoined the ban nationwide, and an appeal is pending in the 5th US Circuit Court of Appeals. While this could play out in several ways, it seems unlikely that the rule will survive. Chair Ferguson dissented from issuing the rule, stating that it was unlawful and outside the FTC's authority.[19]

- **Sector-Specific Enforcement.** An open question remains as to whether the new administration will take a more hands-off antitrust approach to M&A activity in specific sectors. High on this list is traditional (fossil fuel) energy, which President Trump has long championed. Nevertheless, it may be premature to expect laissez-faire antitrust reviews of energy transactions. Some energy M&A transactions, even those that involve large players, occur in relatively unconcentrated markets and therefore often do not raise concern.[20] And in more concentrated segments, it is not clear that the new administration's policy support for fossil fuels will translate into support for additional M&A. For example, the first Trump Administration challenged the combination of Peabody and Arch Coal on the basis that it eliminated competition between the two largest coal miners in the Southern Powder River Basin in northeastern Wyoming.[21] In addition, to the extent fossil fuel energy M&A has implications for consumers—such as by affecting gas prices—the new administration likely would not want to be seen as tolerating these impacts.

C. Conclusion

Some antitrust enforcement questions remain as we enter the second Trump Administration. Nevertheless, US antitrust agencies are expected to retreat from the Biden-era envelope-pushing merger enforcement, and parties to reportable mergers can anticipate the return of negotiated remedies and early termination. Enforcement into traditional horizontal and vertical concerns will likely remain robust, as will scrutiny of large technology companies. ■

Hartmut Schneider is a partner and chair of WilmerHale's Antitrust and Competition Practice. Lauren Ige and John O'Toole are counsel in the firm's Antitrust and Competition Practice.

[1] *Westlaw Practical Law's* database of federal merger enforcement actions counts 123 merger reviews that ended in litigation, were settled with remedies, were abandoned or received agency closing statements during the 2016–2020 period. *See* https://content.next.westlaw.com/practical-law/whats-market/federal-merger-enforcement-actions?transitionType=Default&contextData=(sc.Default).

[2] *U.S. v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc.* (D.DC Nov. 20, 2017).

[3] *U.S. v. Visa Inc., and Plaid Inc.* (N.D. Ca. Nov. 5, 2020).

[4] *FTC v. Peabody Energy Corp. and Arch Coal, Inc.* (E.D. Mo. Feb. 26, 2020).

[5] *FTC v. RAG-Stiftung et al.* (D.DC Aug. 2, 2019).

[6] *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.* (FTC Docket No. 9393) (Apr. 1, 2020).

[7] *In the Matter of Axon Enterprise, Inc. and Safariland, LLC* (FTC Docket No. D9389) (Jan. 3, 2020).

[8] *FTC and DOJ Antitrust Division, Hart-Scott-Rodino Annual Report (Fiscal Year 2023),* at 2 and 8.

[9] *FTC and DOJ Antitrust Division, Hart-Scott-Rodino Annual Report (Fiscal Year 2022),* at 6; 47 second requests for 3,152 reported transactions.

[10] For a report from the first Trump Administration, see, e.g., "FTC and DOJ Antitrust Division," *Hart-Scott-Rodino Annual Report (Fiscal Year 2018)* at 5–6; 51 second requests for 2,111 filings (2.4% of HSR findings).

[11] West Practical Law counts 80 settlements with remedies from 2016 through 2020 (65% of significant investigations), as compared with 23 settlements with remedies from 2021 through 2024 (28% of significant investigations).

[12] *See*, e.g., Dep't of Justice, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section" (Jan. 24, 2022) ("I am concerned that merger remedies short of blocking a transaction too often miss the mark"), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

[13] *See* Press Release, Dep't of Justice, "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger" (Oct. 10, 2018), https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.

[14] *See* Press Release, Dep't of Justice, "Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

[15] Bryan Koenig, "All Merger Fixes 'Should Be on the Table,' FTC's Holyoak Says," Law360 (Nov. 14, 2024), https://www.law360.com/articles/2261096/all-merger-fixes-should-be-on-table-ftc-s-holyoak-says.

[16] *See* Federal Trade Commission, "FTC Finalizes Changes to Premerger Notification Form" (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.

[17] Id.

[18] *See* "A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott," Mercatus Center (June 13, 2024), https://www.mercatus.org/events/2024/06/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott.

[19] *See* Federal Trade Commission, "Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak In the Matter of the Non-Compete Clause Rule" (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

[20] *See*, e.g., Federal Trade Commission, "FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal" (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal.

[21] *See* Federal Trade Commission, "FTC Files Suit to Block Joint Venture between Coal Mining Companies Peabody Energy Corporation and Arch Coal" (Feb. 26, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-files-suit-block-joint-venture-between-coal-mining-companies-peabody-energy-corporation-arch.

CFIUS Under Trump 2.0: Continued Scrutiny of Cross-Border Deals

By Jason C. Chipman and Douglas W. Gates

In 2024, the Biden Administration substantially expanded executive branch power to monitor foreign investment into and out of the United States. First, the administration continued efforts to aggressively police compliance with rules established by the Committee on Foreign Investment in the United States (CFIUS or the Committee). Second, the administration created a new regime regulating certain American investments in Chinese quantum, microelectronic, and artificial intelligence companies. The Trump Administration is unlikely to roll back any of these developments. Indeed, it is more likely that the new Trump team will build on Biden's efforts to aggressively evaluate inbound and outbound investment, particularly with regard to China.

I. CFIUS

There was a time not too long ago when CFIUS was a voluntary regime that primarily impacted the defense, telecom, and aerospace sectors. But those days are gone. Today, the CFIUS regime has the potential to impact any foreign person's acquisition of or investment in a US business involved in a wide range of technologies and economic sectors. CFIUS is keenly interested in nearly all advanced technology sectors, and the Committee made clear in 2024 that it would become far more aggressive about policing compliance with CFIUS mandatory filing requirements and mitigation agreement obligations. The incoming Trump Administration is unlikely to change course in any material way because support for aggressive CFIUS enforcement is one of the few bipartisan commitments in Washington.

What does all this mean for parties pursuing cross-border M&A in 2025? CFIUS should be factored into deal strategy discussions earlier, and parties should be prepared for more post-deal scrutiny for transactions that are not submitted to the Committee.

A. Background

CFIUS has broad authority to review foreign person acquisitions of US businesses. Although CFIUS was historically a voluntary process, with parties opting for a CFIUS review when they desired safe harbor from post-close scrutiny, in 2018 the Committee created a mandatory filing regime to supplement the voluntary filing regime.

Voluntary Filing Regime: CFIUS has the power to review two types of investments pursuant to a voluntary submission to CFIUS. First, CFIUS can review any *"covered control transaction"* to determine the effect of the transaction on the national security of the United States. A covered control transaction is any merger, acquisition, or investment that "could result" in a foreign person exercising "control" of a US business, which is a person or entity "engaged in interstate commerce in the United States."[1] CFIUS rules carve out a limited safe harbor from the definition of "control" for passive investments. Under the passive investment safe harbor provision, "[a] transaction that results in a foreign person holding ten percent or less of the outstanding voting interest in a US business [is not a covered transaction] ... but only if the transaction is solely for the purpose of passive investment."[2]

Second, CFIUS can review any *"covered investment,"* which is any direct or indirect investment by a foreign person in a technology, infrastructure, or data (TID) US business that does not result in control of the US business but affords the foreign person with access to (i) material nonpublic technical information, personal data, or critical infrastructure information, (ii) membership or observer rights on the board of the US business, or (iii) any other involvement in the operation of the US business (other than voting shares).[3]

A TID US business is any US business that satisfies one of three criteria:

(1) Critical Technology—Produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies;

(2) Critical Infrastructure—Performs specified types of work in relation to a list of covered critical infrastructure; or

(3) Sensitive Personal Data—Maintains or collects, directly or indirectly, sensitive personal data of US citizens (other than data associated with its employees).[4]

The "covered investment" category is not applicable to Excepted Investors (currently defined as certain investors from Canada, the United Kingdom, Australia, and New Zealand).[5]

Mandatory Filing Regime: Transaction parties must formally notify CFIUS *before* closing two types of transactions. (Failure to notify a deal covered by these rules can result in a fine of up to the value of the transaction.) First, a mandatory notification to CFIUS may be required for certain types of foreign investments into US businesses that produce, design, test, manufacture, fabricate, or develop critical technology (*i.e.*, that export controlled technology, such as technology subject to the International Traffic in Arms Regulations (ITAR), *if* an export license would be required to send the technology to the country of the investor at issue.[6]

Second, parties must notify CFIUS of any covered investment or covered control transaction that results in a foreign government having a "substantial interest" in a TID US business. A substantial interest occurs when a foreign person obtains a 25% or greater voting interest, directly or indirectly, in a US business *if* a foreign government, in turn, has a 49% or greater voting interest in the foreign person.[7]

B. Changing CFIUS Risk Calculus

The existence of the mandatory regime has made CFIUS filing decisions more consequential than in the past because failure to make a mandatory CFIUS filing can result in substantial penalties. CFIUS announced new regulations in 2024 that created more structure around enforcement activities. In particular, the new rules:

- Expand the ability of CFIUS to seek information from third parties about transactions of interest;
- Expand CFIUS subpoena power;
- Provide CFIUS with more authority to levy civil penalties in response to material misstatements to the Committee; and
- Substantially increase the maximum penalty that may be imposed by CFIUS for violations of CFIUS regulations.[8]

These new rules signal that CFIUS plans to operate more like an enforcement agency than in the past, will expand efforts to police compliance with mandatory filing rules, and will generally be more aggressive in looking for transactions to review. Although it is very likely that the new Trump Administration will continue to use CFIUS authority to focus particular attention on Chinese investment in the United States, expanded CFIUS authority will also be used to more aggressively evaluate M&A from all parts of the globe.

II. “Reverse CFIUS”

On October 28, 2024, the Biden Administration released its new outbound investment or “reverse CFIUS” final rule to restrict US investment in certain Chinese businesses.[9] This new outbound investment regime, which became effective on January 2, 2025, impacts all US persons involved in investing in Chinese businesses that develop artificial intelligence (“AI”), semiconductors and microelectronics, and quantum computing technology. Although this regime is relatively tailored to the noted sectors, the new Trump Administration could expand or contract the rule relatively easily.

Broadly speaking, this outbound investment review regime is intended to deter investment in Chinese technologies and products that are perceived as constituting a national security threat to the United States. Pursuant to the new rules, US investment in (i) Chinese companies engaged in quantum computing, (ii) Chinese companies developing AI systems with certain military or mass-surveillance end uses, and (iii) Chinese companies trained using certain computing thresholds and certain semiconductor activities may be prohibited. Other investments in Chinese AI and semiconductor businesses are permissible but subject to a mandatory Treasury Department notification requirement within 30 days of the investment’s closing.

In light of this new regime, US persons and entities pursuing investment in Chinese technology companies must put significant due diligence processes in place to ensure compliance with the new rules. There is no safe harbor under the rule, which means companies and individuals that knew or should have known they made a covered investment will be subject to potential prohibitions and notification requirements. The Treasury Department has stated that its evaluation of the sufficiency of an investor’s due diligence “will be made based on a consideration of the totality of relevant facts and circumstances.”[10]

III. Conclusion

The regulatory environment for cross-border investment and M&A was complicated in 2024, and it will remain complicated in 2025. The best path for navigating potential regulatory obstacles to intended deal activity is to account for regulatory hurdles in advance, analyze CFIUS and “reverse CFIUS” risks as early as possible, and develop a plan to mitigate any potential risks. ■

Jason Chipman is a partner and Douglas Gates is counsel in WilmerHale’s Defense and National Security Practice.

1 50 U.S.C. App. § 2170(a)(3).

2 31 C.F.R. § 800.302(b). For CFIUS purposes, anything other than standard minority protections might be treated as nonpassive. For example, specially favored positions vis-à-vis other investors or the ability to veto certain company decisions may be enough to make an investment nonpassive in the CFIUS context.

3 *See* 31 C.F.R. § 800.211(a)–(b).

4 *See* 31 C.F.R. § 800.248(a)–(c).

5 *See* 31 C.F.R. §§ 800.304(b), 800.219, 800.219.

6 *See* 31 C.F.R. § 800.401(c).

7 *See* 31 C.F.R. § 800.401(b).

8 Penalty Provisions, Provision of Information, Negotiation of Mitigation Agreements, and Other Procedures Pertaining to Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 89 Fed. Reg. 93179 (Nov. 26, 2024) (to be codified at 31 C.F.R. pts. 800, 802).

9 Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

10 *Id.* at 90468 (to be codified at 31 C.F.R. § 850.302 n.1).

Purchase Price Adjustments in Financial Services M&A Transactions

By Stephanie C. Evans, Andrew P. Alin and Connor McRory

I. Introduction

In most M&A deals involving private targets (including the sales of divisions of publicly traded companies), the purchase agreement will include a baseline dollar value for the target, with several adjustments. Often, the parties will agree upon the enterprise value of the company, and the purchase agreement will provide for both a deduction for the indebtedness and an addition for the cash on hand of the target as of the closing. The agreement will also incorporate an adjustment upward or downward to the extent that the target’s net working capital (*i.e.*, current assets minus current liabilities) as of the closing is more or less than an agreed-upon, normalized level of working capital. The agreement will also typically include a deduction for the transaction-related expenses incurred by the target company, since these would commonly be borne by the seller rather than the buyer. The definitions of “indebtedness,” “cash,” “working capital” and “transaction expenses” are often heavily negotiated. For example, “indebtedness” often includes not only borrowed money, but also debt-like items such as bonus accruals, earnout obligations and deferred revenue, and “transaction expenses” often include payments to employees in connection with the transaction (including associated payroll taxes) and may include other shared costs, such as the costs of obtaining representations and warranties insurance or D&O tail insurance, or governmental filing or other third-party consent fees.

While M&A deals involving financial services companies (such as banks, specialty lenders, asset managers or insurance companies) may employ some or all of these common adjustments, the unique nature of the companies involved—and the fact that they are valued differently from technology, life sciences, manufacturing and other companies—often leads to industry-specific adjustments being included in the purchase agreement. This article provides a high-level overview of some of the more common adjustments utilized in these types of transactions and certain key considerations for each.

II. Types of Purchase Price Adjustments in Financial Services Deals

a.Banks and Specialty Lenders—Book Value Adjustments

Banks and specialty finance companies have a substantially different profile from other companies. The asset side of their balance sheet is primarily made up of loans or similar financing arrangements, such as leases.

Their lending activities are funded by substantial amounts of leverage—in the case of banks, this includes deposits, Federal Reserve or Federal Home Loan Bank borrowings, or other debt, and in the case of specialty lenders, this includes credit facilities, warehouse lines, and other debt arrangements secured by the loans and other assets—which often remain in place following the transaction (even if lender consent is required). Accordingly, these transactions are often priced based on a premium to book value (as opposed to enterprise value), with the purchase price expressed as either (i) a base purchase price, with an adjustment at closing to the extent that the book value as of closing is more or less than the historical book value used to set the base purchase price, or (ii) the book value of the company as of a certain date (which may be the closing or an earlier date) plus the agreed-upon premium.

While this structure sounds simple, there are several decision points for the parties, including (among others) the following:

- ***What is the measurement date for the book value?*** While the parties may agree that the book value will be measured as of the closing date, in which case the seller essentially receives the economics of the business from signing to closing, they may also utilize an earlier date following which the profits (or losses) would accrue to the buyer. In this latter instance, the purchase agreement would include various "lockbox" provisions that apply subsequent to the measurement date, to prevent the seller from taking distributions or receiving other payments from the target company that would reduce the value of the business for the buyer (*i.e.*, leakage).
- ***What are the agreed-upon accounting principles used to determine book value?*** The parties will often start with GAAP but will negotiate one or more deviations that will be documented in the purchase agreement.
- ***Is there any indebtedness that should be treated separately from the balance sheet adjustment?*** While the indebtedness of the business is functionally deducted from the purchase price by its inclusion on the balance sheet, there may be some indebtedness that is not tied to the assets of the business—such as shareholder loans, unsecured parent-level debt or other subordinated indebtedness—that will be paid off at closing and accordingly would not be included on the balance sheet used to determine the purchase price, but rather would be treated as a separate line-item deduction to the purchase price otherwise payable to the seller.

b. Wealth and Other Asset Management Transactions—Client and Advisor Retention Adjustments

In wealth and other asset management transactions, the clients and advisors with such client relationships are key to the value of the business, and the purchase agreement will often include purchase price adjustments and other economic provisions tied to client or advisor retention, with any amount of attrition reducing the maximum amounts payable to the seller.

Before implementing client or advisor retention adjustments, the parties should consider certain key decision points, including (among others) the following:

- ***Over what period is the adjustment applied?*** The parties may determine to measure retention based on the clients or advisors who are retained as of closing and/or at some time following the closing. Regardless, the seller must understand the advisor compensation arrangements that the buyer will put in place for it to properly gauge the likelihood of receiving the maximum value in respect of the adjustment. This is of course directly related to advisor retention but could also be indirectly related to client retention given that the departure of the advisors holding the client relationships could lead to the loss of the client.
- ***Will there be limitations on the adjustments applied?*** Often the parties will include thresholds for the adjustment so that no adjustment applies to the extent that client or advisor attrition is less than an agreed-upon amount. In addition, the size of the adjustment will often be capped—this can be effected by either (i) a maximum downward adjustment applied at closing or, (ii) where the adjustment applies to post-closing attrition, a specific escrow or holdback amount tied to the adjustment that is ultimately paid based on the level of attrition. In some cases, there may be both a closing condition and a purchase price adjustment tied to attrition levels, such that the buyer (or in some cases the seller) does not have to close if the attrition exceeds the maximum size of the adjustment.
- ***What is the universe of clients or advisors covered?*** There may be certain divisions or categories of the target's clients that are more or less integral to the economics of the business, and therefore only certain categories of clients or advisors will be covered by the adjustment. In addition, the seller may ask for any negative adjustment to be mitigated by new clients or new hires during the applicable period.
- ***What is the metric used to determine the adjustment?*** While there are various metrics to choose from, common ones include assets under management, revenue run rate and (for advisor retention adjustments) historical commissions associated with each particular advisor. Once the applicable metric is selected, the parties will then negotiate the associated definitions, including any exceptions to the way the target commonly accounts for these items.
- ***How will the necessary consents be obtained?*** While client contracts often contain an assignment or change-in-control clause requiring the client's consent if the seller is sold, some contracts permit negative or implied consent, meaning an affirmative response is not required and consent will be deemed to have been obtained after a client has received notice about the transaction and has not objected after a certain time period has passed. Where the assets under management include SEC-registered funds, the consent process may require a proxy solicitation under SEC rules, which is substantially more labor-intensive and time-consuming.

LOCKBOX PROVISIONS

Under a lockbox provision, the purchase price will be determined using a pre-closing (and in most cases, pre-signing) balance sheet and will not be trued up as of closing. The buyer will therefore need to protect against fluctuations in the value of the business that are unrelated to its inherent performance. Accordingly, the parties will agree to treat certain seller transactions after the measurement date as "leakage," meaning any value extracted should be deducted dollar-for-dollar from the purchase price. Common examples of leakage include dividends, distributions and other returns of capital to the seller, intra-group payments outside the ordinary course, waivers of rights or claims against seller-affiliated parties, and certain transaction costs or bonuses paid to seller personnel. Alternatively, ordinary course and other transactions may be deemed "permitted leakage" by the parties, meaning such transactions will not cause a purchase price deduction. Common examples of permitted leakage include pre-agreed costs, compensation of personnel (including owners) in the ordinary course and permitted intraparty trading arrangements. Given that a lockbox arrangement results in the buyer capturing any appreciation in the value of the business after the measurement date, a seller may seek to include an interest component to the purchase price that would increase the payments to the seller either for the full duration of the period between the measurement date and closing or only after a specified target closing date.

III. Conclusion

The foregoing are just some high-level examples of the purchase price adjustments employed in financial services deals and some of the key considerations for each. Oftentimes, the negotiations can be quite complex and one or more features of several of these mechanisms are combined. Regardless of the adjustment implemented, it is imperative that the parties to the transaction work in close coordination with their counsel and their financial and accounting advisors, at an early stage, to craft the optimal adjustment mechanics for the particular transaction and consider the possible future events that will need to be accounted for. ■

Stephanie Evans and Andrew Alin are M&A partners and Connor McRory is an associate in WilmerHale's Corporate Practice.

Selected WilmerHale Mergers & Acquisitions Transactions

50+
mergers & acquisitions transactions in 2024

$15B+
aggregate value, providing guidance in corporate, securities, governance and tax, as well as antitrust, CFIUS and other regulatory areas in 2024

Casella
Acquisition of
GFL Environmental
$525,000,000
June 2023

Dedrone
Acquisition by
Axon
$500,000,000
October 2024

General Catalyst
Acquisition of Livongo by
Teladoc Health
$18,500,000,000
October 2020

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

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

mks Technology for Productivity
Acquisition of
Atotech
$4,400,000,000
(financing counsel)
August 2022

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

Houghton Mifflin Harcourt
Acquisition by
Veritas Capital
$2,800,000,000
April 2022

Bottomline Technologies
Acquisition by
Thoma Bravo
$2,600,000,000
(co-counsel)
May 2022

revvity
Sale of Applied, Food and Enterprise Services businesses to
New Mountain Capital
$2,450,000,000
March 2023

Decibel Therapeutics
Acquisition by
Regeneron
$213,000,000
(including contingent payments)
September 2023

Medtronic
Acquisition of
Cosmo Pharmaceuticals's AI-Enabled GI Products Business
$200,000,000
(including contingent payments)
December 2023

TMX
Acquisition of
VettaFi
$848,000,000
January 2024

Nordstrom Family
Acquisition of
Nordstrom by the Nordstrom Family and Liverpool
$6,250,000,000
(enterprise value)
Pending
(as of February 2025)

Merchants Fleet
Acquisition by
Bain Capital and Abu Dhabi Investment Authority
Undisclosed
October 2022

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

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

Thermo Fisher Scientific
Sale of anatomical pathology business to
PHC Holdings
$1,140,000,000
June 2019

exonics Therapeutics
Acquisition by
Vertex Pharmaceuticals
$1,000,000,000
(including contingent payments)
July 2019

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

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

Forendo Pharma
Acquisition by
Organon
$954,000,000
(including contingent payments)
December 2021

Akamai
Acquisition of
Noname Security
$450,000,000
June 2024

Rudolph Technologies
Merger with Nanometrics to form
Onto Innovation
$1,400,000,000
(enterprise value)
October 2019

Adore Me
Acquisition by
Victoria's Secret
$700,000,000
(including post-closing payments)
December 2022

XL Fleet
Acquisition of
Spruce Power
$600,000,000
September 2022

Penn Mutual
Sale of Janney Montgomery to
KKR
Undisclosed
November 2024

AVEO Oncology
Acquisition by
LG Chem
$566,000,000
(implied equity value)
January 2023

spectris
Acquisition of
Micromeritics
$683,000,000
(including contingent payments)
August 2024

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

Telix
Acquisition of
QSAM Biosciences
$123,100,000
(including contingent payments)
May 2024

Akouos
Acquisition by
Eli Lilly
$610,000,000
(including contingent payments)
December 2022

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

TechTarget
Combination with
Informa Tech's Digital Businesses
Over $1,500,000,000
(implied equity value)
December 2024

Dual Track Processes: Pursuing Parallel Paths to Liquidity

As IPO and M&A markets (particularly for life sciences and tech companies) continue to recover from the market disruption of the past few years, companies seeking stockholder liquidity should consider conducting a "dual-track process." In a dual-track process, a company simultaneously pursues an IPO while entertaining—or even courting—acquisition offers. The company's sale efforts on a dual track can range from contacting a small number of likely buyers to a more formal and extensive process similar to an auction. Even if a company does not deliberately embark on a dual track, an IPO filing can have a similar effect, by showcasing the company and enticing potential buyers to inquire about acquisition interest. In that sense, every IPO is on a dual track.

In addition to preserving flexibility when a company is uncertain whether to pursue an IPO or a sale, a dual track can serve as a strategy to maximize the price received when a sale is preferred to, or more likely than, an IPO. The core of this approach is to increase the sense of urgency among bidders—as if to say, "Buy now, or the target will soon become a public company and be much more expensive"—as well as to emphasize to bidders that the target has a compelling alternative to being acquired. Needless to say, an IPO must be viable, in terms of the company's attributes and market conditions, for this strategy to work. The stronger the IPO market and the more attractive the company, the more likely a dual-track strategy will pay off. If the company has filed the Form S-1, has cleared SEC comments and is poised to commence the road show, even better—although the company must consider whether public disclosure of the estimated offering range will adversely affect price negotiations with bidders.

Challenges and Implications

In addition to the considerations that are present in the sale of any private company, a dual-track strategy presents various challenges that must be navigated carefully:

- **Importance of Confidentiality.** Even more so than usual, the M&A process must be kept under wraps, to minimize the risk of premature disclosure and to avoid disruption to the effort and focus demanded by the IPO process.
- **Disclosure Issues.** Absent a leak, the sale process usually need not be publicly disclosed prior to an acquisition announcement. A dual-track strategy can, however, result in two thorny disclosure issues if the company opts for an IPO rather than a sale. One, if an acquisition deal is reached and then falls apart, the company must consider whether the reasons for the failed deal must be disclosed in the IPO prospectus. This could prompt negative disclosures and delay an IPO while the prospectus is supplemented. Two, if the company passes on a sale opportunity and then is acquired shortly after the IPO, it will be vulnerable to claims that it failed to disclose its intention to be acquired. The practical exposure, however, is limited if the post-IPO acquisition price is at a premium to the IPO offering price.
- **Selection of Legal Advisors.** The company will almost certainly utilize its IPO law firm for the M&A track, because using different counsel for the two tracks would squander the hard-earned institutional knowledge from the IPO process and create logistical and other challenges. The company should, however, make sure appropriate M&A expertise is available on the company counsel team for the potential sale.
- **Selection of Financial Advisors.** The company will ordinarily want financial advisors to handle the sale side of the dual track. The IPO managing underwriters will know the company best and be obvious choices for the M&A engagement, but they may be more skilled as underwriters than as M&A advisors. Or one of the managing underwriters may be preferred to the others, leading to the potential for turf battles since the spurned underwriters will suffer the loss of the IPO fees as well as the fees (and prestige) of the M&A transaction. To manage the sale process, the company can even select an M&A advisor that is not involved with the IPO, although this approach introduces additional complications.
- **Potential for Conflicting Motivations.** The company's management and key employees may have financial incentives to prefer one alternative over the other. A company sale often results in the replacement of top management but may also trigger equity acceleration and change-in-control and severance payments. At the same time, an IPO offers management continued employment and the potential for market appreciation, but without the immediate realization of change-in-control benefits. Also, the economic outcomes may be different for financial advisors in a sale transaction than for underwriters in an IPO—especially if there are fewer M&A advisors than IPO underwriters to share the fees—which may give the financial advisors an incentive to steer the process one way or the other. The company's board of directors needs to be conscious of the hazards posed by skewed incentives and may need to make adjustments in compensation arrangements to achieve the best outcome for stockholders.
- **Board Duties.** The board's fiduciary duties to stockholders obviously apply when considering the choice of an IPO or a company sale, and when evaluating acquisition offers. Do its fiduciary duties compel a board to accept an offer that is within, or perhaps in excess of, the estimated IPO price range? No, but the board should follow an appropriate process in a dual track, as it would in any sale process.
- **Valuation Impact**. A dual track can create tricky valuation issues for the company. If the company pursues an IPO after receiving one or more acquisition offers, it must consider the impact of these offers on its subsequent determinations of fair market value for option grants made prior to the IPO. Similarly, the company needs to evaluate whether the amount of any acquisition offers should—or must—be disclosed in response to cheap stock comments from the SEC. Acquisition offers may also cause the company to revisit the operating model it uses to develop financial forecasts, or they may otherwise have an impact on the IPO valuation established by the company and the managing underwriters. An offer that does not result in a completed transaction is not conclusive evidence of value, but it is not likely to be meaningless. The weight accorded to an acquisition offer will depend on various factors, such as the other terms and conditions of the offer, how advanced the proposed transaction was before its abandonment, the extent of the information made available to the bidder before it made its offer, the formality of the offer, and changes in market conditions or the company's circumstances since the offer was received.
- **Timing Considerations.** Although a company can pursue both sides of a dual-track strategy for a long time, eventually it must select one alternative. In theory, the day of reckoning can be delayed until after the IPO road show and moments before inking the underwriting agreement. In reality, the choice is usually made before going on the road, because a road show is expensive and time-consuming, and underwriters are leery of irritating fund managers with meaningless company presentations. If an attractive acquisition offer does not seem imminent, the sale process is ordinarily shut down when the road show begins.

– **Contractual Arrangements With Bidders.** The company should, of course, sign confidentiality agreements with every potential acquirer before substantive discussions or due diligence begins. Preexisting confidentiality agreements entered into for commercial relationships almost certainly will be inadequate for this purpose. Confidentiality agreements with potential acquirers should include "standstill" provisions, pursuant to which bidders agree for a specified period of time (typically 12–24 months) not to seek or participate in any efforts to acquire the company without its consent. Potential acquirers should also commit not to solicit or hire any of the company's employees—often limited to the company employees involved with the proposed transaction—for a specified period of time (which may be equivalent to or shorter than the standstill period). Although a private company ordinarily would not need the protection of a standstill agreement when entering into acquisition discussions, if a company on a dual track completes an IPO, it subsequently may be vulnerable to unsolicited takeover bids from parties that were given access to material nonpublic information about the company during the pre-IPO sale process. The standstill provisions also have the desirable effect of signaling the seriousness with which the company views its IPO alternative.

– **Sale Terms.** If an acceptable acquisition offer emerges from a dual-track process, the focus will shift to a traditional M&A negotiation, but with two wrinkles. One, there will be a strong desire to sign a definitive agreement quickly, so that the company does not miss its IPO opportunity in the event the sale cannot be concluded. Two, the company may seek to style the definitive agreement as if the transaction were an acquisition of a public company, with no representations, indemnities or escrows following the closing, on the theory that its Form S-1 and IPO preparations make the target akin to a public company and thus justify the kind of sale terms that typically apply to the acquisition of a public company. This position has a greater likelihood of prevailing if the company is close to launching its IPO and can provide public company–type "Rule 10b-5" representations with respect to the accuracy and completeness of its Form S-1.

– **Confidential SEC Review.** Issuers can elect to submit a draft Form S-1 for confidential SEC review but must publicly file the Form S-1 on the SEC's EDGAR system no later than 15 days before the commencement of the road show. One consequence of confidential submission is that the company is not fully showcased to potential acquirers until the subsequent public filing is made. An issuer may announce the confidential submission of a draft Form S-1 in reliance on Rule 135, but the information permitted in the announcement is very limited. As a result, an issuer that wishes to maximize its dual-track visibility may want to opt for public filing rather than confidential submission of its initial Form S-1.

– **Unwinding the IPO.** Assuming an acquisition agreement is signed after the Form S-1 has been filed with the SEC, the Form S-1 needs to be withdrawn prior to closing the sale. Since a deal can come undone for many reasons, it is usually advisable to keep the Form S-1 and the exchange listing application alive until shortly before the closing. Company counsel should, however, alert the SEC examiner and exchange listing representative to the company's plans.

– **Extra Effort and Expense.** A dual track combines the rigors of an IPO with the effort of a company sale process, and the added demands of the dual-track process usually arise in a compressed time frame. A few key participants, including the CEO, the CFO, general counsel and outside company counsel, usually bear the brunt of the extra burden. The company should seize efficiency opportunities—such as conducting due diligence through a unified virtual data room through which due diligence materials can be made available to participants in each track simultaneously—when available. Although the company will not have to pay both an IPO underwriting discount and an M&A success fee, the total transaction expenses in a dual-track strategy usually exceed the expenses of either path alone.

Outlook

A dual-track strategy can maximize a company's liquidity and flexibility, and will often produce a more favorable outcome than either the IPO or the M&A process alone. We would expect dual tracks to become more common as IPO and M&A markets improve, especially among small-cap and mid-cap life sciences and technology companies. ■

Pre-IPO Acquisition Challenges:

Concurrent M&A Deal Can Complicate IPO Process but Yield Strategic Benefits

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 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 both the need (at least outside of the life sciences industry) to demonstrate strong earnings at the time of an IPO and the ability 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) and report on the results. While not required in the first year after going public and subject to certain exemptions, the acquirer will also have its ICFR audited. 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.

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 transaction. ■

Beyond the "Just Say No" Defense:

Updated Data on Common Takeover Defenses Available to a Public Company

Established public companies typically maintain at least some takeover defenses, although the prevalence of several defenses previously considered to be standard has declined over the past decade in response to pressure from institutional investors.

Despite the decline in takeover defenses among established public companies, most IPO companies continue to implement anti-takeover provisions (understanding that such measures may in the future need to be dismantled). From 2022 to 2024, however, adoption rates by IPO companies for many takeover defenses declined markedly from historical norms, likely due at least in part to the unusual characteristics of the IPO market during this period—deal flow was significantly depressed, offering sizes were much smaller and IPO companies had far less annual revenue.

Classified Boards

Supporters of classified boards—in which directors serve staggered three-year terms—believe that this structure enhances 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 argue that annual elections for all directors increase director accountability to stockholders, which in turn improves director performance, and that classified boards entrench directors, foster insularity and impede efforts to expand board diversity.

Supermajority Voting Requirements

Advocates for supermajority voting requirements to approve mergers or amend the corporate charter or bylaws 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. By contrast, proponents of a majority-voting standard believe it makes the company more accountable to stockholders and that improved accountability leads to better company performance. Supermajority requirements are also viewed by their detractors as entrenchment devices used to block initiatives that are supported by holders of a majority of the company's stock but opposed by management and the board. In practice, supermajority requirements can be almost impossible to satisfy, especially for a company with a meaningful number of non-institutional stockholders.

Prohibition of Stockholders' Right to Act by Written Consent

Written consents of stockholders can be an efficient means to obtain stockholder approvals but can result in a single stockholder or a 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' meeting for which stockholders have been provided information about the matters to be voted on and given an opportunity to ask questions.

Limitation of Stockholders' Right to Call Special Meetings

If stockholders have the right to call special meetings of stockholders—rather than waiting until the next annual meeting to propose matters for stockholder action—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. 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.

REASONS TO ADOPT TAKEOVER DEFENSES

Companies adopt takeover defenses to help:

- Ensure stability and continuity in decision-making and leadership that will enable the company to focus on long-term value creation;
- Provide the board with adequate time to evaluate and react in an informed manner to unsolicited acquisition proposals;
- Provide negotiating leverage for the board; and
- Maximize overall stockholder value by providing economic disincentives against inadequate, unfair or coercive bids.

Advance Notice Requirements

Advance notice requirements provide that at a stockholders' meeting, stockholders may consider and act upon director nominations or other proposals only if they have been specified in the meeting notice 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, 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. Investors generally do not object to advance notice requirements as long as the advance notice period is not unduly long.

Section 203 of the Delaware Corporation Statute

Unless it opts out of Section 203, a public company incorporated in Delaware is prevented from engaging in a "business combination" with any "interested stockholder" for three years following the time that the person became an interested stockholder without board approval. 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

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. 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.

STOCKHOLDER RIGHTS PLANS

A traditional stockholder rights plan (often referred to as a "poison pill") is a defensive measure designed to deter any acquisition of shares exceeding a specified ownership threshold without board approval. The rights plan gives all stockholders (other than a stockholder acquiring shares of common stock in excess of the specified threshold) a contractual right to purchase additional securities of the company at a substantial discount, thereby significantly diluting the acquiring stockholder's economic and voting power. When combined with a classified board, a rights plan makes an unfriendly takeover particularly difficult. Poison pills are almost unheard of among US IPO companies and are quite uncommon among established public companies.

Multi-Class Capital Structures

While the vast 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 employ a multi-class capital structure under which the company's founders or other pre-IPO stockholders hold shares of common stock that are entitled to multiple votes per share, while the public is issued a separate class of common stock that is entitled to only one vote per share or no voting rights at all. Use of a multi-class capital structure facilitates the ability of the holders of the high-vote stock to retain voting control of the company and to pursue strategies to maximize long-term stockholder value. Critics believe that a multi-class 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.

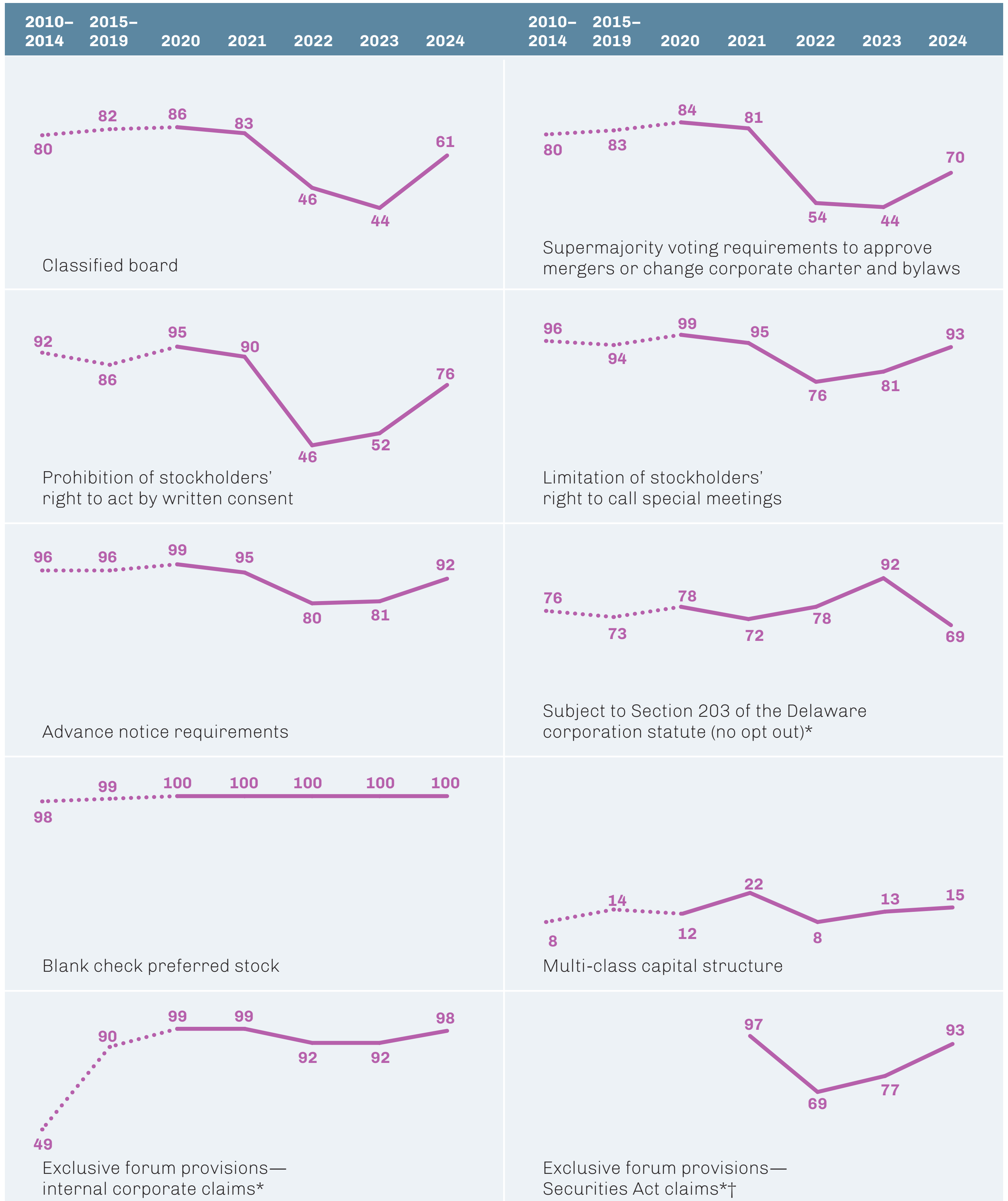
Exclusive Forum Provisions for Internal Corporate Claims

Exclusive forum provisions stipulate that the Court of Chancery of the State of Delaware is the exclusive forum in which internal corporate claims arising under Delaware state law may be brought by stockholders against the company. Proponents of these provisions are motivated by a desire to adjudicate such 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—which have been expressly authorized by the Delaware corporation statute since 2015—deny aggrieved stockholders the ability to bring litigation in a court or jurisdiction of their choosing.

Exclusive Forum Provisions for Securities Act Claims

Prior to 2020, in response to the growing trend of plaintiffs bringing federal securities law class-action lawsuits in state courts, a handful of IPO companies incorporated in Delaware adopted "federal forum" provisions requiring stockholders to sue in federal court, rather than state court, over alleged violations of the Securities Act of 1933. Adoption of federal forum provisions has soared on the heels of a 2020 Delaware Supreme Court decision confirming the validity of the technique. Federal forum provisions are intended to help a company avoid duplicative litigation filings and steer cases to federal courts more accustomed to hearing federal securities claims, while opponents argue that the provisions prevent stockholders from seeking recourse in state courts they may view as more receptive to their claims. ■

TRENDS IN TAKEOVER DEFENSES AMONG IPO COMPANIES



*Delaware corporations only
†2021–2024 only

Source: WilmerHale analysis of SEC filings from 2010 to 2024 for US issuers.

PREVALENCE OF TAKEOVER DEFENSES

	IPO COMPANIES, 2020-2024	ESTABLISHED PUBLIC COMPANIES, YEAR-END 2024	
		S&P 500	RUSSELL 3000
Classified board	75%	12%	41%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	75%	16% to 32%, depending on type of action	15% to 53%, depending on type of action
Prohibition on stockholders' right to act by written consent	82%	68%	74%
Limitation of stockholders' right to call special meetings	93%	26%	50%
Advance notice requirements	93%	100%	97%
Subject to Section 203 of the Delaware corporation statute (no opt out)*	75%	90%	100%
Blank check preferred stock	100%	95%	96%
Multi-class capital structure	17%	8%	10%
Exclusive forum provisions—internal corporate claims	98%*	58%**	65%**
Exclusive forum provisions—Securities Act claims†	92%*	N/A	N/A

*Delaware corporations only
**Not limited to Delaware corporations
†2021–2024 only

Source: IPO company data is based on WilmerHale analysis of SEC filings from 2020 to 2024 for US issuers. Established public company data regarding applicability of Section 203 of the Delaware corporation statute is from the Deal Point Data database at year-end 2024; other established public company data is from FactSet's SharkRepellent database at year-end 2024.

DIFFERENCES IN ANTI-TAKEOVER PRACTICES AMONG TYPES OF IPO COMPANIES

	ALL IPO COMPANIES	VC-BACKED COMPANIES	PE-BACKED COMPANIES	OTHER IPO COMPANIES
Classified board	75%	85%	89%	36%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	75%	86%	83%	41%
Prohibition of stockholders' right to act by written consent	82%	90%	96%	50%
Limitation of stockholders' right to call special meetings	93%	98%	99%	76%
Advance notice requirements	93%	97%	99%	78%
Subject to Section 203 of the Delaware corporation statute (no opt out)*	75%	94%	33%	69%
Blank check preferred stock	100%	100%	100%	99%
Multi-class capital structure	17%	16%	19%	16%
Exclusive forum provisions—internal corporate claims*	98%	99%	100%	91%
Exclusive forum provisions—Securities Act claims*†	92%	95%	100%	73%

*Delaware corporations only
†2021–2024 only

Source: WilmerHale analysis of SEC filings from 2020 to 2024 for US issuers.

Trends in VC-Backed Company M&A Deal Terms

We reviewed all merger transactions between 2020 and 2024 involving VC-backed targets (as reported in PitchBook) 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]

Compiled by Joseph C. Minko, a special counsel in WilmerHale's Corporate Practice

Characteristics of Deals Reviewed		2020	2021	2022	2023	2024
The number of deals we reviewed and the type of consideration paid in each	Sample Size	25	45	22	15	17
	Cash	60%	24%	41%	40%	53%
	Stock	8%	18%	5%	20%	12%
	Cash and Stock	32%	58%	54%	40%	35%

Deals With Earnout		2020	2021	2022	2023	2024
Deals that provided contingent consideration based upon post-closing performance of the target, achievement of milestones by the target or other contingencies concerning the value of target (other than balance sheet adjustments)	With Earnout	28%	42%	41%	27%	41%
	Without Earnout	72%	58%	59%	73%	59%

Deals With Indemnification		2020	2021	2022	2023	2024
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	88%	76%[2]	86%	67%	65%[3]
	By Buyer	32%	29%	68%	47%	24%

Deals With Representation and Warranty Insurance		2020	2021	2022	2023	2024
Deals that expressly contemplate representation and warranty insurance	With Representation and Warranty Insurance	68%	47%	50%	33%	41%

Survival of Representations and Warranties		2020	2021	2022	2023	2024
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.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	18 Mos.	24 Mos.	24 Mos.	24 Mos.	18 Mos.
	Most Frequent	12 Mos.	12 Mos.	12 Mos.	12 & 18 Mos. (tie)	18 Mos.

[1] For certain transactions, certain deal terms have been redacted from the publicly available documentation and are not reflected in the data compiled in this table.
[2] Excludes two transactions that do not provide for indemnification but permit setoff against contingent consideration.
[3] Excludes one transaction where representations do not survive closing, but seller is obligated to reimburse buyer for 50% of the damages buyer cannot recover due to the retention under its representation and warranty insurance.
[4] Measured for representations and warranties generally; specified representations and warranties may survive longer.

Caps on Indemnification Obligations		2020	2021	2022	2023	2024
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[5]	81%	90%	78%	80%	80%
	Limited to Purchase Price	0%	0%	0%	0%	0%
	Exceptions to Limits[6]	95%	100%	89%	100%	100%
	Without Cap	0%	0%	0%	0%	0%

Escrows		2020	2021	2022	2023	2024
Deals having escrows securing indemnification obligations of the target's shareholders (subset: deals with indemnification obligations of the target shareholders)	With Escrow	90%	91%	89%	90%	73%
	% of Deal Value					
	Lowest[7]	8%	5%	7%	5%	7%
	Highest	15%	18%	15%	10%	10%
	Most Frequent	15%	10%	8%	6%	10%
	Length of Time[8]					
	Shortest	12 Mos.	12 Mos.	12 Mos.	12 Mos.	12 Mos.
	Longest	24 Mos.	36 Mos.	30 Mos.	24 Mos.	18 Mos.
	Most Frequent	12 Mos.	12 Mos.	12 Mos.	12 & 18 Mos.(tie)	18 Mos.
	Exclusive Remedy	68%	53%	73%	56%	75%
	Exceptions to Escrow Limit Where Escrow Was Exclusive Remedy[6]	92%	100%	91%	100%	100%

Baskets for Indemnification		2020	2021	2022	2023	2024
Deals with indemnification only for amounts above a specified "deductible" or only after a specified "threshold" amount is reached	Deductible	52%[9]	71%[10]	53%[9]	80%	64%
	Threshold	29%[9]	26%[10]	32%[9]	10%	36%

MAE Closing Condition		2020	2021	2022	2023	2024
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%	97%	100%	91%	100%
	Condition in Favor of Target	24%	37%	29%	18%	40%

Exceptions to MAE		2020	2021	2022	2023	2024
Deals where the definition of "material adverse effect" for the target contained specified exceptions	With Exception[11]	100%	95%[12]	100%	100%	100%

[5] Includes two transactions in 2021 and one transaction in 2023 where the limit was below the escrow amount.
[6] 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.
[7] Excludes transactions that also specifically referred to representation and warranty insurance as recourse for the buyer.
[8] Length of time does not include transactions where such time period cannot be ascertained from publicly available documentation.
[9] A "hybrid" approach with both a deductible and a threshold was used in another 10% of these transactions in 2020 and 11% of these transactions in 2022.
[10] A 50/50 cost sharing approach was used in another 3% of these transactions in 2021.
[11] Generally, exceptions were for general economic and industry conditions.
[12] The only transaction(s) not including such exceptions provided for a closing on the same day the definitive agreement was signed.

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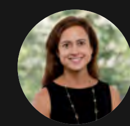

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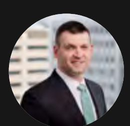

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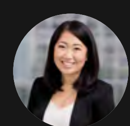

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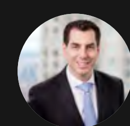

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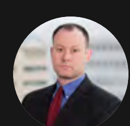

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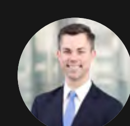

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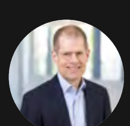

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