Weil

A LOOK AT U.S. SPONSOR-BACKED Going Private TRANSACTIONS

2016 Private Equity SURVEYS

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Introduction

Welcome to the ninth survey of sponsor-backed going private transactions prepared by Weil, Gotshal & Manges LLP. We hope that you will find this information thought-provoking and useful. This survey analyzes and summarizes for the reader the material transaction terms of going private transactions involving private equity sponsors in the United States. We are happy to discuss with clients and friends the detailed findings and analyses underlying this survey.

We want to offer special thanks to the many attorneys at Weil who contributed to this survey, including Adam Borenstein, Megan Briskman, Jonathan Calka, Daniel Cohen, Francesca Cohen, Robert Cohen, Clayton Collett, Sean Devaney, Kelly Diep, Sean Fitzpatrick, Kevin Kitson, David Li, Ololade Oladapo, Kelsey Pfleger, Aamir Rahman, Andrea Ryken, Michelle Sargent, Rachel Shapiro, Ariel Simon and Kimberly Thibault.

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Research Methodology

We surveyed 22 sponsor-backed going private transactions announced between January 1, 2015 and December 31, 2015 with a transaction value of at least $100 million.

The publicly available information for certain surveyed transactions did not disclose all data points covered by our survey; therefore, the charts and graphs in this survey may not reflect information from all surveyed transactions.

The 22 surveyed transactions included transactions involving the following target companies:

Belk, Inc.
Blount International, Inc.
ClickSoftware Technologies Ltd.
E2open, LLC
Frisch's Restaurants, Inc.
GrafTech International
Home Properties, Inc.
Informatica Corporation
Keurig Green Mountain, Inc.
MedAssets, Inc.
Life Time Fitness, Inc.
Lumenis Ltd.
OM Group, Inc.
Premiere Global Services, Inc.
Procera Networks, Inc.
Quality Distribution, Inc.
Saba Software, Inc.
SolarWinds Worldwide, LLC
Solera Holdings, Inc.
Steiner Leisure Limited
Strategic Hotels & Resorts, Inc.
Zep Inc.

Key Conclusions

Key trends for going private transactions in the United States in 2015 included:

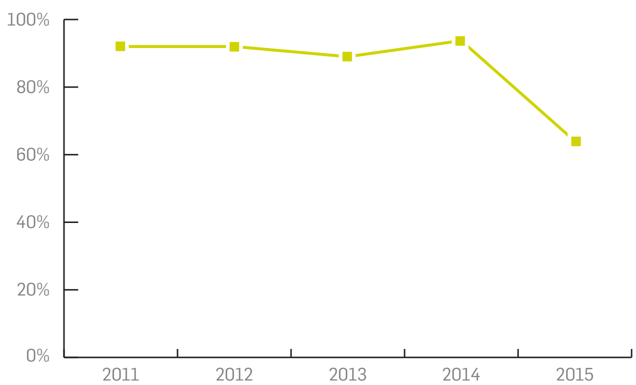
- Reverse termination fees appeared in 64% (14 of 22) of the surveyed transactions in 2015. The decline in percentage terms from 2014 of transactions where reverse termination fees appeared was largely due to the number of "all equity" transactions surveyed in 2015. The average single-tier reverse termination fee was equal to 5.7% of the enterprise value of the transaction and the average company termination fee was equal to 3.2% of the enterprise value of the transaction in 2015, which is relatively consistent with the average values of 5.7% of enterprise value for reverse termination fees and 3.1% of enterprise value for company termination fees in 2014.
- The use of go-shop provisions increased in 2015, appearing in 46% (10 of 22) of the surveyed transactions in 2015, compared to 38% (6 of 16) in 2014. Go-shop provisions have proven to be a useful tool and have appeared in a significant minority of deals over the last several years.
- Tender offers continue to be a relatively unpopular option for sponsors. A tender offer was used in 5% (1 of 22) of the surveyed transactions in 2015 and in only 13% (2 of 16) of the surveyed transactions in 2014. From a sponsor's perspective, the tender offer remains a less attractive option compared to a one-step merger unless agreeing to a tender offer improves its position in a competitive bid process.
- As was the case in 2014, no sponsor-backed going private transaction in 2015 contained a financing out (i.e., a provision that allows the buyer to get out of the deal without the payment of a fee or other recourse in the event that debt financing is unavailable).
- Specific performance "lite" continued to be the predominant market remedy (64%, or 14 of 22 transactions, in 2015) with respect to allocating financing failure and closing risk in sponsor-backed going private transactions. Full specific performance was available to targets in 36% (8 of 22) of the surveyed transactions in 2015. As noted above, those transactions where full specific performance was available were "all equity" transactions.

Highlights of 2015

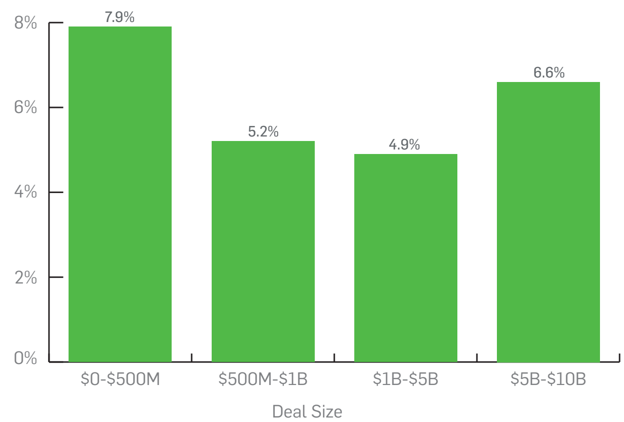
Use of reverse termination fees in 2015 appeared in 64% (14 of 22) of the surveyed going private transactions in 2015. The decline in percentage terms from 2014 of transactions where reverse termination fees appeared was largely due to the number of “all equity” transactions surveyed in 2015. The average single-tier reverse termination fee in the surveyed transactions in 2015 that would have been payable by sponsors in certain termination scenarios (e.g., financing failure) was 5.7% as a percentage of the enterprise value of the target which is identical to 2014.

The two-tier reverse termination fee construct, whereby the sponsor would pay a higher reverse termination fee for a willful breach and/or a refusal to close (other than in connection with a financing failure), has been rarely utilized in recent years and was not used in any of the surveyed transactions in 2015, 2014 or 2013 (it was only used in two surveyed transactions in 2012).

Reverse Termination Fees Continue To Be Widely Used



Reverse Termination Fee as a Percentage of Enterprise Value

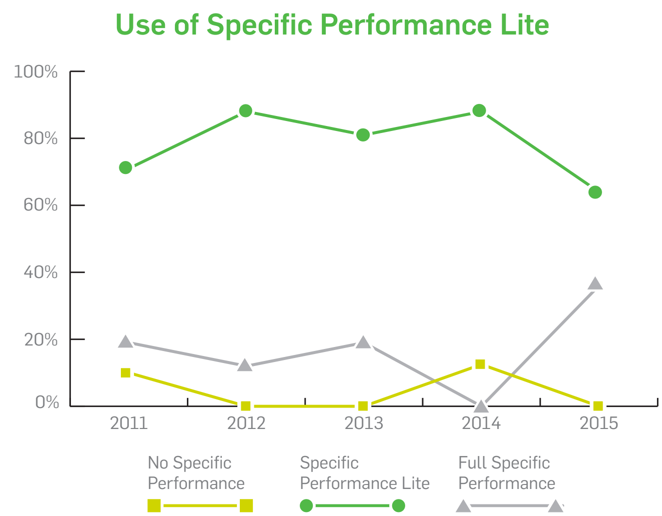


- The average company termination fee as a percentage of enterprise value was 3.2% in the surveyed transactions in 2015. This is the average company termination fee that would have been payable by targets in certain termination scenarios (e.g., entering into an alternative acquisition agreement in connection with a superior proposal). This is relatively consistent with the average company termination fees of 3.1% in the 2014 surveyed transactions. In many of the surveyed transactions in 2015, the company termination fee was set at exactly 50% of the reverse termination fee.
- In eight of the ten 2015 surveyed transactions with go-shop provisions, a superior proposal entered into as a result of the go-shop period would have triggered the payment of a reduced company termination fee. Therefore, most target boards took the view that the original company termination fee was inconsistent with the spirit of the go-shop as a true post-signing “test the market” process. On average, the reduced company termination fee in the 2015 surveyed transactions was just over 45% of the original company termination fee and ranged from 33% to 50%.

Company termination fee scenarios. Each of the 2015 surveyed transactions closed and therefore no target companies paid any company termination fees. The typical trigger for the payment of the company termination fee by the target is the entering into or consummation of an alternative transaction during a defined period of time beginning on the date of termination (usually 12 months).

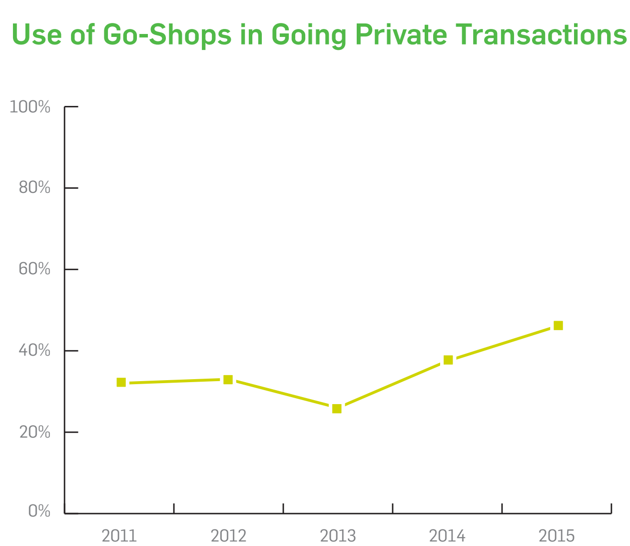
Highlights of 2015

Specific performance "lite" continues to be market. Specific performance lite, whereby the target has the limited right to seek specific performance to force the closing only if all conditions to closing are satisfied and the debt financing is available and ready to be funded, was included in approximately 64% (14 of 22) of the 2015 surveyed transactions (compared with 88% of the surveyed transactions in 2014, 81% of the surveyed transactions in 2013, 88% of the surveyed transactions in 2012 and 74% of the surveyed transactions in 2011). Specific performance lite first emerged after the financial crisis as a compromise between targets, which sought to limit the optionality built into the reverse termination fee structure, and sponsors, which could not accept the risk of being forced to close transactions in the event their lenders failed to fund the debt proceeds.



The significant increase in the percentage of transactions (from 0% in 2014 to 36% in 2015) where the target had the right to seek full specific performance was due to the increase in the number of "all equity" deals surveyed in 2015. All but one of the transactions where full specific performance was available were transactions involving an enterprise value of $500 million or less.

Use of go-shop provisions has increased compared to 2014. Go-shop provisions that permit the target to canvas the market and solicit other potential bids after a deal is announced were more widely used in 2015 (46% of the surveyed transactions compared with 38% of the surveyed transactions in 2014, 26% of the surveyed transactions in 2013, 33% of the surveyed transactions in 2012 and 32% of the surveyed transactions in 2011). This demonstrates that go-shop provisions are a useful tool that appeared in a significant minority of deals over the last several years.



Go-shops are often included as a way to assist a target's board in maximizing shareholder value and are particularly prevalent in transactions where the target's board does not have the opportunity to commence a full sales process or otherwise perform a market check prior to the signing of the transaction.

The length of the go-shop periods in the surveyed transactions in 2015 ranged from 28 days to 50 days, with an average of 38 days (an increase from the 2014 average of 33 days). Each of the 10 surveyed transactions containing a go-shop period in 2015 closed successfully without another bidder emerging.

Highlights of 2015

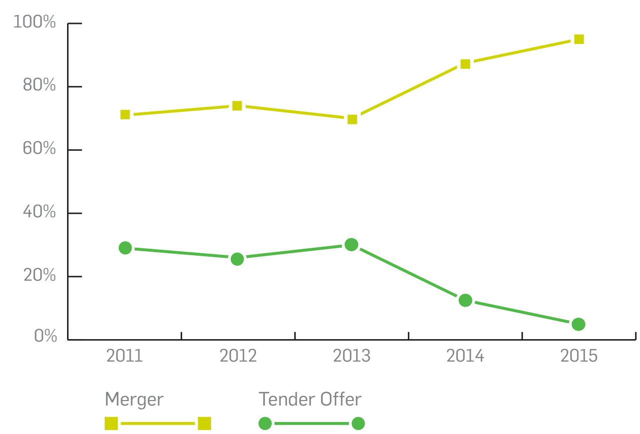
A hard-stop was utilized in 70% of the surveyed transactions in 2015 that contained a go-shop period. A hard-stop imposes a deadline (often an abbreviated period after the end of the go-shop period) on the target board to negotiate a definitive agreement with a competing bidder solicited during the go-shop period in order for the target to benefit from the reduced go-shop termination fee. The hard-stop ranged from 10 to 35 days in the surveyed transactions.

Ability of target board to change its recommendation. All of the 2015 surveyed transactions allowed the target board to change its recommendation in connection with a superior proposal or an "intervening event" (typically defined as an event or circumstance unknown or unforeseeable to the target board at signing that later occurring or known would require the target board to change its recommendation in order not to act in a manner inconsistent with its fiduciary duty). Even in the absence of a superior proposal or an "intervening event," 55% (12 of 22) of the deals also allowed the target board to change its recommendation if required to satisfy its fiduciary duties generally.

Sponsors are not expressly being required to sue their lenders. While initially popular following the financial crisis, provisions expressly requiring sponsors to sue their lenders in the event that these lenders fail to provide the committed debt financing have become less common. In fact, only 5% (1 of 22) of the surveyed deals in 2015 expressly contained such a provision (compared to a majority of the deals surveyed in 2010). It is important to note, however, that a majority of the deals are silent on this point and such agreements may therefore require the sponsor to use its reasonable best efforts to enforce its rights under the debt commitment letter, which could include suing a lender.

Tender offers continue to be relatively unpopular. In 2015, sponsors utilized the two-step tender offer/back-end merger structure in only 5% of the surveyed transactions (compared with 13% of the surveyed transactions in 2014, 30% of the surveyed transactions in 2013, 26% of the surveyed transactions in 2012 and 29% of the surveyed transactions in 2011). The continued decline in tender offers suggests that in most cases they are not a compelling structure for sponsors due to the relative ease and less financing complexity of one-step mergers.

Deal Structured as Tender Offers vs. Mergers



Weil's Global Private Equity Practice

19 offices worldwide, of which **13** are recognized as top tier for Private Equity by *Chambers & Partners* and *Legal 500*

Ranked **Band 1** for Global Private Equity by *Chambers & Partners*

The global private equity team acts for more than 200 private equity clients worldwide, including **80%** of the top 25, and **72%** of the top 50, as ranked by PEI 300 2016

Ranked **Top 5** for Global Private Equity for the last 5 years — Bloomberg; mergermarket

39 Chambers-ranked private equity lawyers worldwide, including **11** ranked Band 1

Market Recognition

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Band 1 for Private Equity Global-wide, Asia-Pacific-wide, and Across Europe
— *Chambers Global, Chambers Asia-Pacific, Chambers Europe, Chambers UK*

Band 1 for Private Equity – Hong Kong
— *Legal 500 Asia Pacific 2016*

Band 1 for Private Equity – U.K.
— *Chambers UK 2016, Legal 500 UK 2015 and IFLR 1000 2016*

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— *Best Lawyers in Germany 2016*

Five Weil Private Equity partners noted as being among the best in France
— *Option Finance Group's 2016 Option Droit & Affaires law firm rankings*

Private Equity Client Program and Global Private Equity Watch blog named among the most "Innovative" Business of Law Initiatives of the Year
— *Financial Times' North America Innovative Lawyers Report*

Recipient of "**Private Equity Deal of the Year**" Award
— *China Law & Practice 2015*

Private Equity Practice Group of the Year
— *Law360 2012 and 2014*

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