A Look at 2022
U.S. Sponsor-Backed

PIPEs

February 2023

Weil
2023
Private Equity
SURVEYS

INTRODUCTION

Welcome to the 16th survey of U.S. sponsor-backed PIPE transactions prepared by Weil, Gotshal & Manges LLP. This survey reviews and analyzes the material financial and governance terms of 20 private investments in public equity transactions (PIPEs) announced in the United States in 2022 involving private equity sponsors or other financial investors making investments of at least $100 million in convertible or non-convertible preferred equity or debt. We are happy to discuss the detailed findings and analyses underlying this survey.

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Editor

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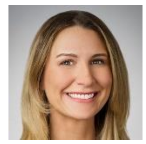
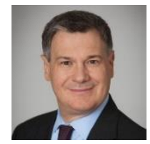
Editor



Douglas Warner
Deputy Editor



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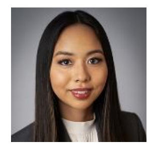
Contributor

Niko Lane
Contributor

Travis Michaud
Contributor

Stephen Jaber
Contributor

Pascale Nguyen
Contributor



Anthony Tulipano
Contributor

RESEARCH METHODOLOGY

We surveyed 20 U.S. sponsor-backed PIPE transactions signed between January 1, 2022 and December 31, 2022 involving investments ranging from $100 million to $1.45 billion. The 20 surveyed transactions involved the following issuers:

InterPrivate II Acquisition Corp.

All dollar (or other) amounts and percentages referenced in this survey are approximate amounts and percentages.

SUMMARY OF KEY FINDINGS

- General Market Observations.
  - 2022 witnessed a significant slow-down in M&A deal activity as compared to the booming M&A market of 2021. With tremendous uncertainty for private equity sponsors looking to realize returns on existing investments and deploy capital for new investments, overall deal volume decreased significantly relative to 2021 and deal structures and terms became more varied. Not surprisingly, we saw a similar decline in sponsor-backed PIPE activity.
  - The total number of PIPE transactions (and total dollars raised therein) decreased in 2022 as compared to 2021 and 2020. The vast majority of the surveyed transactions were signed up in the first half of the year. While PIPE financing for de-SPAC transactions is not a topic of this survey,[1] the nearly nonexistent market for de-SPAC transactions has contributed in part to an overall decrease in the number of PIPE transactions in 2022.
  - 2022 also witnessed a more sponsor-friendly PIPE market as compared to the tightened, and more issuer-friendly, 2021 PIPE market.
  - As traditional debt markets continue to evidence disruption, and public company valuations continue to fluctuate materially, we expect the 2023 PIPE market to follow in the footsteps of what we witnessed in 2022. That said, many sponsors see opportunities in the PIPE market and 2023 has already seen some large PIPE deals.
- **Security Type.** Of the PIPEs surveyed, all except one of the transactions were structured with a convertible debt or equity security (6 as convertible preferred stock and 13 as convertible debt). The prevalence of convertible securities is not surprising, as convertible securities give sponsors downside protection in the investment. The prevalent use of convertible PIPE securities is also consistent with prior years, though 2022 evidenced a sharp uptick in the use of convertible debt relative to convertible preferred stock (this can be attributable to the overall more sponsor favorable 2022 PIPE market, as investors tend to prefer more senior debt securities). The one exception referenced above was structured as a non-convertible preferred security, with warrants. Three of the convertible security deals also included warrants. Notably, in all except one of the seven transactions with a preferred stock PIPE security, the preferred was perpetual (i.e., no maturity).
- **Coupons.** Coupons slightly increased in 2022, with the average coupon being 6.26% (which interestingly represents the average of the 2021 and 2020 average coupons of 5.5% and 7%, respectively). Increased coupons are to be expected given the broader rising interest rate environment. We expect rates will continue to rise in 2023.
- **Conversion Price.** All except one of the surveyed PIPEs involving convertible securities contained fixed conversion prices (subject in most cases to customary anti-dilution adjustment and in some cases, to downwards adjustment upon (x) the occurrence of certain events, including certain fundamental change transactions occurring prior to maturity, or (y) the passage of time). In all but two of those transactions, the fixed conversion price reflected a premium to the closing stock price as of signing (premiums ranged from 7% to 62%).

[1] 2 of the surveyed transactions involved PIPE investments made in contemplation of de-SPAC transactions (Footprint International and InterPrivate II).

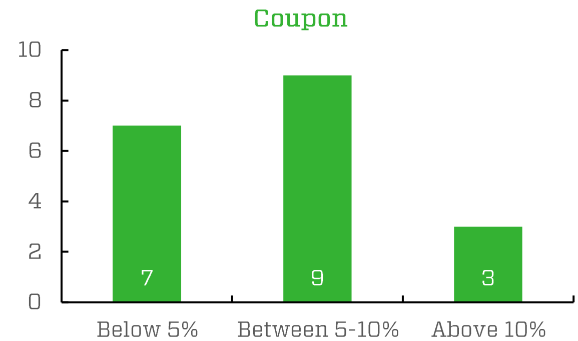
- Sponsor Protections and Governance Rights. Despite the overall friendliness to sponsors in the 2022 PIPE market, there generally was not much movement in deal terms relating to sponsor liquidity protections (right to force a redemption or a conversion) and governance rights (board representation and investor consent rights) as compared to prior years. As explained below, sponsors were able to get more favorable terms in some cases by eviscerating issuer protections that issuers have historically been able to negotiate in PIPE transactions.

- Issuer Protections. Issuers generally received less protections in 2022 PIPEs. For example, forced or automatic conversion triggers (typically, where the PIPE security will convert into issuer's common stock at issuer's discretion if, after a certain period of time, issuer's common stock trades above a specified price for a specified period), which provide a cap on a sponsor's upside, were included in less than half of the 2022 PIPEs involving convertible securities. This represents a stark deviation from 2021 and 2020 where such provisions were included in the vast majority of deals. In addition, we saw a decrease in the average length of lock-up periods and the use of standstill provisions sharply declined. Nonetheless, issuers were able to retain their ability to force a redemption of sponsor's PIPE securities in certain circumstances (often after a certain period of time).

- Expense Reimbursement. In an increase from last year, and more akin to the more sponsor-friendly 2020 PIPE market, sponsors received expense reimbursement by the issuer in 70% of the surveyed PIPEs (compared to 50% in 2021 and 80% in 2020). This is not surprising, as sponsors were generally able to negotiate more favorable terms in 2022.

KEY FINDINGS

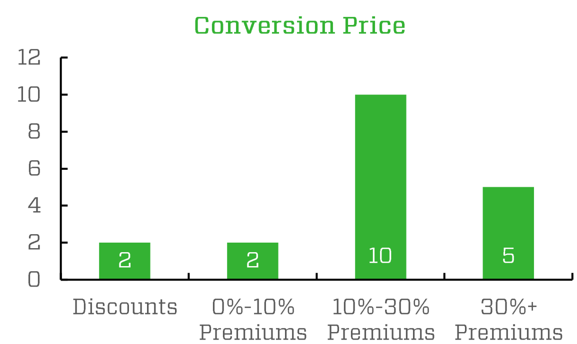
KEY FINANCIAL TERMS



Coupon. Coupons slightly increased in 2022. The mean coupon was 6.26% (median of 6%), as compared to a mean of 5.5% (median of 5.9%) in 2021. Interestingly, the 2022 mean coupon represents the average of the 2021 and 2020 average coupons. Increased coupons are not surprising given the rising interest rate environment (and the more sponsor-friendly environment).

All but one of the surveyed PIPEs included a standalone coupon on the preferred equity or debt. Of those 19 transactions, 42% (8 of 19) involved coupons that were payable in cash only, 47% (9 of 19) involved coupons that were payable in cash and/or payment-in-kind (PIK) at the issuer's option and the remaining 11% (2 of 19) involved PIK only coupons. In a majority of the surveyed PIPEs involving coupons payable in cash and/or by PIK, the coupon increases if issuer elects to PIK rather than pay in cash (increases ranged from 1% to 3%).

In a handful of the surveyed PIPEs, the coupon was subject to increase upon the occurrence of certain events (including, for example, an event of non-compliance or default or the failure of issuer to redeem the PIPE securities when required).[2] Examples of events of non-compliance or default included failure by the issuer to comply with, or an uncured breach of, the issuer's obligations under the investment documents (such as investor veto rights), as well as upon bankruptcy or a similar event.



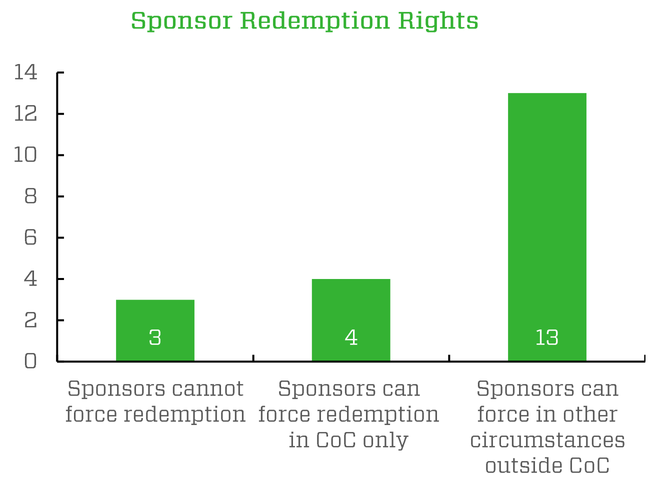
Conversion Price. All except one of the surveyed PIPEs involving convertible securities contained fixed conversion prices. In all but two of those transactions, the fixed conversion prices were subject to customary anti-dilution adjustment for common stock splits, dividends, repurchases, re-classifications and combinations. In some cases, conversion prices were subject to other adjustment, as discussed below.

Almost all conversion prices reflected a premium to the closing stock price as of signing (premiums ranged from 7% to 62%, which represents a similar range as compared to 2021). The mean conversion premium was 20% and the median conversion premium was 22% (representing a slight increase from the mean (19%) and median (15%) 2021 premiums).

In a handful of transactions, conversion prices were subject to decrease (x) upon the occurrence of certain events (including, for example, certain fundamental change transactions occurring prior to maturity) or (y) after a certain period of time (in which case the conversion price adjustment was based on a percentage of the average daily volume-weighted average price of issuer's common stock).

[2] In 1 of the surveyed PIPEs, the coupon increased after a specified period of time.

SPONSOR PROTECTIONS & GOVERNANCE RIGHTS



Redemption. In almost all (17 of 20) of the surveyed PIPEs, sponsors had the right to force issuer to redeem their securities.[3] In most of those transactions (13 of 17), such redemption right was applicable in situations other than just upon a change of control. In only a few (4 of 17) of the applicable transactions, mandatory redemption was available to sponsors only upon a change of control (and not in other circumstances) – and most of those transactions involved perpetual preferred securities. As explained in more detail below, the situations outside of a change of control where sponsors can force a redemption typically include: (i) the passage of a certain period of time; and (ii) the occurrence of certain events of default or non-compliance (sometimes coupled with a requisite vote of the PIPE security holders).

In a shift from last year, in only two of the transactions containing such forced redemption provisions, sponsors could force a redemption after a certain time period (in both cases, 5 years after the issuance date). By comparison, in 2021 70% of the applicable PIPEs permitted sponsors to force a redemption of their securities after a certain time period. This was somewhat surprising given the more sponsor-friendly 2022 PIPE market.

As expected, in the vast majority of the surveyed PIPEs sponsors could force a redemption upon an event of default (with certain events of default resulting in automatic redemption and others resulting in redemption with the consent of investors holding at least a certain percentage (e.g., 25% or 50%) of the applicable PIPE security).

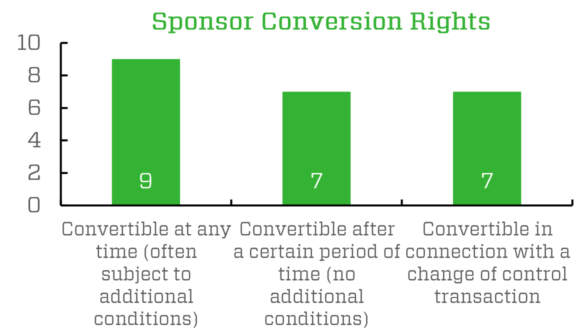
Upon a change of control, as in prior years, sponsors almost always had the right to force a redemption of their PIPE securities.[4] In such cases, sponsors often could elect to receive the greater of (i) the fair market value such sponsor would be entitled to receive if the PIPE security was converted immediately prior to the closing of the change of control or (ii) a redemption amount equal to a certain multiple of the liquidation preference, although in some of the surveyed transactions the redemption price was equal to the liquidation preference (i.e., with no multiple).[5] Redemption amounts in respect of investor-initiated redemptions upon a change of control for the 2022 surveyed PIPEs ranged from 100% - 140% of the liquidation preference.

[3] 2 of the 3 transactions in which sponsors could not force a redemption involved perpetual preferred securities; in the other transaction, the issuer was required to redeem all of the outstanding preferred shares on the maturity date (or upon a liquidity event – including a change of control – if earlier).

[4] In a few of the surveyed transactions, a change of control results in automatic redemption (i.e., without Sponsor electing for such redemption).

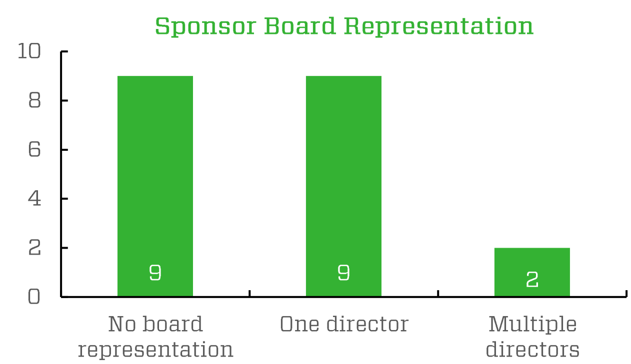
[5] With respect to PIPE debt securities, the redemption price is typically 100% of the principal amount plus accrued and unpaid interest, plus a “make-whole” payment (often equal to the sum of interest payments that would have accrued on the repurchased debt securities from the date of repurchase through maturity).

<u>Conversion</u>. In the vast majority (16 of 19) of the surveyed PIPEs involving convertible securities, sponsors had the right to convert the PIPE securities into issuer's common stock, typically after a certain period of time (and sometimes before such time but subject to certain additional conditions being satisfied) and/or in connection with a change of control transaction.



<u>Board Representation</u>. In 2022, and consistent with prior years, a majority (11 of 20) of the surveyed PIPEs provided sponsor with board designation rights.

Notably, only two of those transactions involved multiple board seats (compared to one of the 2021 PIPEs and 28% of the 2020 PIPEs).



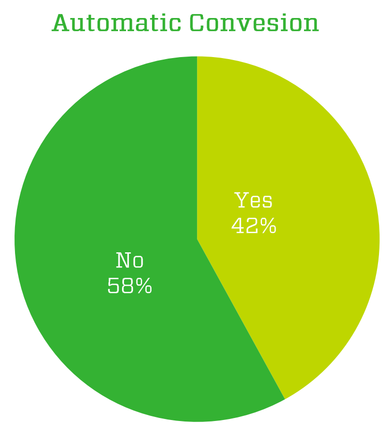
As is customary, almost all of the surveyed PIPEs where sponsor had board designation rights conditioned such rights upon the ownership of a minimum ownership percentage (or dollar threshold) of the applicable security throughout the sponsor's investment.

<u>Investor Consent Rights</u>. In an increase from prior years, all of the surveyed PIPEs involved investor consent rights, typically contingent upon maintaining a minimum ownership percentage. This is indicative of a more sponsor-friendly 2022 PIPE market.

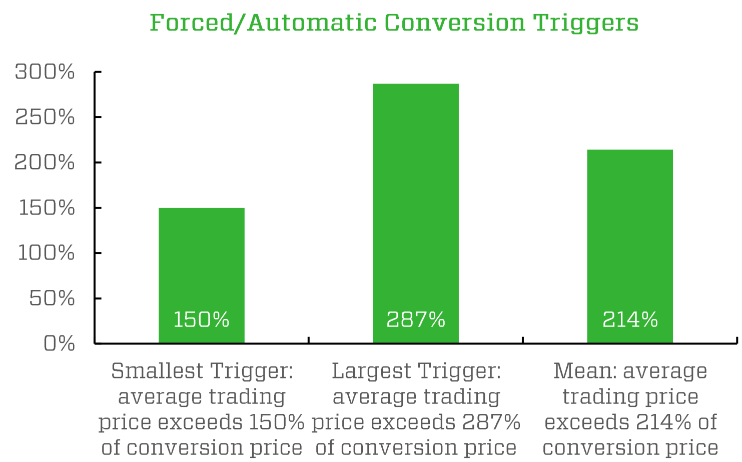
Consent rights granted by issuers to sponsors were largely limited to consent rights over adverse amendments to organizational documents or to the terms or seniority of the securities issued to the sponsor. However, a handful of PIPEs provided for additional veto rights – for example, (i) in 25% (5 of 20) of the surveyed PIPEs, sponsors had consent rights over certain liquidation events (i.e., dissolution, liquidation, winding up, bankruptcy, or change of control transactions), (ii) in 25% (5 of 20) of the surveyed PIPEs, sponsors had consent rights over certain additional indebtedness incurred by issuer (only 1 of which was subject to a monetary threshold), (iii) in 25% (5 of 20) of the surveyed PIPEs, sponsors had consent rights over certain dividend payments or redemptions or repurchases of issuer's securities, (iv) in 25% (5 of 20) of the surveyed PIPEs, sponsors had consent rights over certain affiliate transactions, (v) in 15% (3 of 20) of the surveyed PIPEs, sponsors had consent rights over certain M&A transactions (2 of which were subject to a threshold), (vi) in 15% (3 of 20) of the surveyed PIPEs, sponsors had consent rights with respect to changes in issuer's business, the addition of new businesses or change in principal place of business, and (vii) in 15% (3 of 20) of the surveyed PIPEs, sponsors had consent rights with respect to the payment of management fees or hiring / firing of key personnel.

ISSUER PROTECTIONS

Conversion. Automatic conversion triggers were less common as in prior recent years, which is indicative of a more sponsor-friendly 2022 PIPE market. Under such provisions, the PIPE security will convert into issuer's common stock at issuer's discretion upon certain triggering events (typically if, after a certain period of time, the common stock trades above a specified price for a specified time period). This provides a cap on a sponsor's upside.

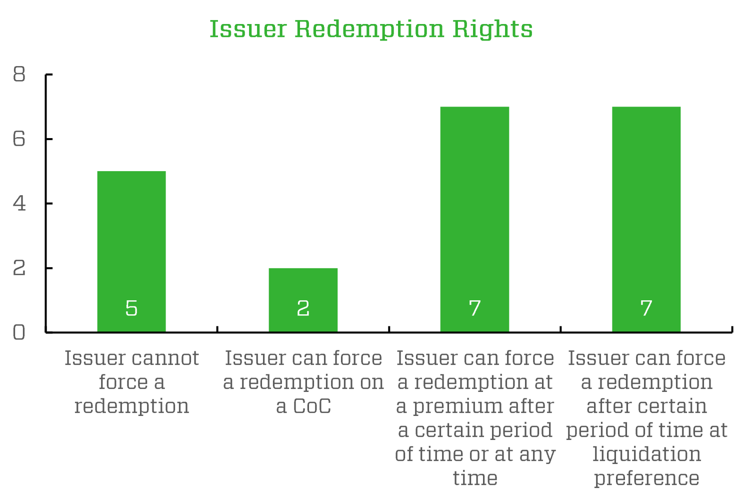


Of the 19 surveyed PIPEs involving convertible securities, 42% (8 of 19) provided for conversion at issuer's discretion upon certain triggering events. Of those, all except two transactions[6] provided for such conversion if issuer's common stock traded above a specified price for a specified period of time, with the mean average trading price trigger being equal to 214% of the conversion price (as compared to 161% and 160% in 2021 and 2020, respectively).



Redemption. As was the case in prior years, most of the surveyed PIPEs allowed issuer to force a redemption of sponsor's securities in certain circumstances.

75% (15 of 20) of the surveyed PIPEs (as compared to 71% and 92% in 2021 and 2020, respectively) provided issuer with redemption rights, exercisable at issuer's option, to force a redemption of sponsor's securities (x) in the event of a sale or other change of control of issuer (sometimes at a multiple) and/or (y) following a



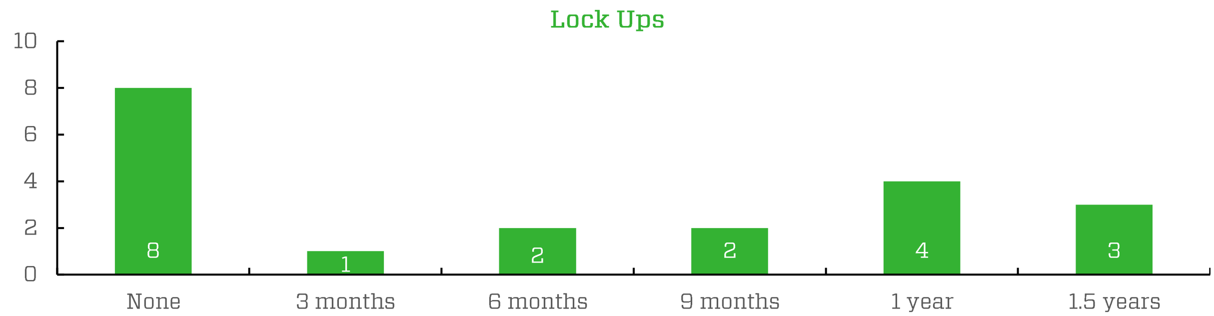
[6]In one transaction, the PIPE securities (convertible notes) automatically convert into common stock upon the consummation of a rights offering. In another transaction, the PIPE securities (preferred stock) automatically convert into common stock upon the date that the requisite shareholder approval is obtained. In two transactions, the PIPE securities were also convertible at issuer's option in connection with a change of control transaction.

certain period of time (most commonly 3 to 7 years) or at any time, often at a redemption premium.[7]

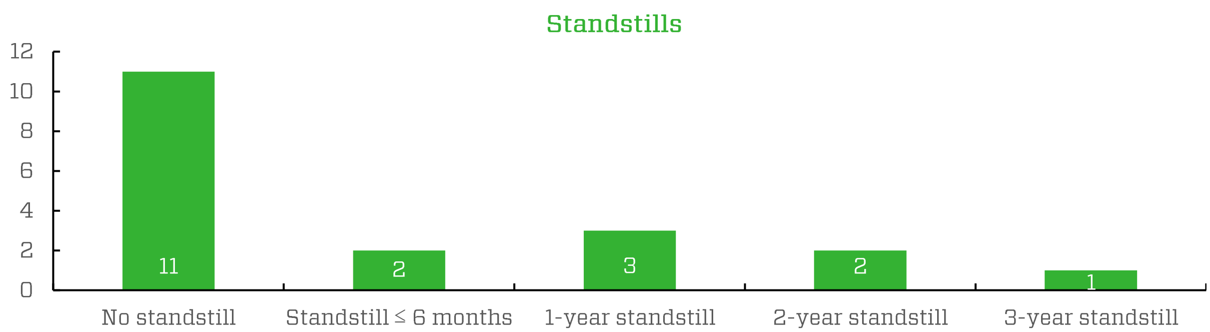
Where redemption premiums were payable (in about half of the applicable transactions), such premiums ranged from 5% to 40%.

<u>Lock-ups; Standstills</u>. Lock-ups and standstill provisions remained prevalent, however the frequency and length of the applicable periods slightly decreased in 2022 as compared to prior years. This is indicative of a more sponsor-friendly 2022 PIPE market.

60% (12 of 20) of the surveyed PIPEs contained lock-up provisions restricting sponsor's ability to transfer its securities for a certain period of time (as compared to 86% of 2021 PIPEs). 75% (9 of 12) of those PIPEs had lock-ups of 1 year or less (as compared to 58% of 2021 PIPES), with the remaining PIPEs (3 of 12) having lock-ups of 1.5 years.



45% (9 of 20) of the surveyed PIPEs contained standstill provisions restricting sponsor from purchasing additional securities of issuer for a fixed period of time (as compared to 71% of 2021 PIPEs), with the longest standstill lasting until the 3rd anniversary of the issuance. The median standstill was 1 year (compared to 3 years and 2 years in 2021 and 2020, respectively).



*Note: In 1 transaction there was no fixed standstill period, but rather it was tied to sponsors holding a certain equity ownership threshold.

[7] In 1 of these 15 transactions, the issuer's right to redeem did not fall into any of these categories; rather, issuer could redeem the securities at any time prior to consummation of a planned rights offering.

EXPENSE REIMBURSEMENT

Sponsor expense reimbursement remained common, and increased in frequency in 2022 as compared to 2021 (70% of the surveyed PIPEs contained expense reimbursement obligations payable to sponsor by issuer as compared to 50% of 2021 PIPEs). This is not surprising given the more sponsor-friendly 2022 PIPE market.

The value of these sponsor expense reimbursements ranged from $100,000 to 100% of sponsor's expenses (i.e., uncapped). Where a capped amount was contemplated, the mean expense reimbursement amount was $2.4 million (and in percentage terms was equal to a mean of 0.8% of the investment amount).

STOCK EXCHANGE SHAREHOLDER APPROVAL REQUIREMENTS

Whenever dealing with convertible PIPE securities, sponsors (and issuers) should consider requisite shareholder approval requirements and any related restrictions on conversion.

Shareholder Approval Requirements. Both NASDAQ and the NYSE require listed companies to obtain shareholder approval for certain issuances of common stock or securities convertible or exchangeable into common stock in excess of 20% of the common stock or voting power outstanding prior to the issuance (the "20% rule"). The "20% rule" contains certain exceptions including: (1) "public offerings" for cash and (2) private placements at a price above a minimum market price. Thus, issuances of more than 20% of the common stock or voting power of an issuer would not require shareholder approval where the issuance is made for cash and where the minimum price condition is met. Note, however, that shareholder approval would be required if the proceeds of any such issuance are to be used to finance an acquisition of the stock or assets of another company, and the issued securities together with any other securities issued in connection with the acquisition would exceed 20% of issuer's outstanding common stock or voting power.

Shareholder approval is also required where the issuance of securities may result in a "change of control" of the issuer. Both NASDAQ and the NYSE will look at several factors in determining whether a "change of control" has occurred. NASDAQ generally considers a "change of control" as a transaction that results in an investor or group of affiliated investors owning, *or having the right to acquire*, 20% or more of an issuer's common stock or voting power, and such ownership or voting power would be the largest ownership in the issuer. The NYSE has indicated that even smaller amounts (i.e., less than 20%) may be deemed to be a "change of control" if the issuance carries certain governance rights (such as the right to appoint directors or veto or blocking rights).

Restrictions on Conversion. Given the potential delay obtaining shareholder approvals can create, sponsors and issuers commonly structure PIPE transactions in a manner that limits the issuance to less than 20% of the pre-transaction common stock, or with caps on the number of shares that may be issued upon conversion or exchange until the requisite shareholder approval is obtained.[8] Notably, any such share cap must apply for the life of the transaction unless shareholder approval is obtained.

A handful of the surveyed PIPEs involving convertible PIPEs (6 of 19) included prohibitions on sponsors from acquiring or converting the applicable PIPE security above a share cap (often 19.99%). Two of the applicable surveyed PIPEs included flat prohibitions (not tied to any share cap) on the

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[8] If an issuer determines to defer a shareholder vote in this manner, NASDAQ interpretations provide that shares issuable under the cap (in the first part of the transaction) would not be eligible to vote to approve the remainder of the transaction.

conversion of the PIPE security into issuer's common stock prior to the date that the requisite shareholder approval was obtained.

Penalties and Sweeteners. Transaction terms for convertible PIPE securities may also contain "penalties" or "sweeteners" that are triggered if the requisite shareholder approval is or is not obtained (e.g., changes to the conversion ratio or coupon or other monetary consequences). However, such "penalty" and "sweetener" provisions should be considered carefully, as the stock exchanges may consider them to be coercive to the shareholders' vote. NASDAQ, for example, will not permit share caps to be used in connection with issuances that also include "penalty" or "sweetener" provisions triggered upon the outcome of the shareholder vote, as it views this combination as potentially preventing shareholders from freely exercising their vote on the transaction. Nonetheless, an issuance of convertible PIPE securities containing "penalties" or "sweeteners" may comply with NASDAQ requirements provided that no common shares are issued prior to the shareholder vote.

Only two of the surveyed PIPEs that included share caps described above included such provisions. In one such transaction, if, as a result of the share cap, a converting holder could not receive common stock, such holder would instead be entitled to pre-funded warrants. In another transaction, the issuer was prohibited from decreasing the conversion price if such decrease would result in the share cap being reached, unless stockholder approval was obtained.

In one of the surveyed transactions that included a share cap restricting conversion but that did not contain any such penalty or sweetener, the transaction documents included explicit language clarifying that the issuer's obligation to deliver consideration otherwise due upon a proposed conversion pursuant to sponsor's optional conversion right will not be extinguished by the fact that the conversion is prohibited, and included an affirmative obligation of issuer to deliver any such consideration as soon as reasonably practicable.

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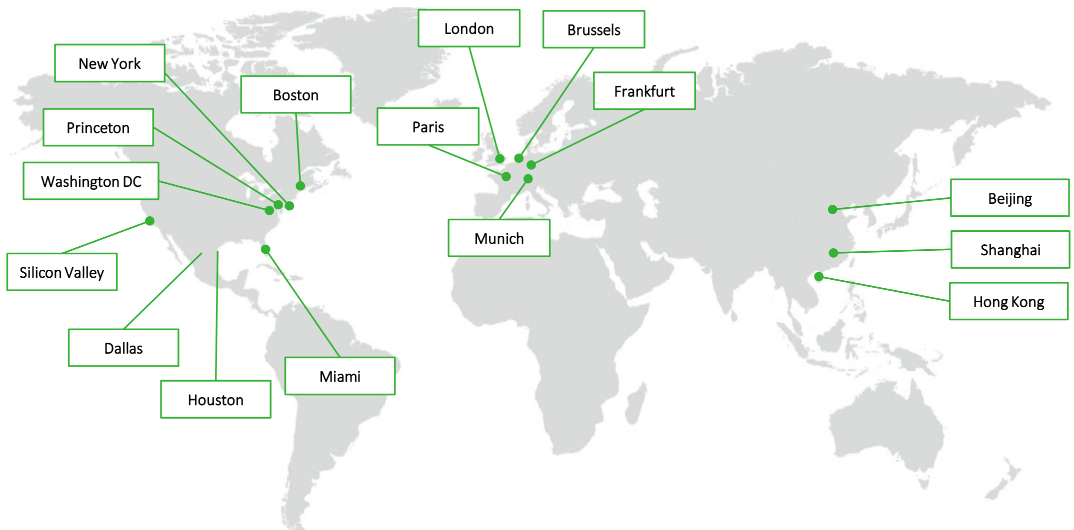

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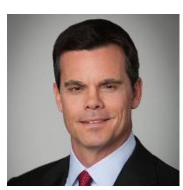

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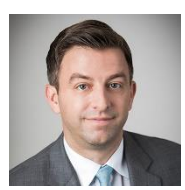

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Co-Head of U.S. Private Equity