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2011 Review of Selected U.S. Strategic M&A Transactions

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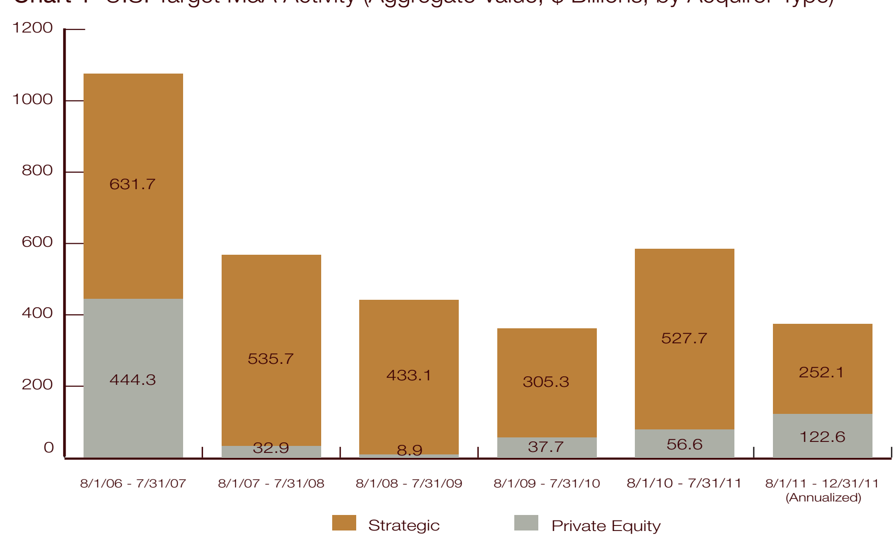
Market Overview

In our October 2009 report, "A Study of Selected U.S. Strategic M&A Transactions in the Wake of the Credit Crisis" (the "2009 Study"), we examined the impact of the mid-2007 through mid-2009 credit cycle on both the overall volume of U.S. strategic M&A transactions and the contractual devices employed by dealmakers. In our 2010 update of that study (the "2010 Study"), we observed the lingering effects of the credit crisis on how strategic M&A transactions were structured. This study, covering U.S. strategic M&A activity in the period from August 1, 2010 through December 31, 2011, examines whether trends observed in the 2009 and 2010 studies have continued or whether dealmakers have reverted to pre-crisis practices.

The seventeen months ended December 31, 2011 saw overall gains in U.S. equity prices, as the market rally that began in the spring of 2010 continued through the middle of 2011 and was only temporarily derailed by a late summer correction which left stock prices roughly flat for calendar year 2011. The period also saw generally improved access to credit and low benchmark interest rates, due in part to the Federal Reserve's second quantitative easing program (which was announced in November 2010 and continued through 2011) and its maintenance of a federal funds rate target of 0.25% for the duration of the period. In the twelve months ended July 31, 2011, the overall volume of strategic and private equity transactions involving U.S. targets increased 70% over the prior twelve-month period to $584.3 billion, reversing the declines observed in the 2009 Study and the 2010 Study and surpassing the overall market volume in the twelve months ended July 31, 2008. Strategic and private equity transactions both contributed to the increase, with the overall volume of each increasing 73% and 50%, respectively. Over the same period, the average size of strategic and private equity transactions increased by 84% and 54%, respectively.

In the five months between August 1 and December 31, 2011, likely as a result of the equity market correction, overall U.S. M&A activity slowed, despite a notable pickup in private equity transactions. The overall volume of U.S. M&A transactions and the volume of U.S. strategic M&A transactions in the period, projected for a full year, would have represented declines of 36% and 52%, respectively, relative to the twelve months ended July 31, 2011. Private equity volume accounted for nearly a third of the overall volume in the period and, projected for a full year, would have represented an increase of 117% over the twelve-month period ended July 31, 2011. See Chart 1. Private equity buyers almost uniformly employ cash as consideration in their transactions and, accordingly, may have been less affected by the equity market volatility than strategic buyers. With equity markets rebounding in the final months of the year, it remains to be seen whether strategic transactions will regain their 2010 and early 2011 momentum and whether private equity transactions will continue their recovery.

Chart 1 U.S. Target M&A Activity (Aggregate Value, $ Billions, by Acquiror Type)

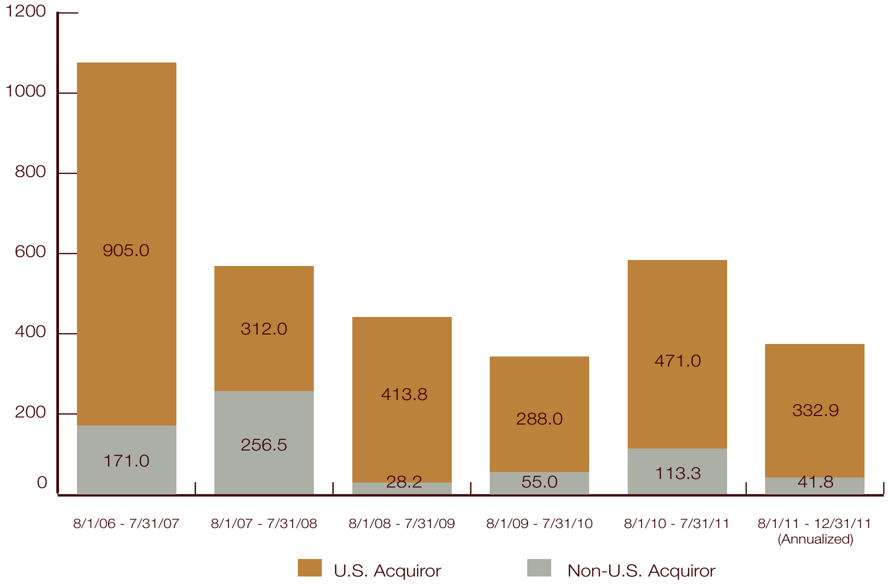


Source: Thomson Financial Securities Data

Transactions involving U.S. targets and non-U.S. acquirors represented 19% of the overall volume of U.S. target transactions in the twelve months ended July 31, 2011, up from 16% in the twelve months prior, though still below the 45% observed in the twelve months ended July 31, 2008. See Chart 2. In the twelve months ended July 31, 2011, transactions involving U.S. targets and non-U.S. acquirors had an average size of $1.12 billion, compared to $925 million for transactions with U.S. acquirors. Non-U.S. acquiror transactions thus represented a smaller share of market activity by number of transactions (17%) than they did by overall volume.

In the last five months of 2011, the volume of non-U.S. acquiror activity declined more steeply than the volume of U.S. acquiror activity, likely reflecting the impact of the debt crisis and the economic slowdown in Europe. The volume of non-U.S. acquiror transactions in the period, projected for a full year, would have represented a 63% decline relative to the twelve months ended July 31, 2011, as compared with a projected 29% decline in the volume of U.S. acquiror transactions in the same period.

Chart 2 U.S. Target M&A Activity (Aggregate Value, $ Billions, U.S. vs. Non-U.S. Acquiror)



Source: Thomson Financial Securities Data

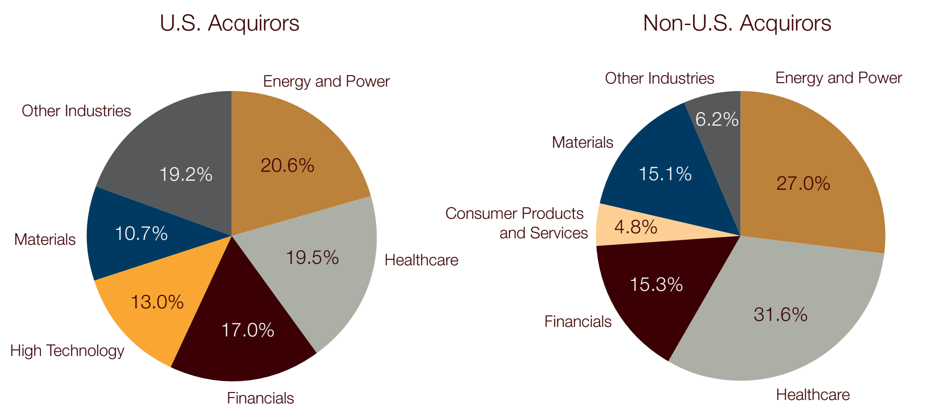
Market Overview

Key Observations

According to Thomson Financial Securities Data, during the twelve months ended July 31, 2011, over 60% of the overall volume of transactions involving U.S. targets and non-U.S. acquirors originated from three European countries: the U.K. (31%), France (22%) and Germany (11%). Canada (11%) and New Zealand (9%) accounted for the fourth and fifth highest percentages of such transactions. Looking forward to 2012, Switzerland is poised to rank among the top acquiror countries. Over a month into the year, according to the *Wall Street Journal*, transactions with Swiss acquirors accounted for $12.8 billion or 18% of global cross-border deal volume.

The most common target industries in transactions with U.S. targets and non-U.S. acquirors roughly matched the top target industries in transactions with U.S. targets and U.S. acquirors, with healthcare (including pharmaceuticals) and energy and power industry transactions accounting for the greatest volume of each. See Chart 3. In the five months between August 1 and December 31, 2011, the target industries for U.S. acquiror and non-U.S. acquiror transactions with U.S. targets remained generally similar, with energy and power industry transactions accounting for the greatest volume of each.

Chart 3   U.S. M&A Activity Target Industries, August 1, 2010 - July 31, 2011 (% of Overall Volume)



Source: Thomson Financial Securities Data

Key Observations

The 2010 Study examined the 25 largest strategic M&A transactions involving U.S. public company targets (excluding financial industry transactions) announced in each of the twelve-month periods from August 1, 2007 to July 31, 2008 ("Year 1"), from August 1, 2008 to July 31, 2009 ("Year 2"), and from August 1, 2009 to July 31, 2010 ("Year 3"). For this report, we examined the 25 largest strategic M&A transactions involving U.S. public company targets (excluding financial industry transactions) announced in the seventeen-month period from August 1, 2010 to December 31, 2011 ("Year 4").

We make the following observations based on our review of the Year 4 transactions:

- ***Rising equity prices raised dealmakers' tolerance for risk.*** In Years 1 through 3, dealmakers increasingly employed contractual devices to protect the agreed transaction and to define the consequences of termination. In Year 4, dealmakers instead appeared to rely on the perceived certainty provided by improving market conditions. Dealmakers in several respects reverted to practices seen in the twelve months ended July 31, 2008, when the surveyed transactions were of similar size but before the full impact of the credit crisis had been felt. This trend persisted both before and in the immediate aftermath of the market correction in late summer 2011.
- ***Private equity-like treatment of financing risk declined substantially.*** In the 2010 Study, we noted that even as credit conditions improved dealmakers continued to use financing conditions and reverse termination fees in transactions in which cash constituted a portion of the consideration. We speculated that such provisions, which began to appear in strategic transactions following several high-profile financing failures in private equity deals, had become a fixture of the strategic marketplace. In Year 4, however, in only two of the largest 25 transactions was the target not entitled to a remedy of specific performance following a financing failure. Although this development suggests a return to the historical approach where financing risk was presumptively borne by the acquiror, we believe that financing risk continued to play an important role in merger negotiations.
- ***The strength of credit markets led to cash being used as the exclusive consideration in over half of the surveyed transactions.*** Despite steady gains in equity prices (likely implying decreasing costs of issuing equity) in much of Year 4, over half of the Year 4 transactions involved exclusively cash consideration, a significant increase from Year 3. This increase likely reflected the strength of the credit markets and, in part, the Federal Reserve's expansionary monetary policy throughout the period. Cash-only transactions remained popular through the end of 2011, even as credit and equity markets experienced increased volatility. This result suggests that large acquirors either were willing to tap into their cash reserves or continued to enjoy reasonable access to financing to fund their acquisitions.
- ***Only one of the surveyed transactions was priced as a merger-of-equals ("MOE")—i.e., by offering no premium to either party's shareholders—but many more included MOE-like post-closing governance provisions.*** There was an increased use among the Year 4 transactions of provisions governing the surviving company's headquarters, board composition, leadership and charitable activities. Such increases may indicate that targets had greater bargaining power than in previous years or that acquirors approached their transactions less as pure acquisitions and more as business combinations. Alternatively, dealmakers may have increasingly employed such provisions so as to preempt or address possible political or regulatory challenges.

- ***Despite an increase in cash-only transactions, the use of two-step (i.e., tender offer) structures declined in Year 4.*** Tender offer structures provide generally the same substantive consequences as one-step mergers, though in a shorter timeframe. One should thus expect tender offer structures to be used frequently in strategic cash-only transactions unless the parties expect another impediment (such as a vote of the acquiror's shareholders, a protracted antitrust approval process or a financing requirement) to affect the overall timing of the transaction. Cash was the exclusive consideration in over half of the Year 4 transactions but tender offer structures were used in only 20% of the Year 4 transactions. This result suggests that dealmakers' concerns about antitrust or other regulatory approval requirements had some impact on how transactions were structured.
- ***The sizes of termination fees and reverse termination fees (in the few cases they were used) declined slightly.*** The average and median sizes of termination fees (as a percentage of transaction value) declined to approximately the levels seen in the twelve months ended July 31, 2008. This was the third consecutive year in which the sizes of termination fees (as a percentage of transaction value) moved in the opposite direction of the average and median size of the surveyed transactions, suggesting that the absolute dollar amount of such fees—not just the percentage they represent of transaction value—plays an important role in the negotiations. Among the Year 4 transactions, the one reverse termination fee payable following a financing failure was smaller (as a percentage of transaction value) than the average and median sizes of such fees in Years 2 and 3. Although we hesitate to draw any conclusions on the basis of a single data point, this decline also may be partly attributable to the increase in transaction values in Year 4. We note that fee sizes in particular are highly negotiated and the trends observed in our limited sample may not apply to the broader market.

* * * * *

For this report we also compared the largest U.S. public company strategic transactions that involved U.S. acquirors to those that involved non-U.S. acquirors. As shown in Chart 2 above, non-U.S. acquiror transactions have represented a significant percentage (over 20%) of the aggregate volume of U.S. M&A transactions over the past five years. Macro trends, such as the growing appetite of non-U.S. acquirors for U.S. brands and distribution channels and the build-up of foreign currency reserves in China and elsewhere, suggest that such transactions will continue to play an important role in the U.S. M&A marketplace. Though not the subject of this report, recent years have also seen an increase in outbound-U.S. and non-U.S. to non-U.S. M&A transactions.

To examine the impact of non-U.S. acquiror transactions on the U.S. M&A marketplace, we examined how, if at all, the structural and contractual features of such transactions have differed from U.S. acquiror transactions. To perform this comparison, we looked beyond our sample of the 25 largest transactions in Year 4 overall to the ten largest transactions in Year 4 involving non-U.S. acquirors and the 25 largest transactions in Year 4 involving U.S. acquirors. We refer to such transactions as the "Year 4 Non-U.S. Acquiror" and the "Year 4 U.S. Acquiror" transactions, respectively.

We make the following observations based on our comparison of the Year 4 Non-U.S. Acquiror transactions to the Year 4 U.S. Acquiror transactions:

- ***Few non-U.S. acquiror transactions used stock consideration, likely reflecting the regulatory burden of listing securities in the U.S.*** Seven of the ten non-U.S. acquiror transactions included exclusively cash consideration, and one more (Sanofi-Aventis/Genzyme) began as a cash-only tender offer but later included a contingent value right as part of the consideration. The greater frequency of cash-only transactions (relative to U.S. acquiror transactions) may reflect that, among non-U.S. acquirors without U.S.-listed securities (or American Depository Receipts), the need to list such securities operates as a "tax" on using stock or other securities as consideration in U.S. transactions.
- ***Antitrust and other regulatory issues were less common among non-U.S. acquiror transactions, leading to the more frequent use of tender offer structures than in U.S. acquiror transactions.*** Of the eight Year 4 Non-U.S. Acquiror transactions whose consideration consisted exclusively of cash or cash and a contingent value right, five were structured as tender offers and three as one-step mergers. The expectation of regulatory scrutiny seems to have driven this choice, as none of the deals structured as tender offers faced significant antitrust or other regulatory difficulties (although one transaction, SAP/SuccessFactors, extended its offer period to allow the Committee on Foreign Investment in the United States (CFIUS) to complete its review of the transaction), whereas two of the one-step mergers drew "second requests" from—and led to divestiture agreements with—antitrust authorities. Assuming that U.S. acquirors decided on the same basis as non-U.S. acquirors whether to use tender offer structures, we can infer from the lower frequency of tender offer structures among the cash-only Year 4 U.S. Acquiror transactions (3 out of 14) that such transactions presented antitrust risks more often than did the non-U.S. acquiror transactions, perhaps because they necessarily concerned a combination within a single jurisdiction.
- ***None of the non-U.S. acquiror transactions limited the acquiror's financing risk.*** None of the Year 4 Non-U.S. Acquiror transactions contained a financing condition or a reverse termination fee following a financing failure or limited the target's entitlement to specific performance following a financing failure. Though possibly a function of the limited sample size, this result may reflect the fact that in many non-U.S. acquirors' home jurisdictions regulations either prohibit financing conditions or require that acquirors arrange fully-committed financing before formally launching an offer.
- ***Non-U.S. acquirors gave more flexibility to target boards to change their recommendations.*** Relative to U.S. acquirors, non-U.S. acquirors far more often allowed the target's board of directors to change its recommendation based solely on the board's determination that doing so was required by its fiduciary duties. This may also result from differences in local practices, as many non-U.S. jurisdictions disfavor contractual restrictions on board discretion. Acquirors from such jurisdictions may be less accustomed to restrictions on board discretion than U.S. acquirors and more willing to agree to them in negotiations in return for other concessions by the target.

In our previous studies, we selected the largest 25 strategic mergers (according to the equity value of the target implied by the merger consideration) involving U.S. public company targets announced during each of the twelve-month periods from August 1, 2007 through July 31, 2008 ("Year 1"), August 1, 2008 through July 31, 2009 ("Year 2") and August 1, 2009 through July 31, 2010 ("Year 3"). For this report, we reviewed the largest 25 such transactions announced during the seventeen-month period from August 1, 2010 through December 31, 2011 ("Year 4"). In addition, we compared the largest transactions in Year 4 involving non-U.S. acquirors to those involving U.S. acquirors. Because only five of the 25 largest Year 4 transactions involved non-U.S. acquirors, we expanded our survey by comparing the ten largest such transactions involving non-U.S. acquirors with the 25 largest such transactions involving U.S. acquirors (the "Year 4 Non-U.S. Acquiror" and the "Year 4 U.S. Acquiror" transactions, respectively). As in previous years, we excluded transactions involving financial industry targets and transactions in which either party owned more than 10% of the other party's shares before the transaction.[1]

This report is intended to be not an exhaustive review of all transaction terms in the surveyed transactions but rather an overview of those matters we found most interesting.

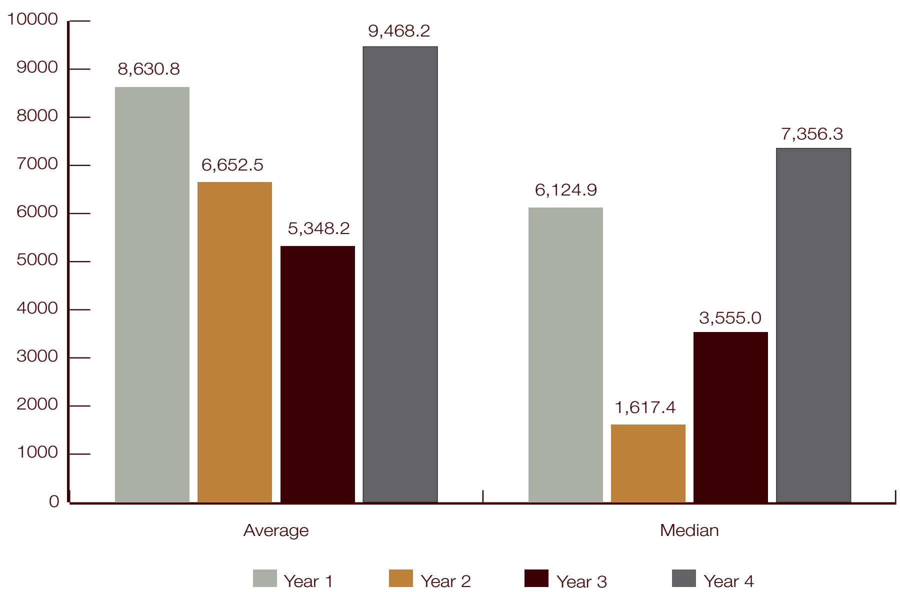
Our observations are based on a review of publicly available information for the surveyed transactions. Such transactions accounted for only a portion of M&A activity during the survey period and may not be representative of the broader M&A market. This is particularly true of the set of Year 4 Non-U.S. Acquiror transactions, which comprised only ten transactions. In addition, we treat the provisions of all of the surveyed transactions as if they were adopted deliberately and in lieu of mutually understood alternatives, and we ignore the inevitable effects of time, resource and informational limitations.

[1] We used Factset Mergers to develop our sample group. To eliminate transactions with financial industry targets, we excluded transactions with targets having any of the following Factset Mergers industry classifications: "Finance/Rental/Leasing," "Financial Conglomerates," "Investment Banks/Brokers," "Investment Trusts/Mutual Funds," "Major Banks," "Regional Banks" or "Savings Banks."

Transaction Size, Form of Consideration and Structure

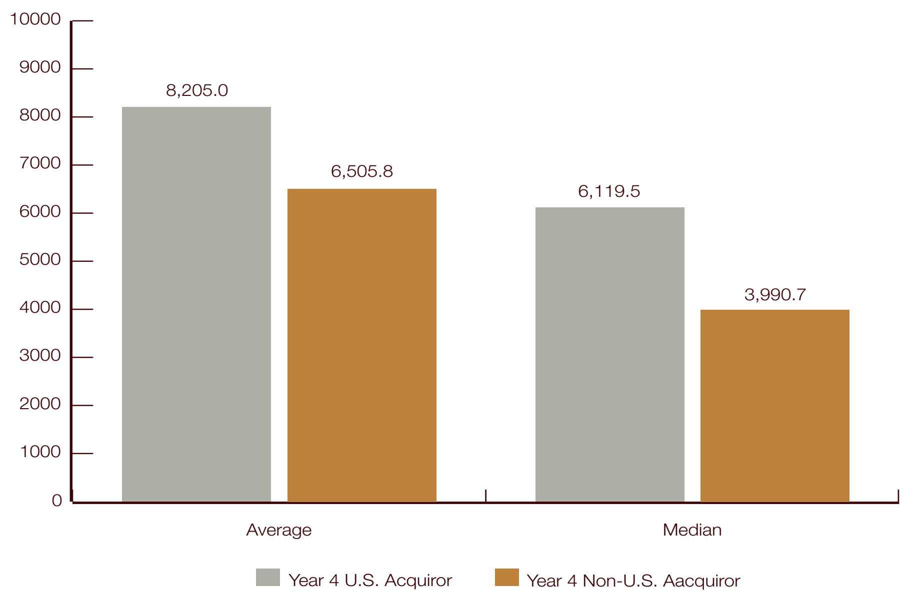
Transaction size. From Year 3 to Year 4, the average size of the surveyed transactions (as measured by the target's implied equity value) increased 77%, reversing the decline from Year 1 to Year 3. The median size of surveyed transactions increased 107% over such period, consistent with the recovery in overall U.S. M&A activity to levels last seen in Year 1, prior to the full impact of the credit crisis. See Chart 4. Notably, four of the eight largest Year 4 transactions (Kinder Morgan/El Paso, United Technologies/Goodrich, Google/Motorola Mobility, and Gilead/Pharmasset) occurred after August 5, 2011, when the S&P 500 had its lowest close of 2011, over 17% below the peaks seen in April and July of 2011.

Chart 4 Size of Surveyed Transactions ($ Millions)



The Year 4 Non-U.S. Acquiror transactions had a lower average and median transaction size than the Year 4 U.S. Acquiror transactions. See Chart 5. As noted, only five of the 25 largest Year 4 transactions, representing 21% of the aggregate transaction value of such transactions, involved non-U.S. acquirors. In Year 3, nine non-U.S. acquiror transactions accounted for 30% of the aggregate transaction value of the 25 largest transactions.

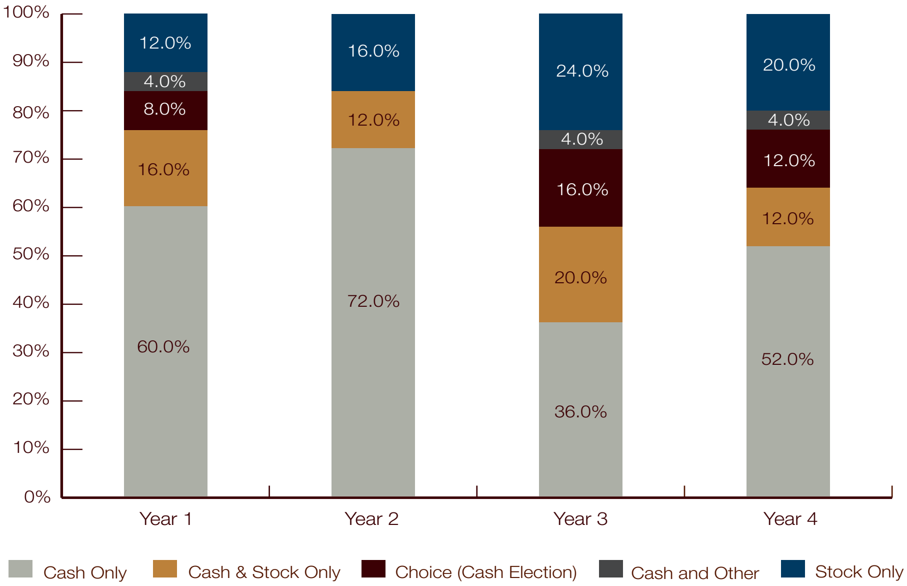
Chart 5 Size of Surveyed Transactions, U.S. vs. Non-U.S. Acquiror ($ Millions)



Cash versus stock. Cash was the exclusive consideration in over half (52%) of Year 4 transactions. This represented an increase from Year 3 (36%) and a partial reversion towards the percentages of cash-only transactions seen in Years 1 and 2. See Chart 6. In the 2010 Study, we noted that the decline in the percentage of cash-only transactions to 36% in Year 3 from 72% in Year 2 occurred during a period of loosening credit markets and rising equity values, indicating that the composition of consideration in strategic transactions was driven by the relative costs to the acquiror of using cash or stock rather than the absolute cost of financing a cash purchase.

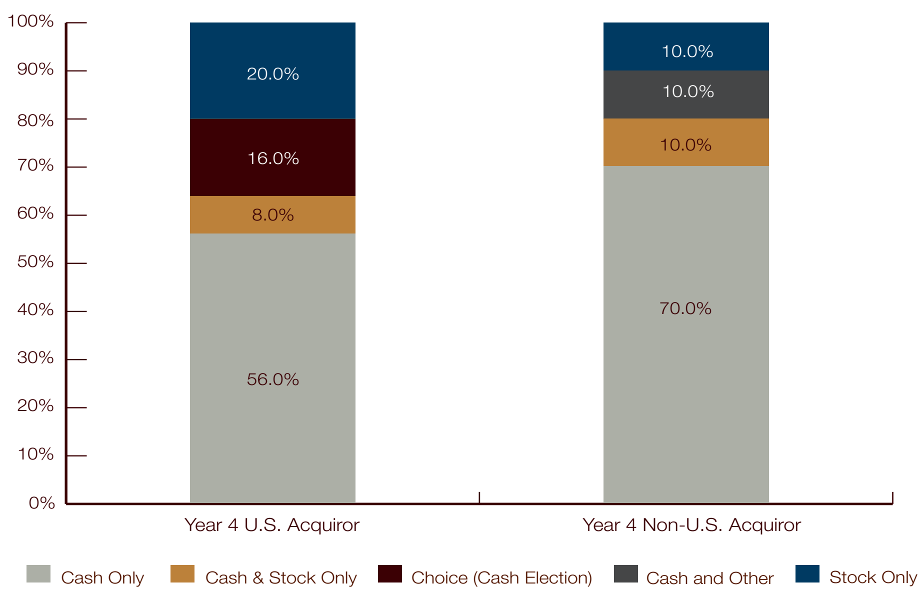
The increase in cash-only transactions in Year 4, a period of increasing equity prices and thus decreasing costs of using stock consideration (assuming that price-to-earnings ratios similarly increased), suggests that acquirors both believed that their stock prices were undervalued and also enjoyed low or declining borrowing costs, likely due to the overall strength of the credit markets and, in part, to the Federal Reserve's quantitative easing policy and its maintenance of a low federal funds rate target.

Chart 6 Form of Consideration (Percentage of Surveyed Transactions)



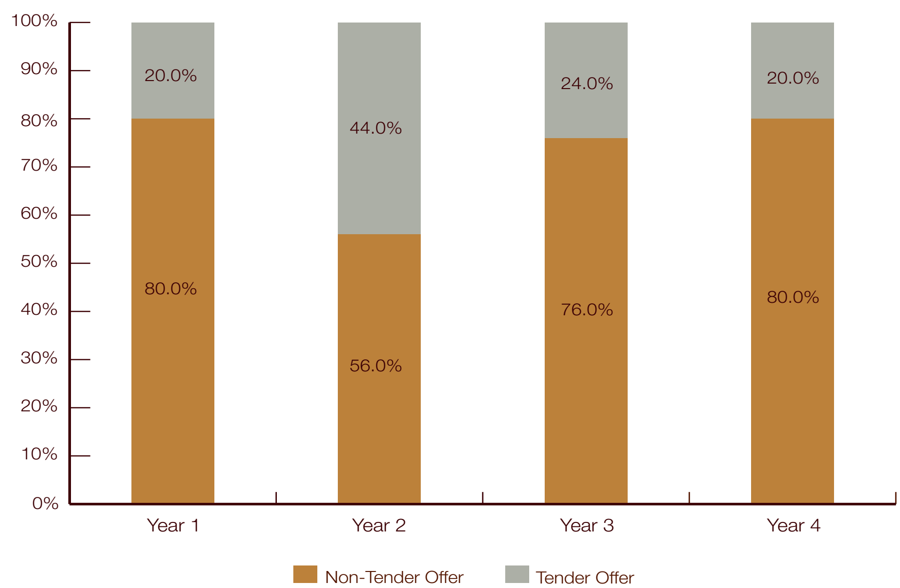
Cash was the exclusive consideration in 70% of the Year 4 Non-U.S. Acquiror transactions, versus 56% of the Year 4 U.S. Acquiror transactions. See Chart 7. This difference likely reflected the burden on non-U.S. acquirors without U.S.-listed securities of having to list securities in the U.S. for use as consideration.

Chart 7 Form of Consideration (Percentage of Surveyed Transactions, U.S. vs. Non-U.S. Acquiror)



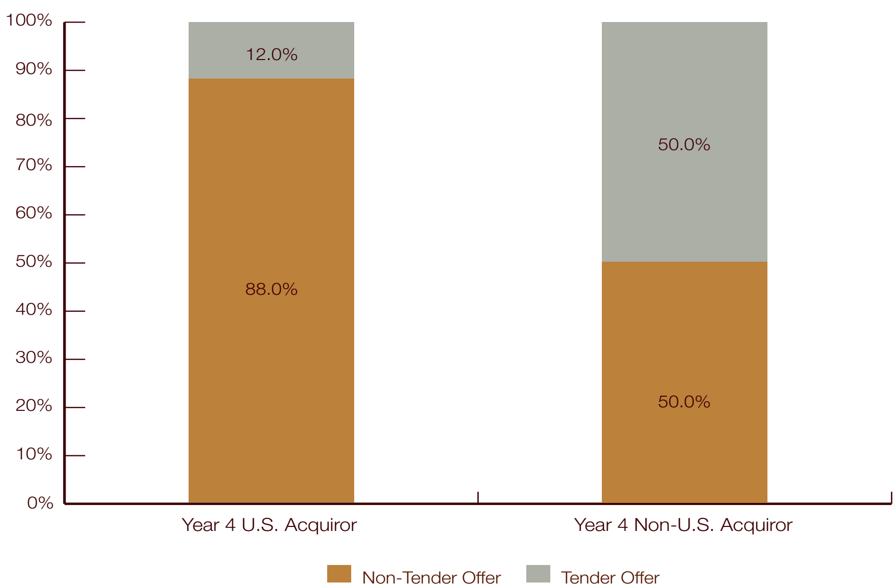
Tender offers. Over three quarters of the Years 1, 3 and 4 transactions and over half of the Year 2 transactions were structured as single-step (*i.e.*, non-tender offer) mergers. See Chart 8. Transacting parties typically use tender offer structures because they offer a potentially faster path to completion than single-step mergers. They typically choose not to use such structures in friendly (non-hostile) transactions when the timing benefits are unavailable, either because the transaction must be approved by the acquiror's shareholders (which is often the case when stock consideration is used) or because the parties expect the antitrust or regulatory approval process to extend beyond the duration of a typical tender offer period. Over the first three surveyed years, the use of tender offers tracked the use of cash consideration—the more cash-only transactions, the more often the parties opted for a two-step structure. This trend ended in Year 4, as more of the transactions used exclusively cash consideration but fewer employed two-step structures. This suggests that the Year 4 transactions raised more antitrust or other regulatory concerns than the Year 3 transactions, either because of the actual risks posed by the transactions or because of the perceived concerns of regulatory authorities.

Chart 8 Tender Offer/Non-Tender Offer (Percentage of Surveyed Transactions)



Tender offers were far more common among the Year 4 Non-U.S. Acquiror transactions than among the Year 4 U.S. Acquiror transactions, representing half of the former and approximately one tenth of the latter. See Chart 9. Among the Year 4 Non-U.S. Acquiror transactions, the choice of whether to use a tender offer structure was likely driven by the parties' expectations of antitrust or other regulatory challenges. Of the eight such transactions without stock consideration, none of the five that were structured as tender offers encountered significant antitrust or regulatory difficulties (although one transaction, SAP/SuccessFactors, extended its offer period to allow CFIUS to complete its review of the transaction), whereas two of the one-step mergers drew "second requests" from—and led to divestiture agreements with—antitrust authorities. Assuming that U.S. acquirors decided on the same basis as non-U.S. acquirors whether to use tender offer structures, the greater frequency of tender offer structures among the Year 4 Non-U.S. Acquiror transactions without stock consideration versus the Year 4 U.S. Acquiror transactions without stock consideration suggests that such transactions posed a lower degree of antitrust or other regulatory risk than did U.S.-acquiror transactions. Though non-U.S. acquiror transactions present regulatory issues that are absent from purely domestic transactions (e.g., CFIUS approval), such transactions may present antitrust risks less often than U.S. acquiror transactions because they are undertaken for reasons that do not inherently impact competition in a single jurisdiction, such as securing distribution channels, acquiring local brands or tariff-jumping.

Chart 9 Tender Offer/Non-Tender Offer, U.S. v. Non-U.S. Acquiror (Percentage of Surveyed Transactions)



Financing Risk and Remedies

Financing risk, specific performance and reverse termination fees. Chart 10 shows (i) the frequency with which the surveyed transactions involving cash consideration entitled targets to a remedy of specific performance if the acquiror were to experience a financing failure and (ii) the average and median reverse termination fees in connection therewith, expressed as a percentage of implied equity value. In Year 4:

- ***There was a sharp decrease*** compared to Years 2 and 3 in the use of financing conditions and limitations on targets' entitlement to a remedy of specific performance following financing failures; and
- ***None of the Year 4 Non-U.S. Acquiror transactions*** contained a financing condition or otherwise limited the target's entitlement to a remedy of specific performance following a financing failure.

In the 2010 Study, we observed a notable shift in strategic transactions toward an approach, more typical of private equity transactions, where the acquiror could not be required to consummate the transaction following its failure (through no fault of its own) to secure financing for the transaction. This trend had continued in Year 3, even as credit conditions improved, suggesting that transacting parties viewed the possibility of a financing failure as a risk to be shared by the parties, regardless of how remote a risk it was. In Year 4 the trend reversed, as only two of the 20 transactions involving cash consideration provided for a financing condition or specified that the target was not entitled to a remedy of specific performance following a financing failure (compared with five of 19 such transactions in Year 3 and five of 21 such transactions in Year 2). Although this decline suggests there has been a return to the historical strategic approach where all financing risk was borne by the acquiror, we believe that financing risk has continued to play an important role in merger negotiations.

Of the two Year 4 transactions in which the target was not entitled to specific performance following a financing failure, only one (Alpha Natural Resources/Massey Energy) contained a reverse termination fee. In the Alpha Natural Resources/Massey Energy transaction, the fee was set at approximately 5% of transaction value, within the range of such fees observed in Year 3 but nearly a 40% decline from the average and median sizes in such year. The other transaction (Kinder Morgan/El Paso), which was financed in part by a $13.3 billion loan package arranged by Barclays, eliminated the target's entitlement to specific performance but did not provide for a reverse termination fee.

We decline to conclude on the basis of the single Year 4 transaction that contained a reverse termination fee payable following a financing failure that dealmakers have substantially changed their views on the appropriate size of such fees since Years 2 and 3, when limitations on the target's entitlement to specific performance following a financing failure (and corresponding reverse termination fees) were more commonplace among the surveyed transactions. We note, however, that the decrease in the size of reverse termination fees as a percentage of transaction value may have resulted from the increase in the transaction values of the surveyed transactions.

None of the Year 4 Non-U.S. Acquiror transactions contained a financing condition or otherwise limited the target's entitlement to specific performance in the event of a financing failure. Though possibly a function of the limited sample size, this result may reflect non-U.S. acquirors' local practice of arranging fully-committed financing before formally launching an offer. For example, the U.K., France, Switzerland and the Netherlands (four of the jurisdictions represented in the Year 4 Non-U.S. Acquiror transactions) either explicitly prohibit the use of financing conditions or require financing to be fully confirmed at the time an offer is formally announced.

Chart 10 Availability of Specific Performance Against Acquiror Following Financing Failures

	Percentage of All/Part Cash Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Method of allocating financing risk							
Specific performance against acquiror after financing failure available	84%	95%	76%	74%	90%	90%	100%
Specific performance never available against acquiror	2%	5%	5%	0%	0%	0%	0%
Specific performance never available against either party	1%	0%	5%	0%	0%	0%	0%
Specific performance after financing failure never available	6%	0%	5%	11%	10%	10%	0%
Acquiror has limited financing condition	2%	0%	5%	5%	0%	0%	0%
Acquiror has unlimited financing condition	4%	0%	5%	11%	0%	0%	0%
Reverse termination fee following financing failure (fee size, percentage of transaction value)							
Average		4.56%	5.71%	8.08%	5.02%	5.02%	N/A
Change			*25%*	*42%*	*-38%*		
Median		4.56%	6.51%	7.90%	5.02%	5.02%	N/A
Change			*43%*	*21%*	*-36%*		

Competing Offers and Changes in the Target Board's Recommendation

Non-solicitation provisions. As in the 2010 Study, all of the Year 4 transactions prohibited the target from soliciting competing offers from third parties but allowed the target to respond to and enter into negotiations with respect to unsolicited competing proposals that the target's board determined constituted, or were reasonably likely to lead to, a "superior proposal" (variously defined).

Chart 11 analyzes how "superior proposal" was defined in the surveyed transactions. In Year 4:

- ***44% of transactions*** required that a superior proposal meet certain financing-related requirements (*e.g.*, that it have committed financing or financing no less favorable than that of the acquiror or that it not be subject to a financing condition), surpassing the results in Years 2 and 3 and far exceeding the result in Year 1;
- ***Fewer transactions*** than in Year 3 required that a superior proposal be "reasonably likely" to be consummated; and
- ***More transactions*** than in Year 3 required that a superior proposal be superior to the target's shareholders "from a financial point of view."

The first result demonstrates that since Year 1 an increasing portion of acquirors have successfully negotiated to protect their transactions from competing bids by less-well-funded (often private equity) rivals. That such constraints have remained in only a minority of the surveyed transactions demonstrates the unwillingness of targets to limit the potential set of competing bidders, either because they believe a better offer may emerge from such bidders or out of a concern that agreeing to a significant limitation on competing offers would violate their fiduciary duties.

The second result seems inconsistent with the first, as it suggests that acquirors were less focused than in the past on the threat posed by competing bids with weak financing. We hesitate to reach that conclusion, however, because the requirement that a superior proposal be "reasonably likely" to be consummated offers a target board wide latitude to deem competing offers "superior" to the agreed transaction. We consider the continued use of the requirements discussed above—that a superior offer meet certain financing-related requirements—to be a clearer indication of market sentiment.

These results were largely replicated in the Year 4 U.S. Acquiror and Year 4 Non-U.S. Acquiror transactions. U.S. acquirors more often than non-U.S. acquirors required that a superior proposal be "reasonably likely" to be consummated and less often than non-U.S. acquirors required that a superior proposal be superior "from a financial point of view."

Chart 11 Definition of Superior Proposal

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Funding certainty of superior proposal							
Proposal must have committed financing, have financing no less favorable than acquiror's or have no financing condition	27%	8%	28%	28%	44%	36%	40%
Proposal not expressly required to have committed financing, have financing no less favorable than acquiror's or have no financing condition	73%	92%	72%	72%	56%	64%	60%
Closing certainty of superior proposal							
Proposal must be "reasonably likely" to be consummated	67%	64%	80%	72%	52%	52%	40%
Proposal not required to be "reasonably likely" to be consummated	33%	36%	20%	28%	48%	48%	60%
Proposal must be superior "from a financial point of view"							
Required	60%	48%	56%	64%	72%	64%	70%
Not required	40%	52%	44%	36%	28%	36%	30%
Minimum acquisition percentage required							
<50%	3%	8%	0%	4%	0%	0%	0%
50%	70%	72%	60%	68%	80%	84%	70%
>50%; <100%	10%	12%	12%	8%	8%	8%	10%
100%	17%	8%	28%	20%	12%	8%	20%

Changes in board recommendation. As in the 2010 Study, all of the surveyed transactions allowed the target board of directors to change its recommendation of the transaction in specified circumstances. Chart 12 shows the varieties of such limits on board discretion. In Year 4, as compared with Year 3:

- ***Fewer transactions*** allowed the target board to change its recommendation only in response to a "superior proposal"; and
- ***More transactions*** allowed the target board to change its recommendation in response to either a "superior proposal" or an "intervening event" (typically defined as an unforeseen material event other than a competing acquisition proposal).

In Year 4, the lowest percentage of transactions of any of the survey years (32%, equal to the sum of the results in the first two rows in Chart 12) allowed the target board to change its recommendation based solely on its determination that doing so was required by its fiduciary duties. In addition, fewer of the Year 4 transactions (4%, compared with 8% in Year 3) allowed the target board to change its recommendation only in response to a "superior proposal." Instead, nearly two-thirds of the Year 4 transactions (64%) allowed the target board to change its recommendation in response to an "intervening event" upon its determination that its fiduciary duties required it to do so. Such provisions, which have experienced a substantial increase in use since Year 1, allow the target board to recommend against (though not to terminate) an agreed transaction following an unforeseen event, other than a superior proposal, that causes the transaction to be against the target shareholders' interests—the proverbial "discovery of oil" under the target company's headquarters. Unlike the fiduciary duty standard, the intervening event approach gives the acquiror the benefit of all facts that are known to the target at the time of the transaction.

A further development in Year 4 was that two of the transactions allowed the target board to change its recommendation upon the occurrence of an "intervening event," but prohibited the target board from changing its recommendation in response to a superior proposal unless it simultaneously terminated the agreement to enter into such superior proposal. Unlike the typical structure, such transactions prevent the target board from recommending in favor of a competing proposal (or against the agreed transaction) while the competing proposal is being negotiated. To our knowledge, the question of whether such a provision impermissibly restricts the target board's actions has not yet been considered by Delaware courts.

Compared to the Year 4 U.S. Acquiror transactions, a substantially higher percentage of Year 4 Non-U.S. Acquiror transactions allowed the target board to change its recommendation based solely on its determination that its fiduciary duties so required, regardless of whether a "superior proposal" had been made or an "intervening event" had occurred. The reason for this differential is unclear, but we doubt that it resulted from target boards negotiating more strenuously with non-U.S. acquirors than with U.S. acquirors for flexibility to change their recommendations. More likely, the non-U.S. acquirors were more willing to accept the fiduciary duty standard because it was more consistent with market practice in the acquirors' home jurisdictions, where regulations may prohibit contractual restrictions on the target board's ability to respond to superior proposals or intervening events. The U.K. Takeover Code, for example, generally restricts targets from taking actions that "frustrate" competing offers or that result in shareholders being denied the opportunity to decide on the merits of a competing offer. And while non-solicitation agreements are commonly sought in U.K. transactions, target boards are typically free to take any action required to comply with their fiduciary duties, whether in connection with a competing offer, intervening event or otherwise. Acquirors who are more accustomed to such practices, and not to restricting a target board's conduct, may argue less strenuously for such restrictions on the target board's conduct even when they are permissible.

Chart 12 Target Board Duty to Recommend

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Conditions allowing change of recommendation							
Whenever fiduciary duties require	33%	44%	28%	40%	20%	16%	40%
Whenever fiduciary duties require or, in any case, in connection with a superior proposal	16%	24%	20%	8%	12%	12%	10%
Only in connection with a superior proposal	17%	28%	28%	8%	4%	8%	0%
Whenever fiduciary duties require in response to an intervening event; Target may not change recommendation but may terminate in response to a superior proposal	3%	0%	0%	4%	8%	8%	0%
Whenever fiduciary duties require in response to an intervening event or, in any case, in connection with a superior propsal	31%	4%	24%	40%	56%	56%	50%

Force-the-vote agreements and match rights. Chart 13 shows the percentages of the surveyed transactions that allowed the target to terminate the transaction in order to enter into a "superior proposal" and the percentages of such transactions that gave the acquiror a "match right" with respect to such proposal. In Year 4:

- ***Fewer transactions*** than in Year 3 used "force-the-vote" agreements, which prohibit the target board from terminating in response to a superior proposal and effectively force the target's shareholders to vote on the agreed transaction before any competing proposal can be accepted;
- ***All of the 25 largest Year 4 transactions*** gave the acquiror a match right before the target board could terminate to enter into—or, when not entitled to terminate, to change its recommendation in response to—a superior proposal; and
- ***The one Non-U.S. Acquiror transaction that lacked a match right*** originally contained such a right but later removed it in response to shareholder litigation.

In the 2010 Study we hypothesized that the increase in force-the-vote transactions had resulted from acquirors responding to economic uncertainty by seeking to protect their transactions from competing proposals. The observed decrease in the number of such restrictions in Year 4 may reflect these concerns subsiding.

All of the Year 4 U.S. Acquiror and Year 4 Non-U.S. Acquiror transactions, when announced, gave the acquiror a virtually unlimited right to match competing proposals, at least within a limited period of time (typically four or five days).[2] In two transactions, however, the match right was later modified in response to shareholder litigation that alleged, among other things, that the match right deterred other potential bidders from making an offer. Specifically, in Express Scripts/Medco, the parties amended the merger agreement to prohibit Express Scripts from exercising the right more than once, and in Unilever/Alberto Culver, the parties amended the agreement to remove the right altogether.

Chart 13 Force-the-Vote Agreements and Match Rights

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Target has right to enter into definitive agreement in respect of a superior proposal							
Does not include	17%	8%	16%	28%	16%	24%	10%
Includes	83%	92%	84%	72%	84%	76%	90%
Acquiror has right to match a superior proposal							
Does not include	4%	4%	12%	0%	0%	0%	10%
Includes	96%	96%	88%	100%	100%	100%	90%

[2] We note that a recent opinion of the Delaware Chancery Court questioned in dicta whether a match period of four business days, during which time the target board was precluded from updating its recommendation in response to the competing offer, and which period was subject to extension following any changes in the competing offer, improperly deprived the target shareholders' of their entitlement to a "current, candid, and accurate board recommendation." *In re Compellent Techs., Inc.*, Consol. C.A. No.6084-VCL, 2011 Del. Ch. LEXIS 190, at *38 (Del. Ch. Dec. 9, 2011).

Termination fees for entering into superior proposals and changes in board recommendations. Chart 14 shows the average and median fees to be paid by a target that terminates to enter into a superior proposal or whose board changes its recommendation. From Year 3 to Year 4:

- ***There were 10% and 5% decreases*** in the average and median fees to be paid by targets that terminate a transaction to enter into a superior proposal; and
- ***There were 11% and 5% decreases*** in the average and median fees to be paid by targets following changes in their board's recommendation and the acquiror's decision to terminate the transaction.

As noted in the 2010 Study, termination fees have largely stabilized, generally to between 3.0% and 3.7% of transaction value. Within that band, fee sizes (expressed as a percentage of transaction value) have been negatively correlated with the average and median size of the surveyed transactions. Fee sizes peaked on a percentage basis in Year 2, when the average and median transaction size was lowest, and have declined in each of the past two years as transaction sizes have increased. This suggests that dealmakers may set the sizes of termination fees based in part on their absolute dollar amounts, not just the percentages they represent of transaction value.

Chart 14 Superior Proposal and Change in Board Recommendation Termination Fees[3]

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Superior proposal (fee trigger)							
Fee payable	81%	92%	80%	72%	84%	76%	90%
Fee not payable	1%	0%	4%	0%	0%	0%	0%
No termination right included	18%	8%	16%	28%	16%	24%	10%
Superior proposal (fee size, percentage of transaction value)							
Average		3.11%	3.70%	3.40%	3.06%	3.02%	3.23%
Change			*19%*	*-8%*	*-10%*		
Median		3.05%	3.51%	3.30%	3.15%	3.14%	3.19%
Change			*15%*	*-6%*	*-5%*		
Change in board recommendation (fee trigger)							
Fee payable	90%	88%	92%	84%	92%	92%	90%
Fee not payable	8%	8%	8%	12%	8%	8%	10%
No termination right included	2%	4%	0%	4%	0%	0%	0%
Change in board recommendation (fee size, percentage of transaction value)							
Average		3.25%	3.64%	3.40%	3.04%	3.02%	3.30%
Change			*12%*	*-6%*	*-11%*		
Median		3.15%	3.48%	3.26%	3.09%	3.09%	3.34%
Change			*11%*	*-6%*	*-5%*		

3 Average and median termination fees are calculated based upon only the subset of surveyed transactions in which such fees were agreed upon. As a result, the variance in such statistics across different types of termination fees is generally not due to multi-level fee structures in individual transactions but to the different subsets of the surveyed transactions in which such fees were imposed.

Limitations on Damages

Damages following termination. All of the Year 4 transactions allowed the parties to seek damages following termination, but typically for only a limited set of breaches or fraud. As set forth in Chart 15, the most common limitations have been notably consistent from Year 1 through Year 4. In addition, eight of the Year 4 transactions, versus five of the Year 3 transactions, provided that a party may only be deemed to have intentionally or willfully breached the agreement if it undertakes its conduct with the knowledge that such conduct would constitute breach. Such provisions respond to the exposition of the phrase "knowing and intentional" in the Hexion litigation.[4] That such provisions appeared in less than one-third of the Year 4 transactions demonstrates that they have not yet become customary market practice.

Chart 15 Breaches Supporting Damages Post-Termination

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Damages following termination							
Allowed, but breach must be willful or intentional, among other limitations	81%	76%	76%	80%	92%	92%	100%
Allowed, but breach must be material, among other limitations	45%	44%	36%	52%	48%	40%	50%
Allowed, without limitation	8%	12%	8%	8%	4%	4%	0%

[4] *Hexion Specialty Chemicals, Inc. v. Huntsman Corp., C.A. No. 3841 (CL) (Del. Ch. Sept. 29, 2008).*

[5] 426 F.3d 524 (2d Cir. 2005).

Stockholders as third party beneficiaries. Parties in the surveyed transactions have attempted to contract around the Second Circuit's 2005 decision in *Consolidated Edison Inc.* v. *Northeastern Utilities*.[5] *Con Ed* precluded a target's shareholders from collecting the consideration they would have received but for the transaction's failure on the rationale that such shareholders were not third-party beneficiaries of the merger agreement. Parties have adopted two methods of avoiding this result: first, by providing that the target may sue on behalf of its shareholders; second, by providing that the target's damages include the lost shareholder premium. The use of such provisions has been notably consistent across the years surveyed. Chart 16 shows that:

- ***24% of the Year 4 transactions*** provided that the target could collect the damages its shareholders would receive if they were third-party beneficiaries to the merger agreement;
- ***12% of the Year 4 transactions*** provided that the measure of the target's damages should include the amount of its shareholders' lost consideration; and
- ***Fewer of the Year 4 Non-U.S. Acquiror transactions than Year 4 U.S. Acquiror transactions*** attempted to contract around *Con Ed*'s holdings by adopting one of the two approaches.

Chart 16 Measure of Damages (Anti-*Con Edison* Language)

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Does not include	70%	68%	80%	68%	64%	60%	70%
Agency approach (target can sue "on behalf of" shareholders)	21%	24%	16%	20%	24%	28%	10%
Damages definition (target's damages include lost shareholder premium)	9%	8%	4%	12%	12%	12%	20%

Post-Closing Governance Provisions

The use in merger agreements of post-closing governance provisions—regarding the surviving company's headquarters, name, board composition, chairman or CEO, charitable or community activities, or other operations—increased nearly across the board in Year 4. See Chart 17. Such provisions frequently appear in merger-of-equals ("MOE") transactions and aim to secure the support for the transaction from the target's stockholders and other stakeholder constituencies. In Year 4, only one transaction (AMB/Prologis) was structured as a true MOE and provided no premium to the target's shareholders. Many more transactions, however, were similar to MOEs in their use of post-closing governance provisions. The increase in the use of such provisions may have resulted from targets having greater bargaining power than in previous years or from acquirors approaching their transactions less as pure acquisitions and more as business combinations. Alternatively, because such provisions communicate to political, community and other stakeholders the acquiror's intention to undertake certain actions (and put at risk the acquiror's credibility if it fails to take such actions), the increase in the use of such provisions may evidence an increased desire on the part of merging parties to preempt or address challenges to the transaction by such stakeholders.

We also note that all types of post-closing governance provisions were less common among the Year 4 Non-U.S. Acquiror transactions than among the Year 4 U.S. Acquiror transactions. This result, perhaps counterintuitive given the perceived differences in culture and objectives of non-U.S. and U.S. acquirors, may stem from the greater frequency of cash-only transactions (in which such provisions are less common) among the Year 4 Non-U.S. Acquiror transactions. Our results do not eliminate the possibility that in transactions involving stock consideration post-closing governance provisions could be more common among non-U.S. acquiror transactions than among U.S. acquiror transactions.

Chart 17 Post-Merger Governance Provisions

	Percentage of Surveyed Transactions						
	Total	Year 1	Year 2	Year 3	Year 4	Year 4 U.S. Acquiror	Year 4 Non-U.S. Acquiror
Provision regarding location of headquarters							
Does not include	86%	80%	88%	92%	84%	80%	80%
Includes	14%	20%	12%	8%	16%	20%	20%
Provision regarding surviving company name							
Does not include	86%	68%	96%	88%	92%	88%	100%
Includes	14%	32%	4%	12%	8%	12%	0%
Restriction on identity of board members							
Does not include	74%	60%	84%	80%	72%	68%	90%
Includes	26%	40%	16%	20%	28%	32%	10%
Provision regarding identity of chairman/CEO							
Does not include	83%	76%	84%	88%	84%	80%	90%
Includes	17%	24%	16%	12%	16%	20%	10%
Provision regarding continuation of charitable and community activities							
Does not include	93%	88%	100%	96%	88%	84%	100%
Includes	7%	12%	0%	4%	12%	16%	0%
Other operational restrictions							
Does not include	89%	84%	96%	96%	80%	80%	80%
Includes	11%	16%	4%	4%	20%	20%	20%

APPENDICES

List of Surveyed Transactions

Year 1 Transactions

Target	Acquiror	Date Announced
CheckFree Corporation	Fiserv, Inc.	8/2/2007
NAVTEQ Corporation	Nokia Corporation	10/1/2007
Tektronix, Inc.	Danaher Corporation	10/15/2007
MGI PHARMA, Inc.	Eisai Co., Ltd.	12/10/2007
Trane Inc.	Ingersoll-Rand Company Limited	12/17/2007
Grant Prideco, Inc.	National Oilwell Varco, Inc.	12/17/2007
Respironics, Inc.	Koninklijke Philips Electronics N.V.	12/21/2007
BEA Systems, Inc.	Oracle Corporation	1/16/2008
ChoicePoint Inc.	Reed Elsevier Group plc	2/21/2008
Millennium Pharmaceuticals, Inc.	Takeda Pharmaceutical Company Limited	4/10/2008
Northwest Airlines Corporation	Delta Air Lines, Inc.	4/14/2008
Safeco Corporation	Liberty Mutual Group Inc.	4/23/2008
Wm. Wrigley Jr. Company	Mars, Incorporated	4/28/2008
DRS Technologies, Inc.	Finmeccanica SpA	5/12/2008
Electronic Data Systems Corporation	Hewlett-Packard Company	5/13/2008
W-H Energy Services, Inc.	Smith International, Inc.	6/3/2008
Anheuser-Busch Companies, Inc.	InBev NV	6/11/2008
Applera Corporation - Applied Biosystems Group	Invitrogen Corporation	6/12/2008
Allied Waste Industries, Inc.	Republic Services, Inc.	6/23/2008
Corn Products International, Inc.	Bunge Limited	6/23/2008
APP Pharmaceuticals, Inc.	Fresenius SE	7/7/2008
Rohm and Haas Company	The Dow Chemical Company	7/10/2008
Alpha Natural Resources, Inc.	Cleveland-Cliffs Inc	7/16/2008
Barr Pharmaceuticals, Inc.	Teva Pharmaceutical Industries Limited	7/18/2008
Philadelphia Consolidated. Holding Corp	Tokio Marine Holdings, Inc.	7/23/2008

List of Surveyed Transactions

Year 2 Transactions

Target	Acquiror	Date Announced
Longs Drug Stores Corporation	CVS/Caremark Corporation	8/12/2008
Alpharma Inc.	King Pharmaceuticals, Inc.	8/22/2008
IKON Office Solutions, Inc.	Ricoh Company, Ltd.	8/27/2008
Sciele Pharma, Inc.	Shionogi & Co. Ltd.	9/1/2008
UST Inc.	Altria Group, Inc.	9/8/2008
Constellation Energy Group, Inc.	Berkshire Hathaway Inc.	9/18/2008
ImClone Systems Incorporated	Eli Lilly and Company	10/6/2008
Embarq Corporation	CenturyTel, Inc.	10/27/2008
Centennial Communications Corp.	AT&T Inc.	11/7/2008
Mentor Corporation	Johnson & Johnson	12/1/2008
Advanced Medical Optics, Inc.	Abbott Laboratories	1/12/2009
Wyeth	Pfizer, Inc.	1/26/2009
Schering-Plough Corporation	Merck & Co., Inc.	3/9/2009
CV Therapeutics, Inc.	Gilead Sciences, Inc.	3/12/2009
Metavante Technologies, Inc.	Fidelity National Information Services, Inc.	4/1/2009
Centex Corporation	Pulte Homes, Inc.	4/8/2009
Sun Microsystems, Inc.	Oracle Corporation	4/20/2009
Foundation Coal Holdings Inc.	Alpha Natural Resources, Inc.	5/12/2009
Data Domain, Inc.	NetApp Inc.	5/20/2009
Cougar Biotechnology, Inc.	Johnson & Johnson	5/21/2009
Data Domain, Inc.	EMC Corporation	6/1/2009
Wind River Systems, Inc.	Intel Corporation	6/4/2009
Medarex, Inc.	Bristol-Myers Squibb Company	7/22/2009
Varian, Inc.	Agilent Technologies, Inc.	7/27/2009
SPSS Inc.	International Business Machines	7/28/2009

List of Surveyed Transactions

Year 3 Transactions

Target	Acquiror	Date Announced
BJ Services Company	Baker Hughes Incorporated	8/31/2009
Sepracor Inc.	Dainippon Sumitomo Pharma Co., Ltd.	9/3/2009
Perot Systems Corporation	Dell Inc.	9/21/2009
Affiliated Computer Services, Inc.	Xerox Corporation	9/28/2009
Starent Networks, Corp.	Cisco Systems, Inc.	10/13/2009
Encore Acquisition Company	Denbury Resources Inc.	11/1/2009
The Black & Decker Corporation	The Stanley Works	11/2/2009
3Com Corporation	Hewlett-Packard Company	11/11/2009
XTO Energy Inc.	Exxon Mobil Corporation	12/14/2009
Brink's Home Security Holdings, Inc.	Tyco International Ltd.	1/18/2010
Allegheny Energy, Inc.	FirstEnergy Corp.	2/11/2010
Terra Industries Inc.	Vara International ASA	2/15/2010
Smith International, Inc.	Schlumberger Limited	2/21/2010
Millipore Corporation	Merck KGaA	2/28/2010
OSI Pharmaceuticals, Inc.	Astellas Pharma Inc.	3/1/2010
Terra Industries Inc.	CF Industries Holdings, Inc.	3/2/2010
Mariner Energy, Inc.	Apache Corporation	4/15/2010
Qwest Communications International Inc.	CenturyTel, Inc.	4/22/2010
Continental Airlines, Inc.	UAL Corporation	5/3/2010
Sybase, Inc.	SAP America, Inc.	5/12/2010
ev3 Inc.	Covidien Group S.a.r.l.	6/1/2010
Talecris Biotherapeutics Holdings Corp.	Grifols, S.A.	6/7/2010
Valeant Pharmaceuticals International	Biovail Corporation	6/21/2010
Abraxis BioScience, Inc.	Celgene Corporation	6/30/2010
Hewitt Associates, Inc.	Aon Corporation	7/12/2010

List of Surveyed Transactions

Year 4 U.S. Acquiror Transactions

Target	Acquiror	Date Announced
McAfee, Inc.	Intel Corporation	8/19/2010*
King Pharmaceuticals, Inc.	Pfizer Inc.	10/12/2010
NSTAR	Northeast Utilities	10/18/2010*
Bucyrus International, Inc.	Caterpillar Inc.	11/15/2010*
Progress Energy, Inc.	Duke Energy Corporation	1/10/2011*
Massey Energy Company	Alpha Natural Resources, Inc.	1/29/2011*
ProLogis	AMB Property Corporation	1/31/2011*
Beckman Coulter, Inc.	Danaher Corporation	2/7/2011*
Nationwide Health Properties, Inc.	Ventas, Inc.	2/28/2011*
The Lubrizol Corporation	Berkshire Hathaway Inc.	3/14/2011*
National Semiconductor Corporation	Texas Instruments Incorporated	4/4/2011*
DPL Inc.	The AES Corporation	4/20/2011
Constellation Energy Group, Inc.	Exelon Corporation	4/28/2011*
Varian Semiconductor Equipment Associates, Inc.	Applied Materials, Inc.	5/4/2011*
Temple-Island Inc.	International Paper Company	6/6/2011
Southern Union Company	Energy Transfer Equity, L.P.	6/16/2011*
Nalco Holding Company	Ecolab Inc.	7/20/2011*
Medco Health Solutions, Inc.	Express Scripts, Inc.	7/21/2011*
Motorola Mobility Holdings, Inc.	Google Inc.	8/15/2011*
NetLogic Microsystems, Inc.	Broadcom Corporation	9/12/2011
Goodrich Corporation	United Technologies Corporation	9/21/2011*
El Paso Corporation	Kinder Morgan, Inc.	10/16/2011*
HealthSpring, Inc.	Cigna Corporation	10/24/2011*
Pharmasset, Inc.	Gilead Sciences, Inc.	11/21/2011*
Transatlantic Holdings, Inc.	Alleghany Corporation	11/21/2011

* Transaction included among the 25 largest transactions overall in Year 4 and thus designated as a "Year 4 Transaction."

List of Surveyed Transactions

Year 4 Non-U.S. Acquiror Transactions

Target	Acquiror	Date Announced
Genzyme Corporation	Sanofi-Aventis	8/29/2010*
Alberto-Culver Company	Unilever NV	9/27/2010
Baldor Electric Company	ABB Ltd	11/30/2010
Pride International, Inc.	Ensco plc	2/7/2011*
Cephalon, Inc.	Teva Pharmaceutical Industries Ltd.	5/2/2011*
Transatlantic Holdings, Inc.	Allied World Assurance Company Holdings, AG	6/12/2011
Petrohawk Energy Corporation	BHP Billiton Limited	7/14/2011*
Brigham Exploration Company	Statoil ASA	10/17/2011*
SuccessFactors, Inc.	SAP AG	12/3/2011
Delphi Financial Group, Inc.	Tokio Marine Holdings, Inc.	12/21/2011

* Transaction included among the 25 largest transactions overall in Year 4 and thus designated as a "Year 4 Transaction."

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Acknowledgements / Editors

A team of Paul, Weiss lawyers contributed to this effort. The principal authors were partner Ariel J. Deckelbaum, counsel Didier Malaquin and Frances F. Mi, and associates Daniel B. Levine and James T. McClary. Invaluable assistance was provided by associate Joseph L Christensen and summer associates John T. Byrnes, Koonho Cho, Christopher W. Garos, David E. Lin and Yvonne M. Saadi. Retired partner Judith R. Thoyer was instrumental in launching this project and offering it direction.

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