2007

Private Equity Buyer/Public Target
Mergers & Acquisitions Deal Points Study

A Project of the Mergers & Acquisitions Market Trends Subcommittee
(In Association with the Private Equity M&A Subcommittee)

of the

Committee on Negotiated Acquisitions

of the

American Bar Association’s Section of Business Law
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DISCLAIMERS

The findings presented in this Study do not necessarily reflect the personal views of the Working Group members or the views of their respective firms. In addition, the acquisition agreement provisions that form the basis of this Study are drafted in many different ways and do not always fit precisely into particular “data point” categories. Therefore, Working Group members have had to make various judgment calls regarding, for example, how to categorize the nature or effect of particular provisions. As a result, the conclusions presented in this Study may be subject to important qualifications that are not expressly articulated in this Study. The sample provisions included in this Study are for illustrative purposes only.
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2007 Private Equity Buyer/Public Target Study Sample Overview

♦ This Study analyzes 79 publicly-available acquisition agreements for acquisitions of U.S. publicly-traded targets by private equity acquirers for deals announced in calendar years 2005 and 2006.

♦ Deals announced in 2005 - 44
♦ Deals announced in 2006 - 35

♦ Transaction Value - $100 million and above

♦ The Study sample was obtained from www.LivEdgar.com
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TARGET’S REPRESENTATIONS AND WARRANTIES
“Full Disclosure.” [To the knowledge of the Target,] No representation or warranty made by the Target in this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make any such representation or warranty, in light of the circumstances in which it was made, not misleading.”
Target's Representations and Warranties

“Full Disclosure” Representation

* In the one agreement that included a full disclosure representation, that representation was qualified by the knowledge of the sellers.
BUYER’S REPRESENTATIONS
AND WARRANTIES
Buyer’s Representations and Warranties

Financing

"Financing. The Buyer has delivered to the Target a true and complete copy of an executed commitment letter (the "Commitment Letter"), dated [__________], 2007 from [______] (the "Lender"), pursuant to which the lender parties thereto have committed, subject to the terms and conditions set forth therein, to lend the amounts set forth therein for the purpose of funding the cash portion of the merger consideration contemplated by this Agreement (the "Financing"). As of the date of this Agreement, the Commitment Letter has not been amended or modified and the commitments contained in the Commitment Letter have not been withdrawn or rescinded in any respect. As of the date hereof, the Commitment Letter, in the form delivered to the Target, is in full force and effect and is a legal, valid and binding obligation of the Buyer and, to the Knowledge of the Buyer, the other parties thereto. There are no conditions precedent or other contingencies, side agreements or other arrangements or understandings related to the funding of the full amount of the Financing or the terms thereof, other than as set forth in the Commitment Letter in the forms delivered to the Target. As of the date of this Agreement, the Buyer does not have any reason to believe that it will be unable to satisfy on a timely basis any term or condition to be satisfied by it contained in the Commitment Letter. The Buyer has fully paid any and all commitment fees that have been incurred and are due and payable in connection with the Commitment Letter prior to the date hereof and has otherwise satisfied all other terms and conditions required to be satisfied pursuant to the terms of the Commitment Letter on or before the date hereof, and the Buyer will pay when due all other commitment fees arising under the Commitment Letter as and when they become payable."

"At Closing, the Buyer will have sufficient funds to pay the full cash portion of the Merger Consideration contemplated by this Agreement and to pay all related fees and expenses of the Buyer and the Target associated with the transactions contemplated by this Agreement."
Buyer’s Representations and Warranties

Financing

- 86.1% - Delivered Commitment Letters
- 8.8% - Currently has Funds Available
- 5.1% - Will Obtain Financing – No Specific Reference to Commitment Letters
“Solvency. As of the effective time of the merger, after giving effect to the transactions contemplated by this Agreement, the Surviving Corporation will not: (a) be insolvent (either because its financial condition is such that the sum of its debts is greater than the fair market value of its assets or because the fair saleable value of its assets is less than the amount required to pay its probable liabilities on its existing debts as they mature); (b) have unreasonably small capital with which to engage in its business; or (c) have incurred debts beyond its ability to pay as they become due.
Buyer’s Representations and Warranties

Solvency Representation

68% No Rep

32% Includes Rep
CONDITIONS TO CLOSING
Buyer’s MAC/MAE “Walk Right”

“No Material Adverse Change. Since the date of this Agreement, there has not been any material adverse change in the business, financial condition, capitalization, assets, liabilities, operations, results of operations or prospects of the Target or its Subsidiaries.”
Conditions to Closing

**Buyer’s MAC/MAE “Walk Right”** *

* MAC/MAE “walk right” includes closing condition, specific termination right in termination section and “back door” MAC (i.e., MAC termination right through bringdown of MAC representation).
Many of the acquisition agreements that do not include the word “prospects” in the MAC clause do include other forward-looking language in that clause, such as “events that could/would reasonably be expected to result in a MAC.”
"MATERIAL ADVERSE CHANGE/EFFECT" means, when used in connection with the Target, any change, event, violation, inaccuracy, circumstance or effect that is materially adverse to the business, assets, liabilities, financial condition, results of operations or prospects of the Target and its Subsidiaries taken as a whole, other than as a result of: (i) changes adversely affecting the United States economy (so long as the Target is not disproportionately affected thereby); (ii) changes adversely affecting the industry in which the Target operates (so long as the Target is not disproportionately affected thereby); (iii) the announcement or pendency of the transactions contemplated by this Agreement; (iv) the failure to meet analyst projections, in and of itself; (v) changes in laws; (vi) changes in accounting principles; or (vii) acts of war or terrorism.
Conditions to Closing

MAC/MAE CARVEOUTS

General Economy

- No Carveout: 6%
- Includes Carveout: 94%

(Subset: Includes Carveout)

- No "Disproportionate" Language: 23%
- Includes "Disproportionate" Language: 77%

Industry

- No Carveout: 23%
- Includes Carveout: 77%

(Subset: Includes Carveout)

- No "Disproportionate" Language: 5%
- Includes "Disproportionate" Language: 95%
Other Popular MAC/MAE Carveouts

- 82% - Announcement or Pendency
- 58% - Change in Law
- 66% - Change in Accounting
- 53% - War/Terrorism
- 38% - Failure to Meet Projections
Retention of Specified Employees of Target

“Employees. None of the individuals identified on Schedule 6.7(a) shall have ceased to be employed by the Target, or shall have expressed an intention to terminate his or her employment with the Target or to decline to accept employment with the Buyer; and not more than [90%] of the individuals identified on Schedule 6.7(b) shall have ceased to be employed by the Target or shall have expressed an intention to terminate their employment with the Target or to decline to accept employment with the Buyer.”
Retention of Specified Employees of Target

**Note:** None of the deals included this condition to closing.
Availability of Financing

“Financing. The Buyer shall have obtained the financing described in the Commitment Letters on the terms set forth in the Commitment Letters and on such other terms as are reasonably satisfactory to the Buyer.”
Availability of Financing

Deals Announced in 2005

- Includes Condition: 48%
- No Condition: 52%

Deals Announced in 2006

- Includes Condition: 23%
- No Condition: 77%
"No Market MAC. No Market MAC shall have occurred after the date of this Agreement. For purposes of this Agreement, “Market MAC” shall mean: (a) any general suspension of trading in, or limitation on prices for, securities on the NYSE for three or more consecutive business days, including but not limited to any changes in trading conditions resulting from actual or threatened terrorist attacks, responses by the United States or its allies thereto, or the effects thereof; (b) the declaration of a banking moratorium or any suspension of payments in respect of banks in the United States generally for three or more consecutive business days; (c) the commencement or material escalation of a war, armed hostilities or other international or national crisis or security event directly or indirectly involving the United States or any of its territories after the date of this Agreement, including any acts of terrorism, domestic or foreign or responses of the United States or its allies, or a national or international economic or financial crisis, as a result of which there has occurred any material disruption or material adverse change in the United States commercial credit, debt, capital or commercial mortgage-backed securities markets (including the market for leveraged loans or high yield securities) for a period of three or more consecutive business days; or (d) any limitation by any governmental, regulatory or administrative agency or authority which prohibits the extension of credit by banks or other lending institutions in the United States generally in a manner that prevents a lender from providing the Debt Financing for a period of three or more consecutive business days."
* Excludes 29 deals that contained a separate “Availability of Financing” condition. Fifty-seven percent (57%) of the deals had neither a “No Market MAC” condition nor an “Availability of Financing” condition.
Solvency Opinion
(For the Benefit of the Target)

“Solvency. The Target shall have received a solvency opinion rendered by a firm of nationally recognized reputation in the area of solvency opinions. Such opinion shall be in form and substance similar to the opinion to such effect provided by a firm of nationally recognized reputation to the lenders referred to in the Financing Letters, and otherwise reasonably acceptable to the Target.”
Solvency Opinion
(For the Benefit of the Target)

* Includes covenant obligating the Buyer to deliver a solvency opinion. Does not include: (a) covenant obligating the Buyer to use reasonable efforts to deliver a solvency opinion; or (b) bring down of solvency representation.
“Appraisal Rights. The aggregate number of shares of Target Common Stock at the effective time of the Merger, the holders of which have demanded purchase of their shares of Target Common Stock in accordance with the provisions of Section 262 of the DGCL, shall not equal 10% or more of the shares of Target Common Stock outstanding as of the record date for the Target Stockholders Meeting.”
Conditions to Closing

APPRAISAL RIGHTS

<table>
<thead>
<tr>
<th>Appraisal Rights Cap</th>
<th>Number of Deals</th>
</tr>
</thead>
<tbody>
<tr>
<td>22.5%</td>
<td>1 out of 27</td>
</tr>
<tr>
<td>11% - 15%</td>
<td>6 out of 27</td>
</tr>
<tr>
<td>6% - 10%</td>
<td>13 out of 27</td>
</tr>
<tr>
<td>1% - 5%</td>
<td>7 out of 27</td>
</tr>
</tbody>
</table>

(Subset: Deals with Condition)
Bring Down of Fairness Opinion

“Bring Down of Fairness Opinion. The opinion of [Investment Banker] referred to in Section 3.21 shall not have been withdrawn and shall remain in full force and effect.”
Conditions to Closing

**Bring Down of Fairness Opinion**

*Note:* None of the deals included this condition to closing.
DEAL PROTECTION AND RELATED PROVISIONS
Go Shop

“Go Shop. During the period beginning on the date of this Agreement and continuing until 11:59 p.m. (EST) on the date that is twenty-five (25) days after the date hereof ... (the “Solicitation Period End-Date”), the Target ... shall have the right ... to directly or indirectly: (i) initiate, solicit and encourage Acquisition Proposals, including by way of providing access to non-public information pursuant to one or more Acceptable Confidentiality Agreements, provided that the Target shall promptly provide to the Buyer any material non-public information concerning the Target or its Subsidiaries that is provided to any Person given such access which was not previously made available to the Buyer; and (ii) enter into and maintain discussions or negotiations with respect to potential Acquisition Proposals or otherwise cooperate with or assist or participate in, or facilitate, any such inquiries, proposals, discussions or negotiations.”


Deal Protection and Related Provisions

Go Shop

Deals Announced in 2005

Deals Announced in 2006

* (1) “Go Shop” time periods ranged between 20 calendar days and 55 calendar days.
(2) Approximately 45% of deals that included “go shop” also included lower “break-up” fee during “go shop” period.
(3) One deal included a limitation on the type of buyer that could be approached during “go shop” period.
**Target Fiduciary (Superior Offer) Termination Right**

"**Termination.** This Agreement may be terminated at any time prior to the Effective Time, whether before or after the requisite approvals of the stockholders of the Buyer or of the Target . . . (f) by the Target if: (i) . . .; (A) the Target Stockholder Approval has not been obtained; and (B) concurrently the Target enters into a definitive Target Acquisition Agreement providing for a Superior Offer in accordance with Section 5.3; *provided* that [first pay "break-up" fee]."
Deal Protection and Related Provisions

**Target Fiduciary (Superior Offer) Termination Right**

No FTR
- 5%

95%
FTR
Target “Break-Up” Fee Triggers

“8.3 Expenses; Termination Fees.
(a) Except as set forth in this Section 8.3, all fees and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement shall be paid by the party incurring such expenses, whether or not the Merger is consummated; provided, however, that:

(i) [Naked No-Vote Fee] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(d) [“no vote”], then the Target shall pay to the Buyer, in cash, a nonrefundable fee in an amount equal to $________ [1% of aggregate transaction value].

(ii) [Fee for No-Vote + Acquisition Proposal] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(d) [“no vote”] and at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been made, then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount equal to $________ [3% of the aggregate transaction value].

(iii) [Drop-Dead Date + Acquisition Proposal] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(b) [drop dead date] and at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been made, then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount equal to $________ [3% of the aggregate transaction value].

(iv) [Change in Board Recommendation; Certain Breaches] If this Agreement is terminated by the Buyer pursuant to Section 8.1(e) [change in Board Recommendation], Section 8.1(f) [breach of no shop or meeting covenants] or Section 8.1(g) [breach of representations, warranties or covenants], then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount equal to $________ [3% of the aggregate transaction value].”
Deal Protection and Related Provisions

Target “Break-Up” Fee Triggers
(“Naked No-Vote”)

* Excludes three transactions structured as tender offers. Out of the 36 transactions that contained a naked “no-vote” trigger, 29 required reimbursement of expenses only, four required payment of a full break-up fee (i.e., the same dollar amount as the break-up fee payable in other contexts), one required payment of a partial break-up fee (i.e., a break-up fee in an amount less than the amount of the break-up fee payable in other contexts) and two required reimbursement of expenses and payment of a partial break-up fee.
Target “Break-Up” Fee Triggers
(“No-Vote” + Acquisition Proposal)*

Included?

- No “No-Vote” + Acquisition Proposal Fee: 14%
- 86% includes “No-Vote” + Acquisition Proposal Fee

Acquisition Proposal Still Pending?

- Includes “Still Pending” Requirement: 38%
- 62% No “Still Pending” Requirement

When Payable?

- Payable on Signing or Consummation of Third Party Deal: 98%
- Payable on/immediately after Termination: 2%

* Excludes three transactions structured as tender offers.
Deal Protection and Related Provisions

**Target “Break-Up” Fee Triggers**
(Drop Dead Date + Acquisition Proposal)

- **Included?**
  - Includes Drop Dead Date + Acquisition Proposal Fee: 59%
  - No Drop Dead Date + Acquisition Proposal Fee: 41%

- **Acquisition Proposal Still Pending?**
  - No "Still Pending" Requirement: 57%

- **When Payable?**
  - Payable on Signing or Consummation of Third Party Deal: 100%
Deal Protection and Related Provisions

**Target “Break-Up” Fee Triggers**
(Change of Board Recommendation)

* A small number of transactions contain conditions in addition to mere change or withdrawal of board recommendation, such as consummation of a third party deal within a specified period after termination.

97% Includes Fee *

3% No Fee
**Deal Protection and Related Provisions**

**Target “Break-Up” Fee Triggers**
(Breach of Acquisition Agreement)

* General breach of representations, warranties and covenants: (a) is limited to transactions in which mere breach, without other conditions (such as consummation of a third party bid), triggers a break-up fee; however, some transactions require willful or intentional breach; and (b) do not include transactions in which a breach triggers reimbursement of expenses rather than full break-up fee.

** Breach of no-shop covenants and breach of stockholder meeting covenants: (a) do not include general breach of representations, warranties and covenants; and (b) are limited to transactions in which mere breach, without other conditions, triggers a break-up fee.

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OTHER MERGER AGREEMENT
DATA POINTS
Other Merger Agreement Data Points

**Buyer/Management Knowledge of Breach**

“**Knowledge of Breach.** No representation or warranty of the Target contained in this Agreement shall be deemed to be untrue if any facts or circumstances that constitute or give rise to the untruth of the representation or warranty were known to the Buyer or any any one or more officer(s), director(s), employee(s) or representative(s) of the Buyer.”
Other Merger Agreement Data Points

Buyer/Management Knowledge of Breach

- 97% No Provision
- 3% Includes Provision

Sources:
D&O Insurance

“D&O Insurance. From the Effective Time until the ___ anniversary of the Effective Time, the Surviving Corporation shall maintain in effect, for the benefit of the Indemnified Persons with respect to their acts and omissions occurring prior to the Effective Time, the existing policy of directors’ and officers’ liability insurance maintained by the Target as of the date of this Agreement in the form disclosed by the Target to the Buyer prior to the date of this Agreement (the “Existing Policy”); provided, however, that: (i) the Surviving Corporation may substitute for the Existing Policy a policy or policies of comparable coverage; and (ii) the Surviving Corporation shall not be required to pay annual premiums for the Existing Policy (or for any substitute policies) in excess of $__________ in the aggregate [150% of the current premium]....
Other Merger Agreement Data Points

D&O Insurance*

* All deals in sample provided for six years of insurance continuation, except unable to determine time period for one deal. Excludes eight deals from main study sample because unable to determine premium cap percentage.
Termination Fee Payable by Buyer
(For Failure to Obtain Financing)

“(e) The Buyer agrees that, if the Company shall terminate this Agreement pursuant to (i) Section 8.01(e) [Buyer Breach]; (ii) Section 8.01(b) [End Date]; and, at the time of such termination, the conditions set forth in Section 7.01 and Sections 7.02(a), (b), (d) and (e) have been satisfied; or (iii) Section 8.01(i) [conditions satisfied and Merger not consummated by end of Marketing Period], then the Buyer shall pay to the Company a fee of $300,000,000 (the “Buyer Termination Fee”) in immediately available funds no later than two business days after such termination by the Company.”

“Notwithstanding anything to the contrary in this Agreement, the Target’s right to receive payment of the Buyer Termination Fee pursuant to this Section 8.03 or the guarantee thereof pursuant to the Guarantees shall be the exclusive remedy of the Target and the Subsidiaries against the Buyer, the Guarantors or any of their respective stockholders, partners, members, directors, officers or agents for the loss suffered as a result of the failure of the Merger to be consummated…”
Termination Fee Payable by Buyer
(For Breach)

“(e) The Buyer agrees that, if the Company shall terminate this Agreement pursuant to (i) Section 8.01(e) [Buyer Breach]; (ii) Section 8.01(b) [End Date]; and, at the time of such termination, the conditions set forth in Section 7.01 and Sections 7.02(a), (b), (d) and (e) have been satisfied; or (iii) Section 8.01(i) [conditions satisfied and Merger not consummated by end of Marketing Period], then the Buyer shall pay to the Company a fee of $300,000,000 (the “Buyer Termination Fee”) in immediately available funds no later than two business days after such termination by the Company.”

“Notwithstanding anything to the contrary in this Agreement, the Target’s right to receive payment of the Buyer Termination Fee pursuant to this Section 8.03 or the guarantee thereof pursuant to the Guarantees shall be the exclusive remedy of the Target and the Subsidiaries against the Buyer, the Guarantors or any of their respective stockholders, partners, members, directors, officers or agents for the loss suffered as a result of the failure of the Merger to be consummated…”
Other Merger Agreement Data Points

Termination Fee Payable by Buyer
(For Breach and/or Failure to Obtain Financing)*

* Excludes transactions that contain a financing condition in favor of the Buyer.
** Does not include mere expense reimbursement.
*** This Study does not yet analyze whether, and to what extent, a sponsor guarantee has been provided. Supplements to this Study will provide that information.