

REUTERS/Stringer

# Public M&A Year in Review: Trends and Highlights from 2013

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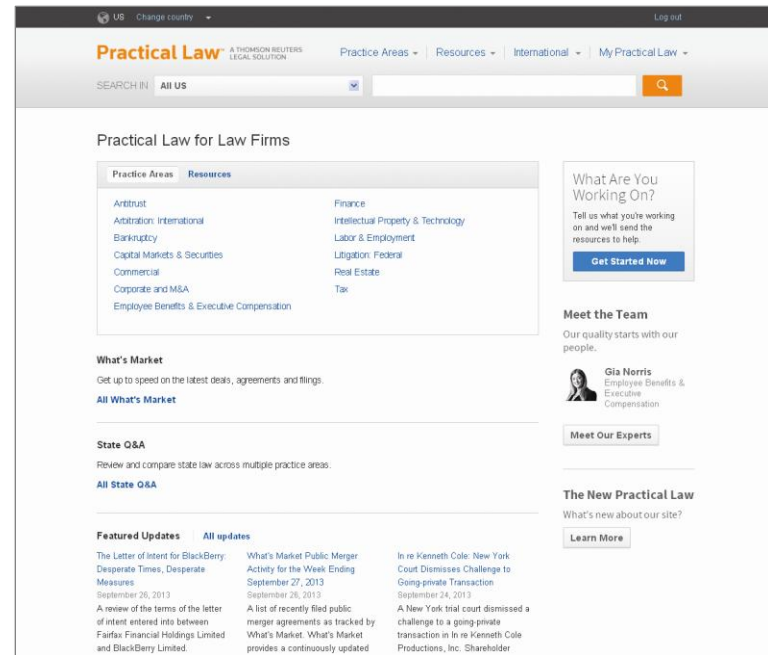
February 12, 2014

**Presenter:**

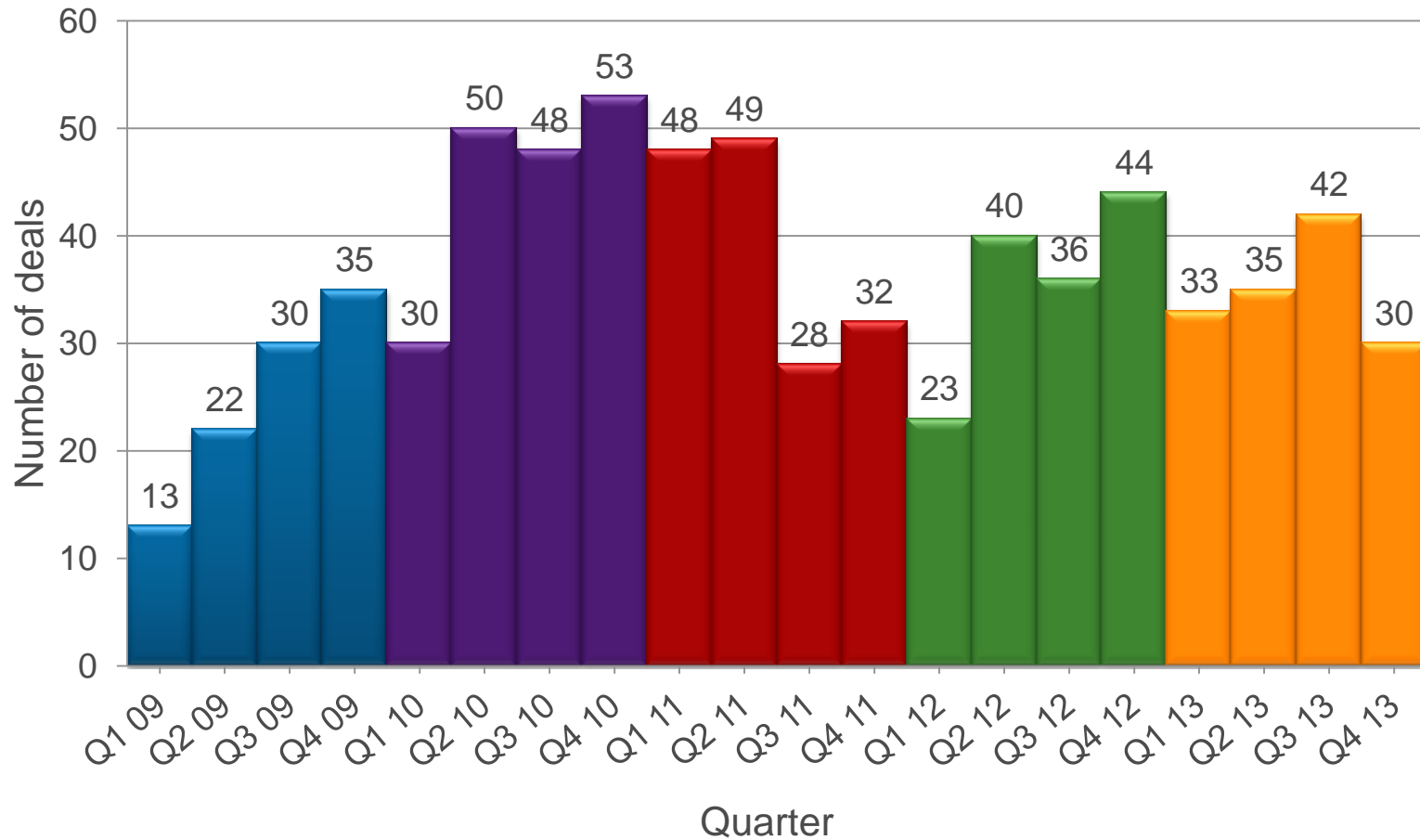
Daniel Rubin, *Practical Law Corporate & Securities*

# About Practical Law

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- *Practical Law The Journal* magazine covering today's transactional and compliance topics as well as key issues and developments in litigation practice and procedure.



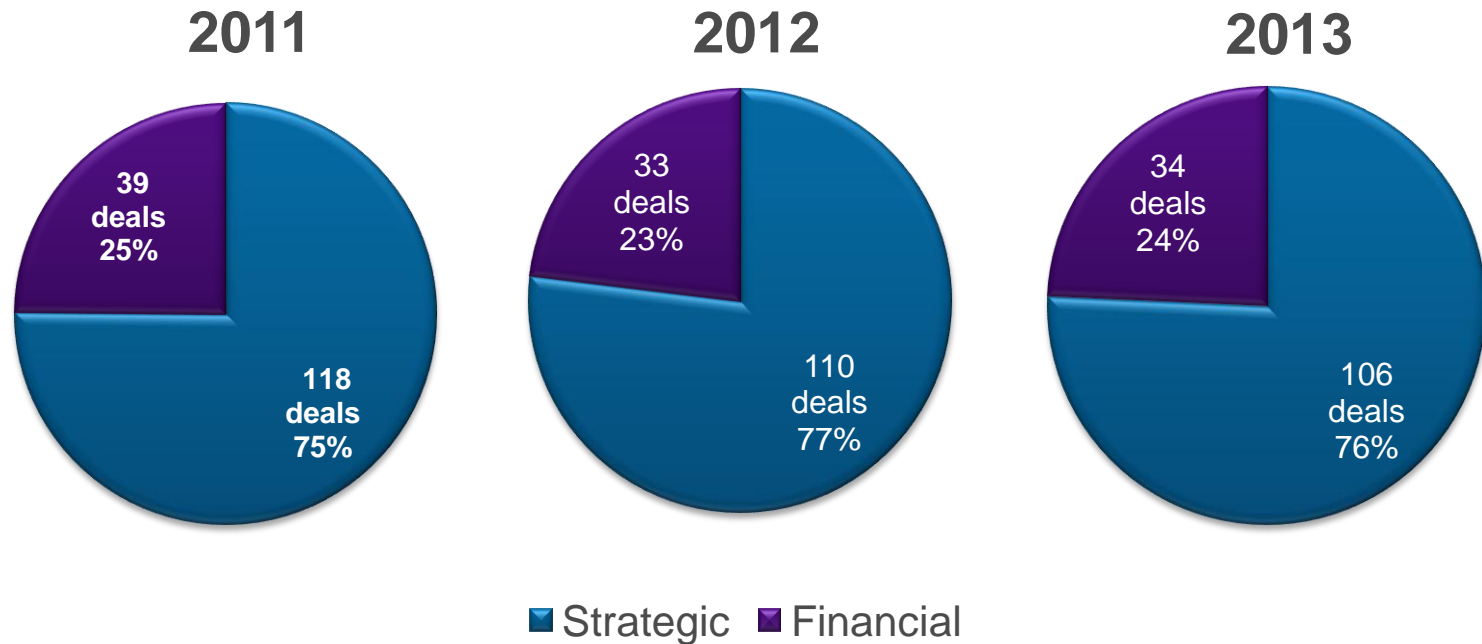
# Public M&A Activity by Quarter



What's Market tracks acquisitions of US publicly traded companies valued over \$100 million.

# Strategic v. Financial Buyer Activity

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157 Total Deals

44 deals (28%) were structured as front-end tender offers.

143 Total Deals

40 deals (28%) were structured as front-end tender offers.

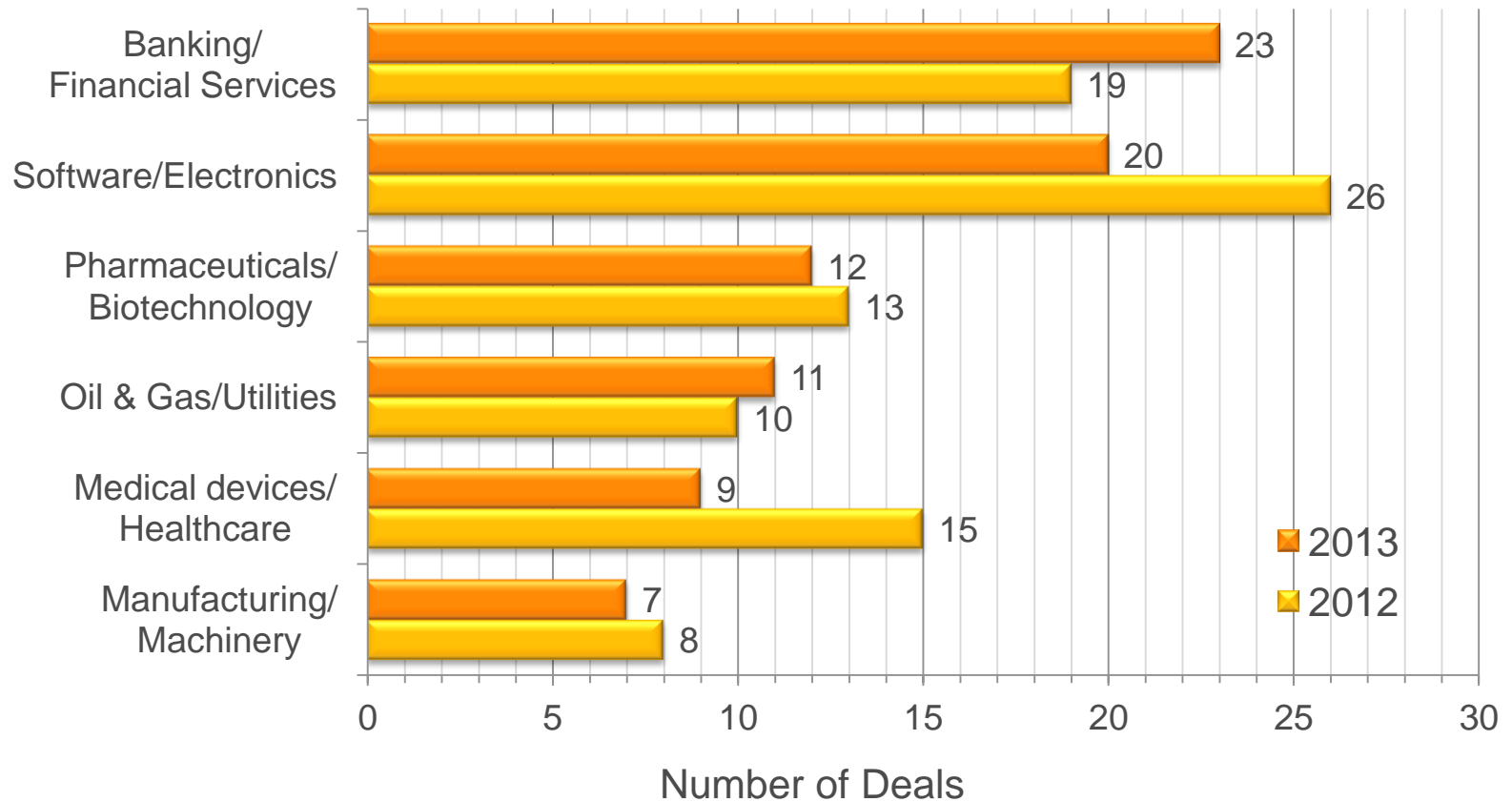
140 Total Deals

36 deals (26%) were structured as front-end tender offers.

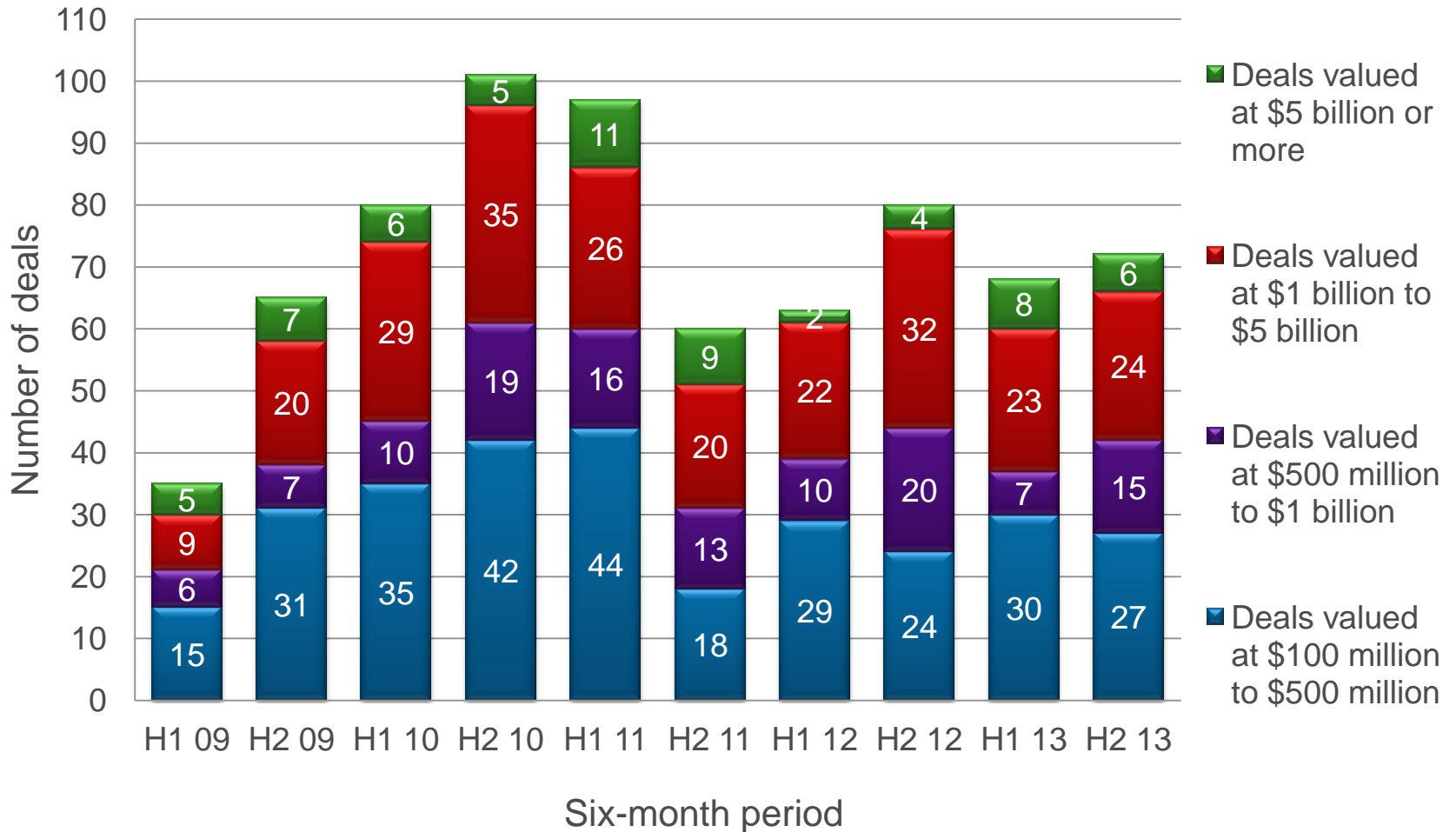
# Most Active Industries

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## Industry Sector



# Public M&A by Deal Value



# Largest Strategic Deals

Parties / Signing Date	Industry	Deal Value	Consideration
Publicis Groupe S.A. and <b>Omnicom Group Inc.</b> merger (July 27, 2013)	Media and entertainment	\$35.1 billion (combined market capitalization)	All stock
Liberty Global, Inc. and <b>Virgin Media Inc.</b> merger (February 5, 2013)	Telecommunications	\$23.3 billion (on date signed)	Cash and stock
Thermo Fisher Scientific Inc. and <b>Life Technologies Corporation</b> merger (April 14, 2013)	Medical devices and healthcare	\$13.6 billion (plus assumed debt)	All cash
AMR Corporation and <b>US Airways Group, Inc.</b> merger (February 13, 2013)	Automobiles, airlines and transportation	\$11 billion (on date signed)	All stock
Amgen Inc. tender offer for <b>Onyx Pharmaceuticals, Inc.</b> (August 24, 2013)	Pharmaceuticals and biotechnology	\$10.4 billion (including cash assumed)	All cash

Of the fourteen deals valued at over \$5 billion in 2013, eleven (79%) were with strategic buyers.

# Largest Financial Deals

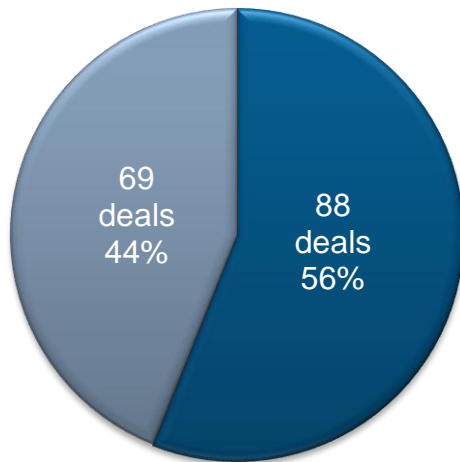
Parties / Signing Date	Industry	Deal Value	Consideration
Berkshire Hathaway/3G Capital and <b>H.J. Heinz Company</b> merger (February 13, 2013)	Food and beverage	\$28 billion (including assumed debt)	All cash
Michael Dell/Silver Lake Partners and <b>Dell Inc.</b> merger (February 5, 2013)	Computer and electronic equipment	\$24.75 billion	All cash
Bain Capital/Golden Gate Capital/GIC Special Investments/Insight Venture Partners and <b>BMC Software, Inc.</b> merger (May 6, 2013)	Computer and electronic equipment	\$6.9 billion	All cash
KKR and <b>Gardner Denver, Inc.</b> merger (March 7, 2013)	Manufacturing and machinery	\$3.9 billion (including assumed debt)	All cash
KKR & Co. L.P. and <b>KKR Financial Holdings LLC</b> merger (December 16, 2013)	Banking and financial services	\$2.6 billion (on date signed)	All equity



# Debt v. Non-debt Transactions

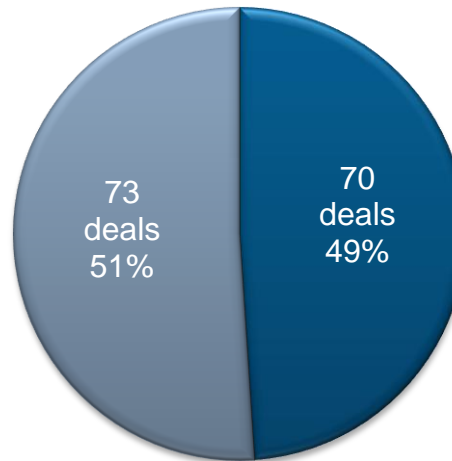
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2011



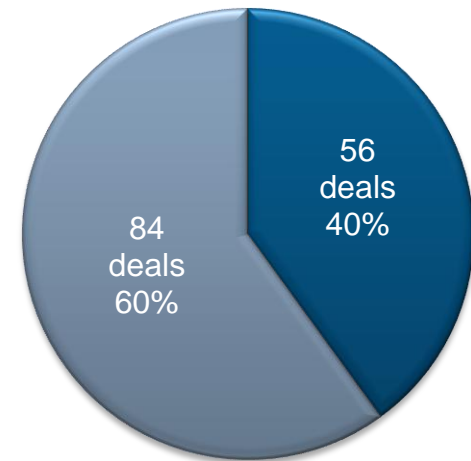
157 Total Deals

2012



143 Total Deals

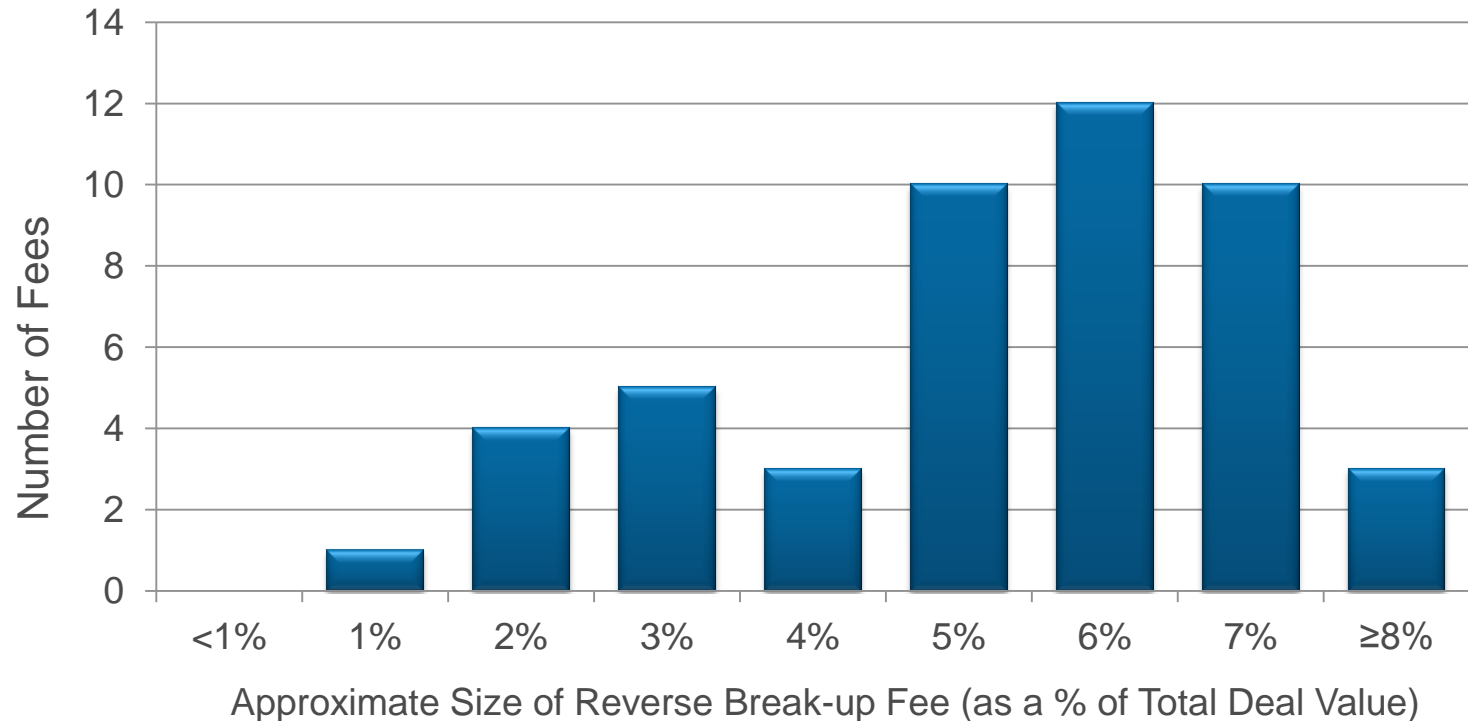
2013



140 Total Deals

■ Debt ■ Non-debt

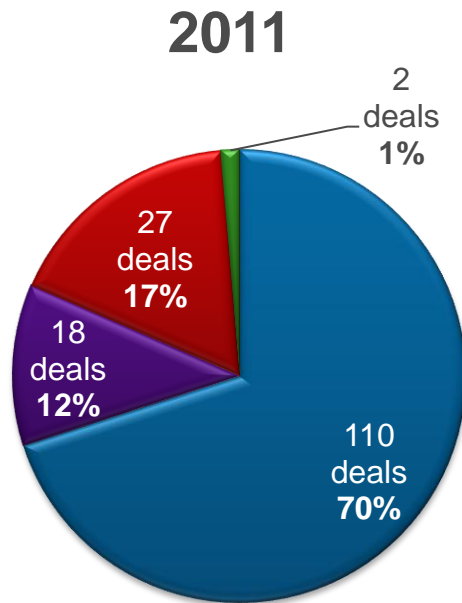
# Reverse Break-up Fees in Debt-financed Deals



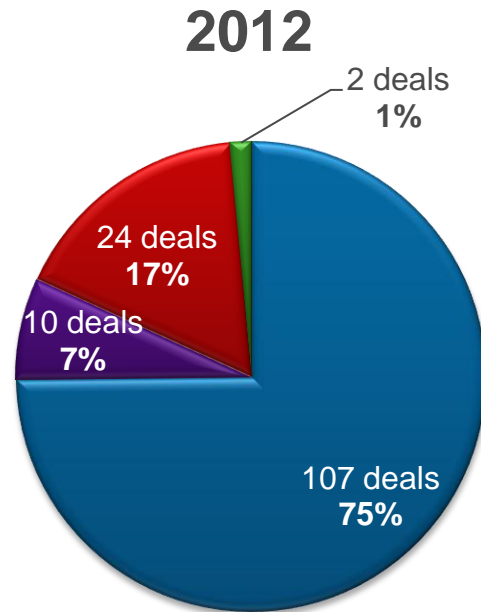
- 68% of all leveraged deals in 2013 were structured to have a reverse break-up fee payable for the buyer's material breach or failure to close the transaction (excluding reverse break-up fees payable for antitrust failure or other triggers similar to a target company break-up fee).
- Largest reverse break-up fee in **TPG Capital's acquisition of Assisted Living Concepts, Inc.**: over 14% of deal value.

# Type of Consideration

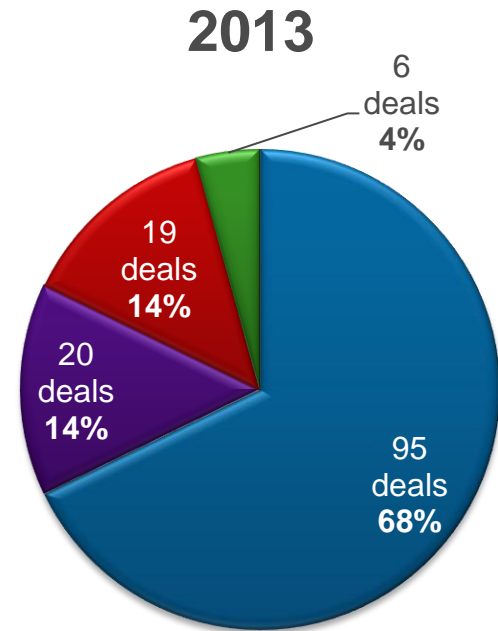
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157 Total Deals



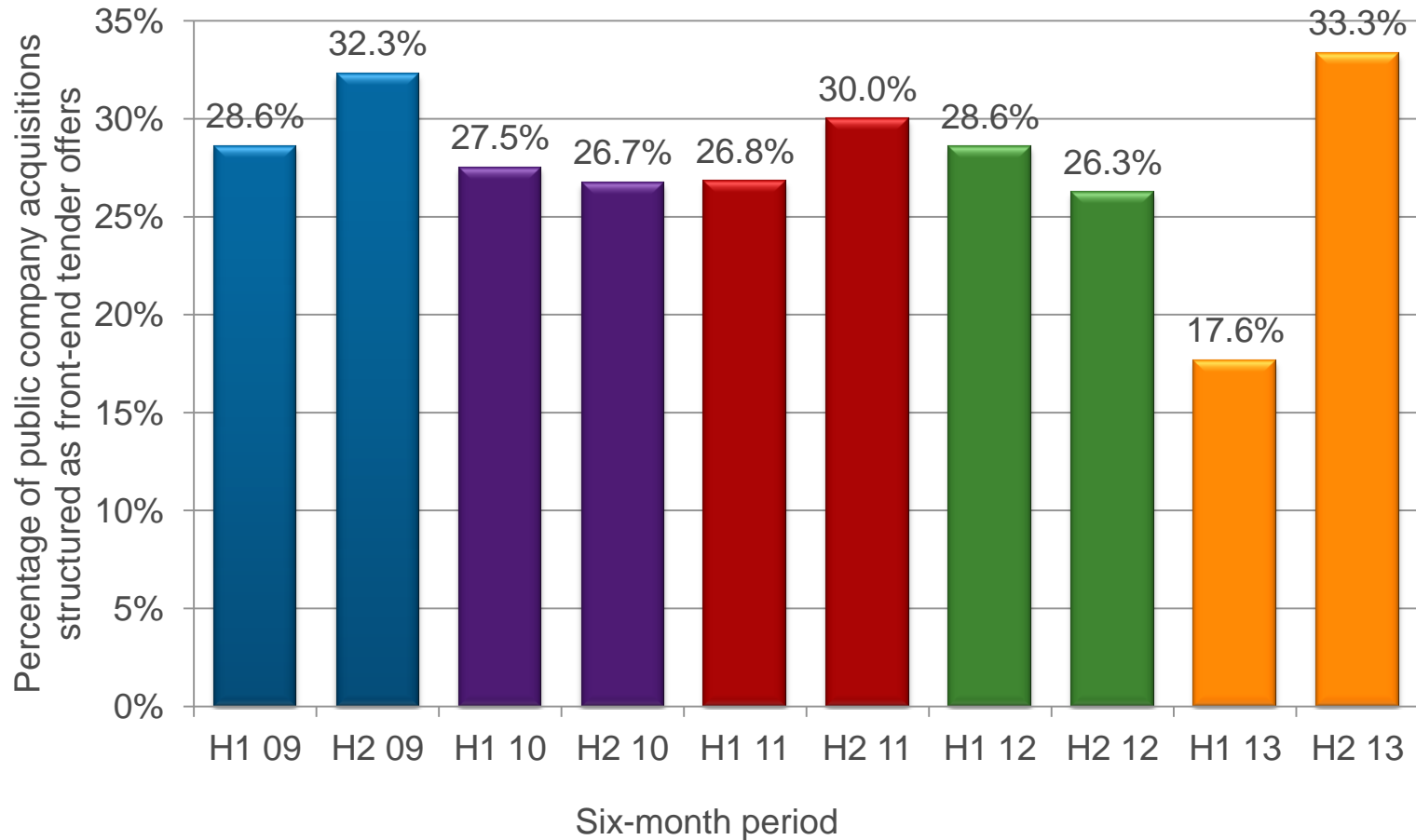
143 Total Deals



140 Total Deals

- All Cash
- All Stock
- Cash and/or Stock
- Contingent Value Rights

# Tender Offers and DGCL Section 251(h)



Of the 58 deals signed after Aug. 1, 23 (39.7%) were structured as tender offers.

## What's Market in Section 251(h) deals

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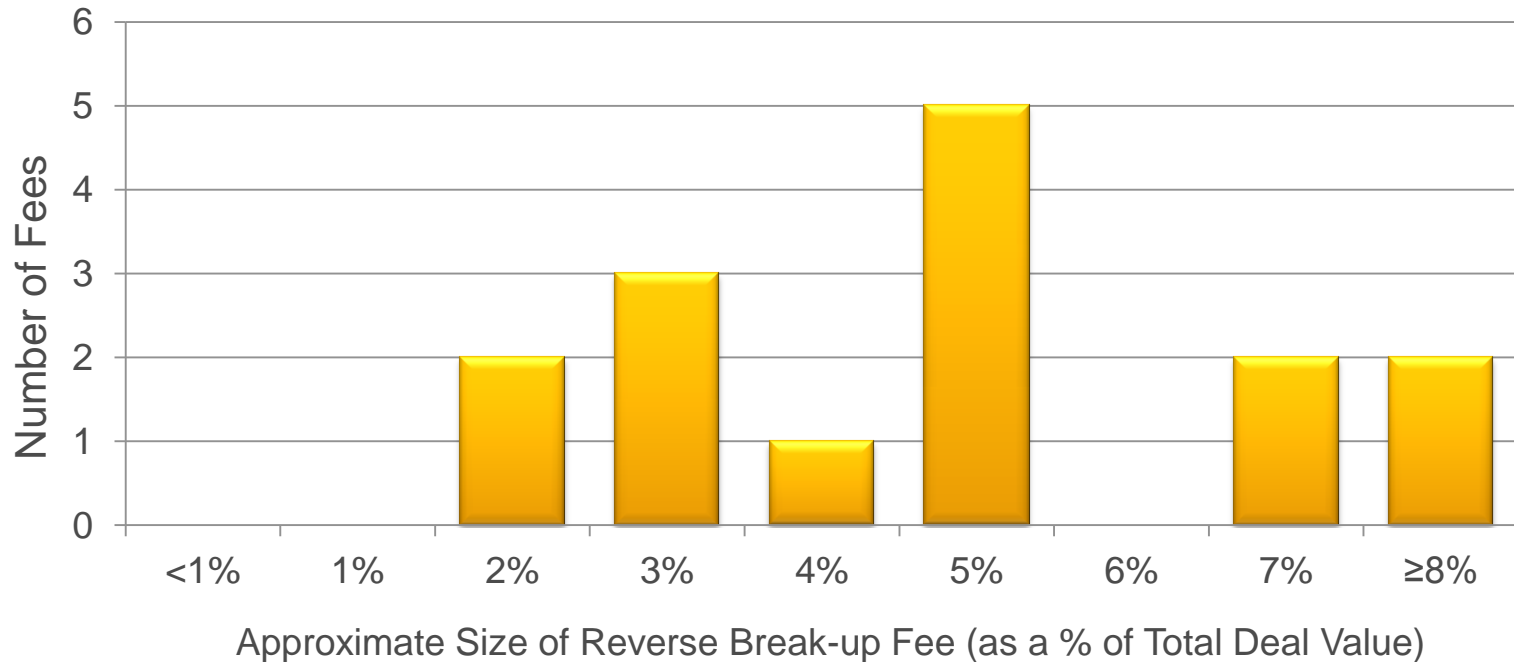
- Of the 20 DE-governed tender offers signed in 2013 since August 1st, only one did not “opt-in” to Section 251(h).
- Of the 19 tender offers that opted in to Section 251(h), 13 did not include a top-up option.
- Fifteen (15) deals had no stockholder meeting covenant.
- Only one (1) deal did **not** include a Section 203 interested stockholder representation by the buyer.

## What's Market in Section 251(h) deals

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- Four (4) deals did not include any language for a “subsequent offering period.”
- Four (4) deals permitted a subsequent offering with the target’s prior approval.
- Eight (8) transactions included provisions for a subsequent offering period at the buyer’s option (including one (1) deal conditioning the period on the inapplicability of Section 251(h) and the top-up option not being exercised due to potential violation of applicable law).
- Three (3) deals conditioned the period on the Section 251(h) being inapplicable and the exercise of the top-up **not** giving the buyer at least 90% of target’s common stock.

# Antitrust-related Reverse Break-up Fees



- Largest antitrust-related reverse break-up fee in **The Kroger Co./Harris Teeter Supermarkets, Inc.**: 8.00% of deal value.
- In two deals, the parties negotiated for the rare, antitrust-related “ticking fee:”
  - **Service Corporation International/Stewart Enterprises, Inc.** (both an antitrust-related ticking fee and a reverse break-up fee for antitrust failure).
  - **Thermo Fisher Scientific/Life Technologies Corporation** (only a ticking fee).

# Go-shops in Public M&A Deals

## % of Overall Deals

### 2012:

- 143 total deals
- 13% of all deals had a go-shop

### 2013:

- 140 total deals
- 12% of all deals had a go-shop

2012



- Go-shop
- No Go-shop

2013



## % of Strategic Deals

### 2012:

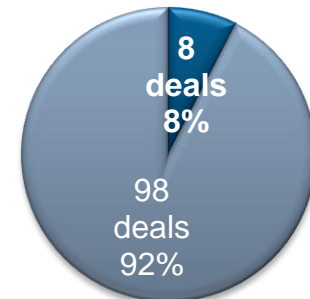
- 112 strategic deals
- 5% of strategic deals had a go-shop

### 2013:

- 106 strategic deals
- 8% of strategic deals had a go-shop



- Go-shop
- No Go-shop



## Deals with Go-shops

### 2012: 19 deals with a go-shop

- 32% with strategic buyers
- 68% with financial buyers

### 2013: 17 deals with a go-shop

- 47% with strategic buyers
- 53% with financial buyers

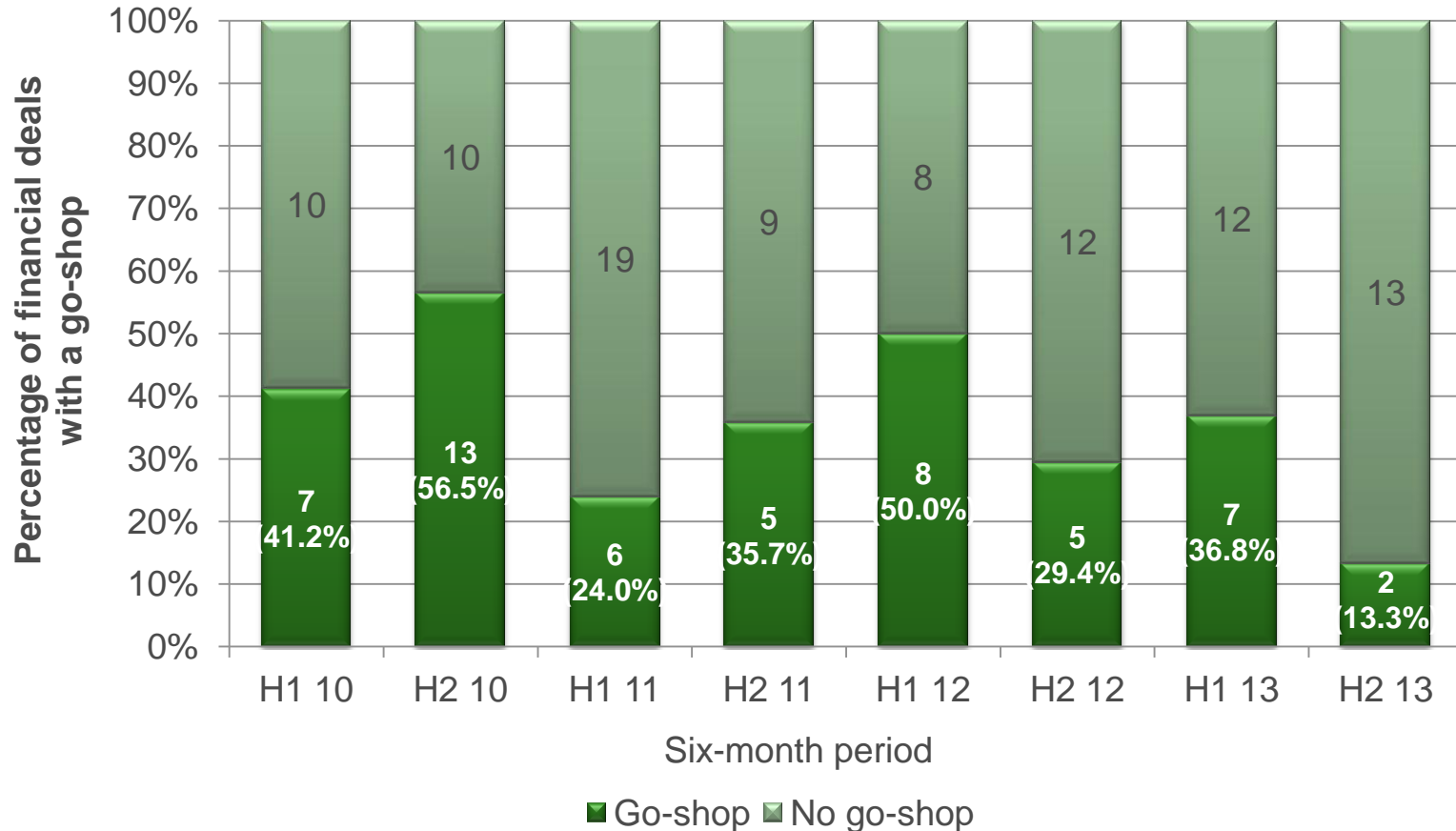


- Strategic
- Financial





# Go-shops in Financial Deals



- Of the 39 financial deals in 2012, 13 deals (39.4%) had a go-shop.
- Of the 34 financial deals in 2013, nine deals (26.5%) had a go-shop.

# Go-shop Innovations

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- **Modified Go-shops:**

- Do not explicitly carve out an exception to the no-shop to actively solicit third-party bids.
- Instead offer a two-tiered break-up fee structure based on timing of termination for a superior offer.
- Appeared in six deals in 2013, up from only two such deals in 2012, both in the second half of the year.

- **Grandfather Clauses:**

- Permit the target company to continue negotiations after expiration of the go-shop with qualifying competing bidders who submitted a proposal during the go-shop period.
- Of deals containing a go-shop, 76% (13 of 17 deals) in 2013 and 73.7% (14 of 19 deals) in 2012 included a grandfather clause, up from 62.5% (ten of 16 deals) in 2011.

- **Exceptions for Prior Bidders:**

- Additional exception to the no-shop that allows the target company to continue discussions with third parties who had submitted acquisition proposals before the signing of the merger agreement.
- Three of the deals in 2013 with modified go-shop structures contained an exception for prior bidders.

# Contingent Value Rights

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- Contingent value rights (CVRs) are most common in the pharmaceutical or healthcare industries, where they generally are driven by drug-approval and drug-sale metrics.
- Six deals in 2013 with CVRs, five in pharmaceutical/healthcare, one in telecommunications.
  - Four of the pharmaceutical deals have CVRs triggered by the achievement of sales milestones, with one also having milestones for regulatory approvals.
  - The CVR in the telecom deal pays out a share of the proceeds of a sale of a spectrum license.
  - The CVR in the healthcare deal is tied to the resolution of litigation involving the target company.
- What's Market tracked only two deals with CVRs in 2012, four in 2011, two in 2010 and one in 2009.

# Material Adverse Effect

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- In 2013, a significant number of agreements featured uncommon material adverse effect (MAE) definitions, thresholds or carve-outs.
- For example:
  - Four deals reacted to the political environment by specifically carving out any government shutdown or the effects of the "sequester" or "debt ceiling" from an MAE.
  - Two MAE definitions included carve-outs for specified labor disruptions, even if the disruptions are not specifically related to the announcement of the merger agreement.
  - Two merger agreements included explicit monetary thresholds that trigger an MAE.
  - Three deals included MAE carve-outs to confirm that seasonal fluctuations in the target company's business will not count as an MAE.

# Shareholder Activism and M&A

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- Activist shareholders in 2013 broadened their scope by influencing, prompting or disrupting several prominent M&A deals, including by encouraging unsolicited bids, advocating for spin-offs or other sales, or opposing a board-approved merger.
- For example:
  - The Dell buyout
  - Community Health Systems, Inc./Health Management Associates, Inc. acquisition
  - Office Depot, Inc./OfficeMax Incorporated merger
  - Men's Wearhouse, Inc./Jos. A. Bank Clothiers, Inc
- Several other hostile situations triggered by activist shareholders, including Barington Capital/Darden Restaurants, Inc., Crescendo Partners/Aeropostale Inc. and Biglari Capital/Cracker Barrel Old Country Store, Inc., are still ongoing.

# What We Talked About Last Year

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- Crown-jewel lock-ups
- Buyer stock options
- Limited window-shops
- Sign-and-consent deals (*Openlane*)

# Questions

# Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

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- Public Mergers: Overview
- Merger Agreement (Tender Offer, Pro-Buyer)
- Tender Offer Timeline (With Section 251(h) Merger)



# About the Speaker

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**Daniel Rubin, *Senior Editor, Practical Law Corporate & Securities***

Daniel Rubin joined Practical Law from O'Melveny & Myers LLP, where he was counsel in the M&A group. Previously he was a corporate associate at Fried, Frank, Harris, Shriver & Jacobson LLP.