

# Deal Protections and Remedies

April 30, 2014

Presenter: Daniel Rubin, *Practical Law Corporate & Securities*

# About Practical Law

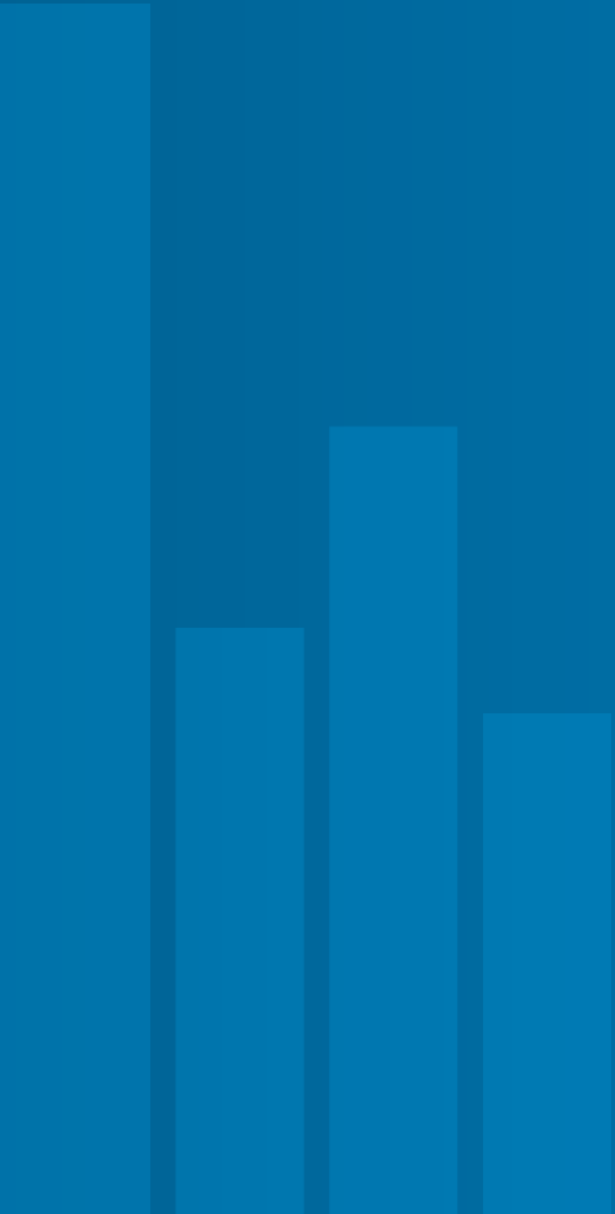
- Practical resources covering all major practice areas.
- Overviews, model documents, trend articles and more created by our expert attorneys.
- Dedicated areas for law firms, law departments and law schools.
- Practice centers for specialists
- What's Market for public merger agreements, private acquisition agreements and more.
- Updates on the latest legal and market developments.
- *Practical Law The Journal* magazine covering today's transactional and compliance topics as well as key issues and developments in litigation practice and procedure.

The screenshot displays the Practical Law website interface. At the top, there is a navigation bar with a 'US' location selector, a 'Change country' dropdown, and a 'Log out' link. The main header features the 'Practical Law' logo with the tagline 'A THOMSON REUTERS LEGAL SOLUTION', followed by navigation links for 'Practice Areas', 'Resources', 'International', and 'My Practical Law'. A search bar is positioned below the header, with 'All US' selected in the dropdown and a search icon on the right.

The main content area is titled 'Practical Law for Law Firms'. It includes a 'Practice Areas' section with a grid of links: Antitrust, Arbitration: International, Bankruptcy, Capital Markets & Securities, Commercial, Corporate and M&A, Employee Benefits & Executive Compensation, Finance, Intellectual Property & Technology, Labor & Employment, Litigation: Federal, Real Estate, and Tax. To the right of this grid is a 'What Are You Working On?' section with a 'Get Started Now' button.

Below the grid are three sections: 'What's Market' (with a 'Get up to speed on the latest deals, agreements and filings.' and 'All What's Market' link), 'State Q&A' (with a 'Review and compare state law across multiple practice areas.' and 'All State Q&A' link), and 'Featured Updates' (with an 'All updates' link). The 'Featured Updates' section contains three articles: 'The Letter of Intent for BlackBerry: Desperate Times, Desperate Measures' (dated September 26, 2013), 'What's Market Public Merger Activity for the Week Ending September 27, 2013' (dated September 26, 2013), and 'In re Kenneth Cole: New York Court Dismisses Challenge to Going-private Transaction' (dated September 24, 2013).

On the right side of the page, there is a 'Meet the Team' section featuring a profile for 'Lawrence Hsieh, Commercial' and a 'Meet Our Experts' button. Below that is a 'The New Practical Law' section with the text 'What's new about our site?' and a 'Learn More' button.



# Study Overview

# Study Overview

---

- Study of deal-protection measures and remedies governing the target company's conduct and fiduciary duties in public merger agreements.
- Change from previous years' studies, which focused on financing-risk allocation and remedies for buyer breach: reverse break-up fees and specific performance, financing covenants and "Xerox" provisions.
- Remedy models largely unchanged. Most strategic buyers agree to traditional model, even in leveraged deals. Most private equity buyers negotiate a reverse break-up fee (priced at a multiple of the target company's break-up fee) and conditional specific performance.
- Current information on reverse break-up fees and specific performance always available in What's Market database merger agreement summaries.
- New topic: opportunity to add to existing studies and literature, bring fresh perspective.

# Study Overview

---

- First section: the post-signing market check.
  - Window-shop fiduciary-determination requirement.
  - Waivers of standstills.
  - Go-shops, conventional and limited, and other post-signing incentives for third-party bids.
  - Strategic vs. private equity buyers.
- Second section: the change of recommendation.
  - The fiduciary out—bases and threshold for “superior offer.”
  - Matching rights, both initial and “last look.”
- Third section: termination and break-up fee.
  - Right to terminate for superior offer—distinction between cash and stock deals.
  - Force the vote—cash vs. stock deals, intersection with termination for superior offer.
  - Break-up fees—amounts, triggers, impact of deal size.
- Fourth section: introduction of deal-protection scoring system.
  - Comparison for buyer type, consideration, premium, buyer-breach remedy.

# Study Overview

---

## STUDY SAMPLE AT A GLANCE: 137 MERGER AGREEMENTS

**Buyers:** 104 agreements with strategic buyers, 33 with financial buyers. Five of the strategic buyers raised new equity financing from private equity investors. Two of those buyers are portfolio companies of private equity sponsors.

**Consideration:** 97 all-cash deals, including six with an equity rollover and five with CVRs for potential future payment; 20 all-stock or other equity deals; 17 with a cash/stock mix, including two with an additional CVR; and three that offered a cash/stock election.

**Leverage:** 59 deals with new debt financing.

**Structure:** 35 front-end tender offers, including four with a dual-track process. All 35 were all-cash tender offers, with two also offering CVRs.

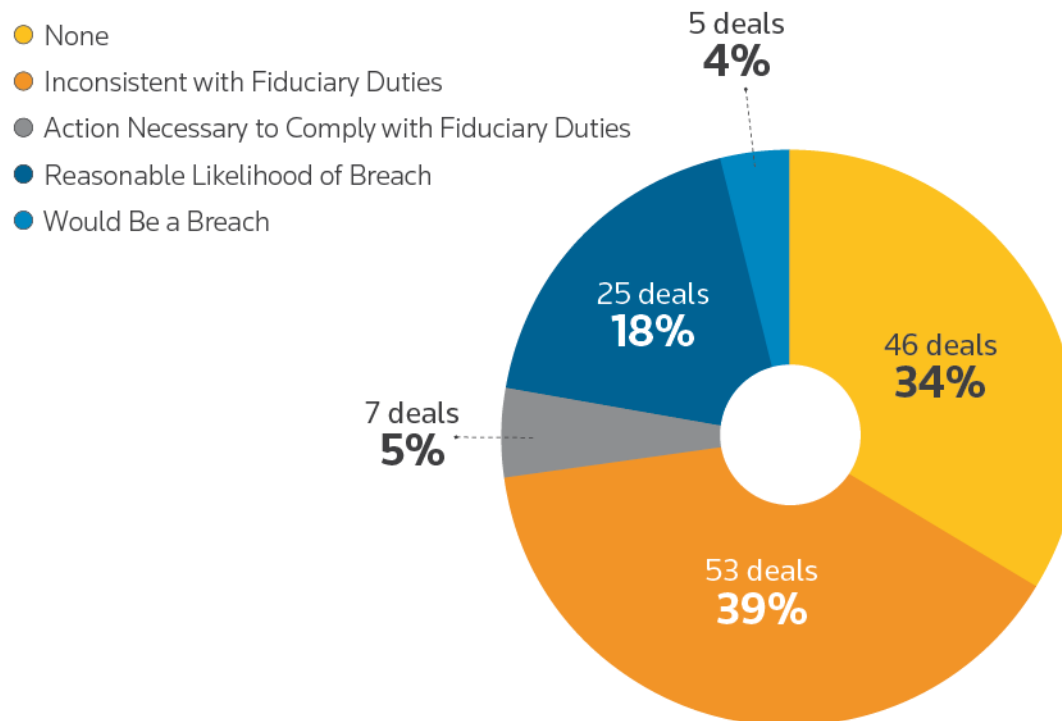
**Posture:** Three are superior offers to prior, signed agreements. Five were terminated before closing.



# Post-Signing Market Check

# Post-Signing Market Check: Window-Shop

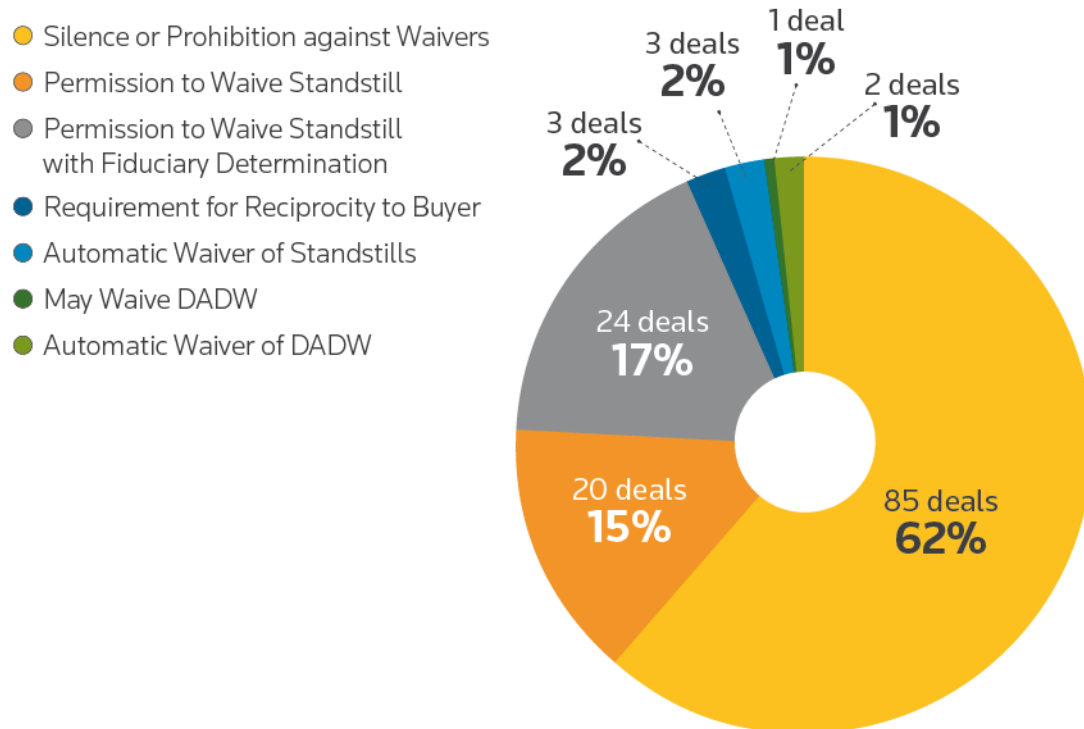
**FIGURE A** Window-shop Fiduciary Determination





# Post-Signing Market Check: Window-Shop

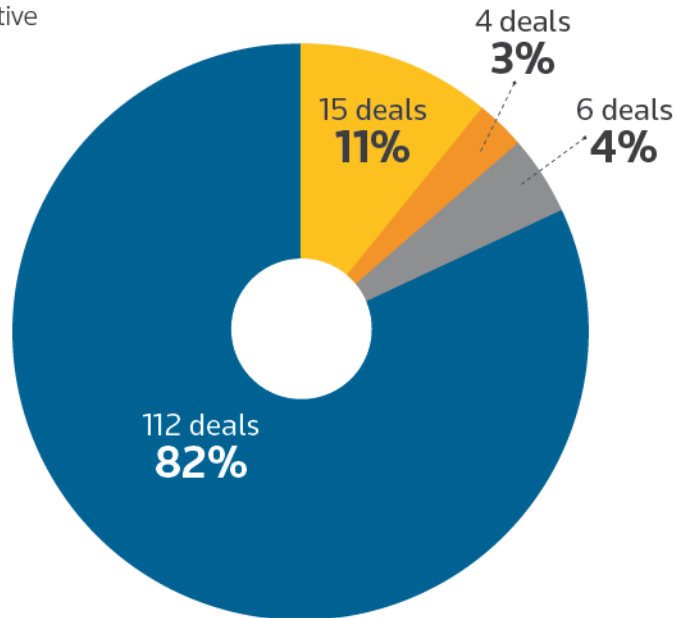
**FIGURE B** Waivers of Standstills



# Post-Signing Market Check: Go-Shop

**FIGURE C** Go-shops and other Incentives

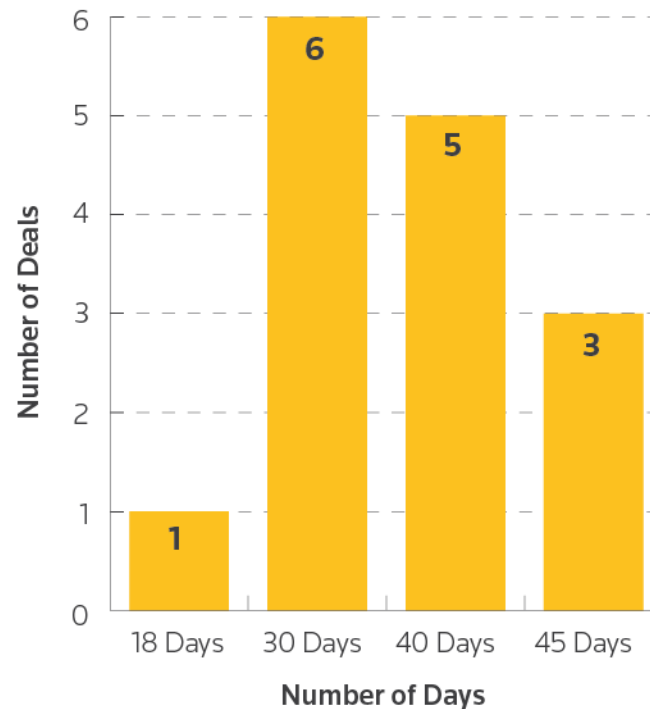
- Conventional Go-shop Provision
- Limited Go-shop Provision
- Modified Break-up Fee Incentive
- None



# Post-Signing Market Check: Go-Shop

---

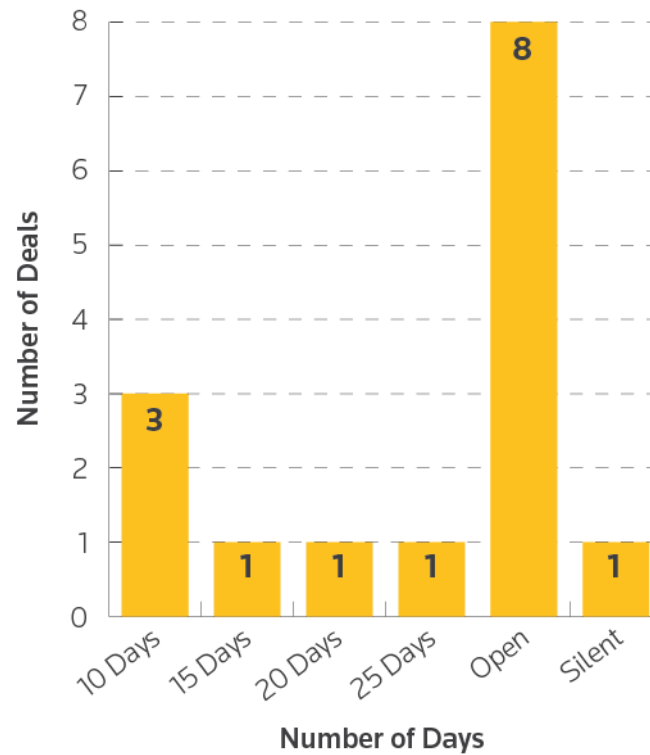
**FIGURE D** Length of Go-shop Period



# Post-Signing Market Check: Go-Shop

---

**FIGURE E** Length of Cut-off Period

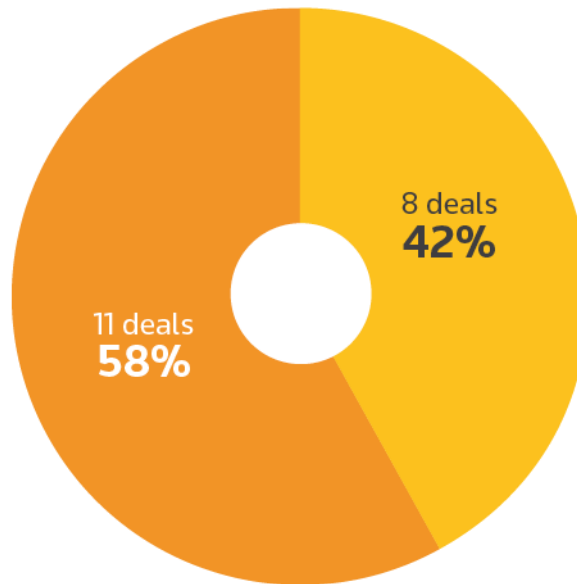


# Post-Signing Market Check: Go-Shop

---

**FIGURE F** Go-shops with Strategic and Financial Buyers

- Strategic Buyer
- Financial Buyer

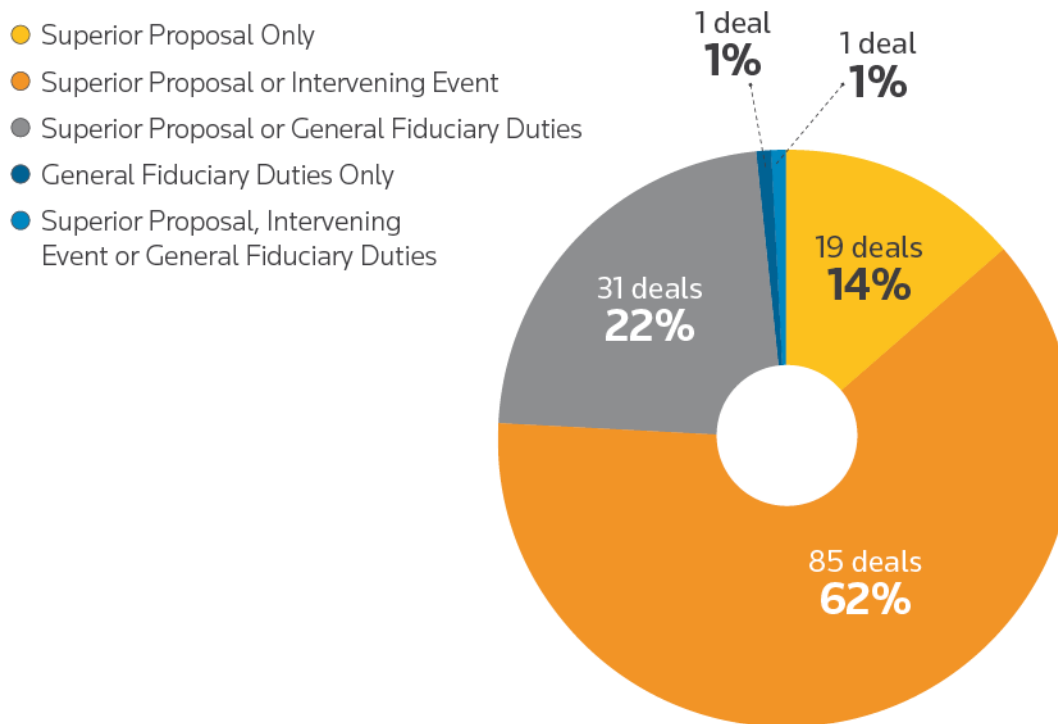




# Fiduciary Outs and Matching Rights

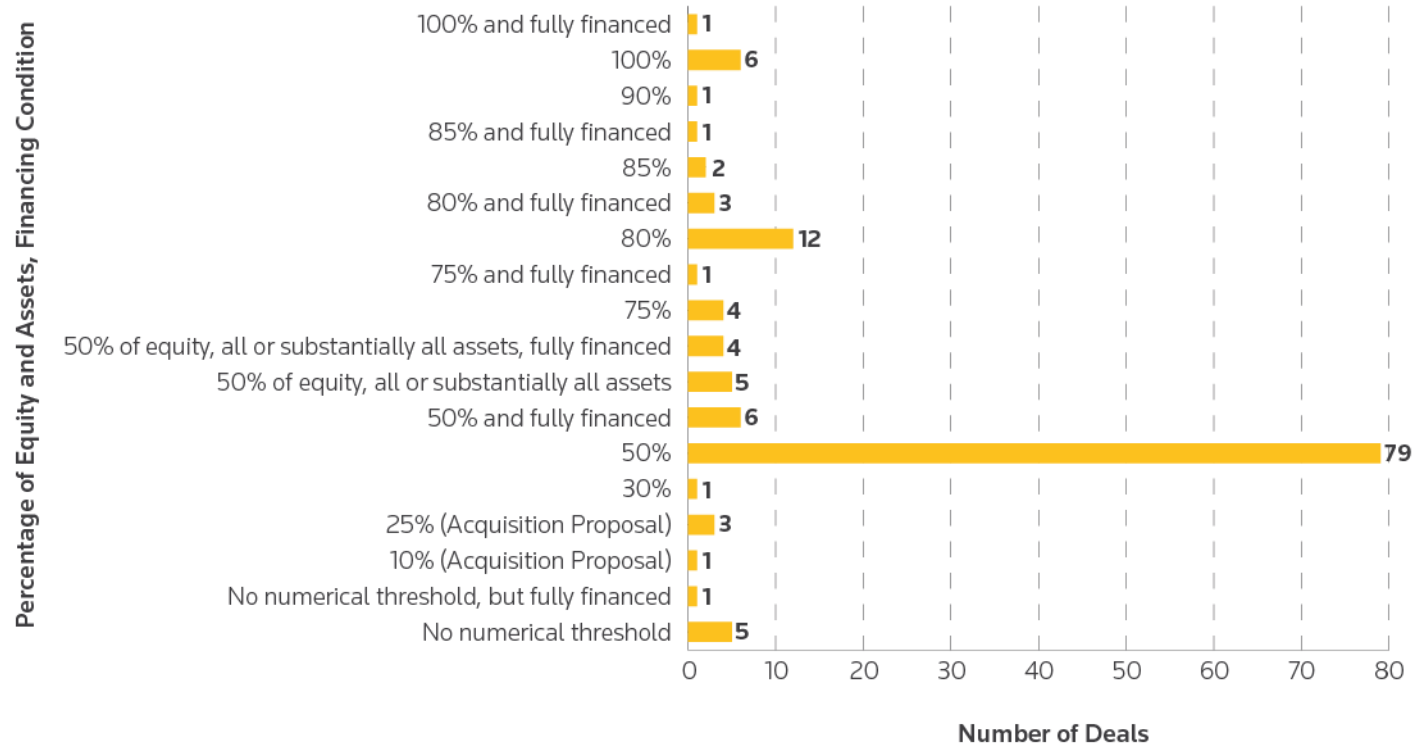
# Fiduciary Outs and Matching Rights

**FIGURE G** Basis for Fiduciary Out



# Fiduciary Outs and Matching Rights

**FIGURE H** Threshold for Superior Offer





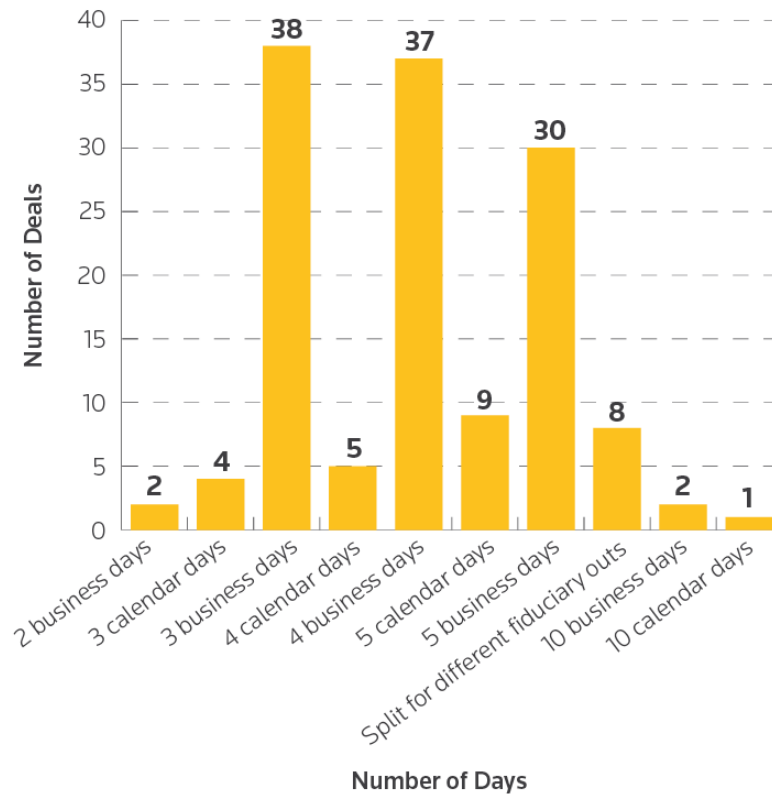
# Fiduciary Outs and Matching Rights

---

- Matching Right for Intervening Event:
  - Of 86 total agreements with a fiduciary out for an intervening event, 80 give the buyer a matching right to prevent the change of recommendation.
- Matching Right for General Fiduciary Duties:
  - Of 33 total agreements with a general fiduciary out, 20 have a matching right to obviate the need for a change of recommendation.

# Fiduciary Outs and Matching Rights

**FIGURE I** Length of Initial Matching Right



# Fiduciary Outs and Matching Rights

---

- “Last Look” Matching Right
  - Different formulations of the trigger for a last look are recorded in the appendix.
  - 120 out of 135 agreements with an initial matching right also provide a last-look matching right.
  - Most of the 120 are for shorter periods than the initial matching-right period.
  - All lengths of last-look matching-right periods are recorded in the appendix.



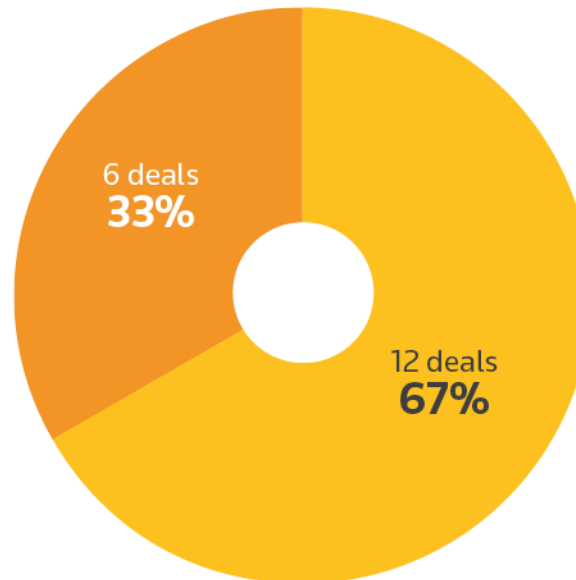
# Termination and Remedies

# Termination and Remedies: Superior Offer

---

**FIGURE J** No Termination Right for Superior Offer

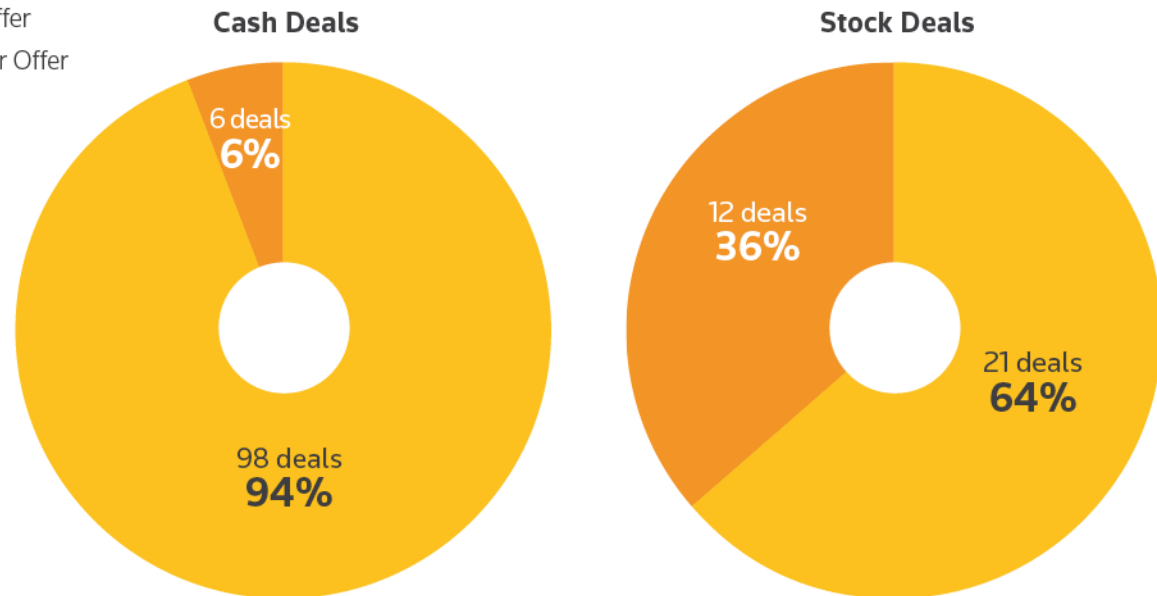
- Stock Deals
- Cash Deals



# Termination and Remedies: Superior Offer

**FIGURE K** Termination for Superior Offer by Consideration

- Termination for Superior Offer
- No Termination for Superior Offer

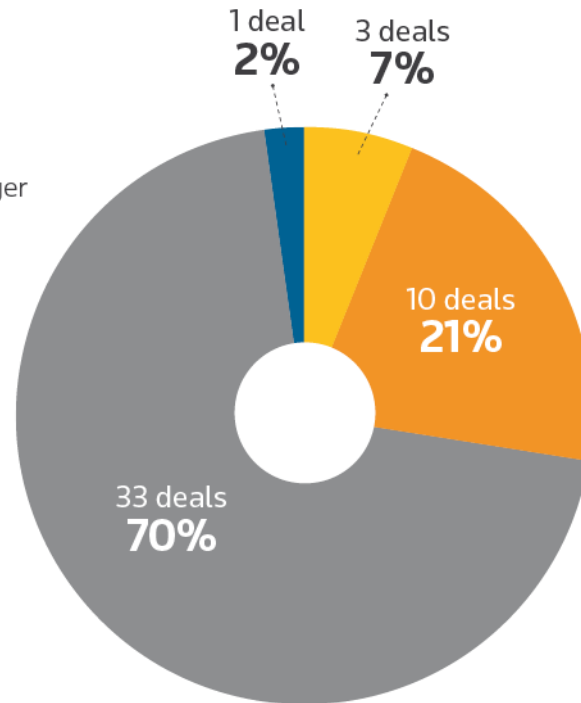


# Termination and Remedies: Force the Vote

---

**FIGURE L** Force the Vote Covenants

- Version 1: Submit even with Acquisition Proposal
- Version 2: Submit even with Recommendation Change
- Version 3: Submit unless Merger Agreement Terminated
- Version 4: Unqualified Obligation

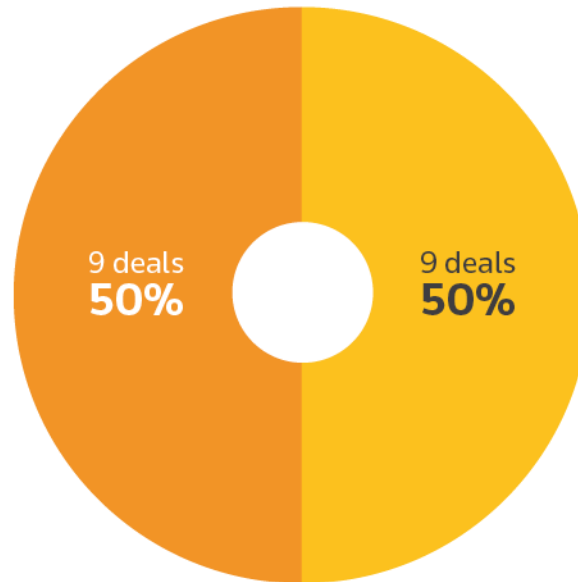


# Termination and Remedies: Force the Vote

---

**FIGURE M** Agreements with No Termination Right for Superior Proposal

- Includes a Force the Vote Covenant
- No Force the Vote Covenant



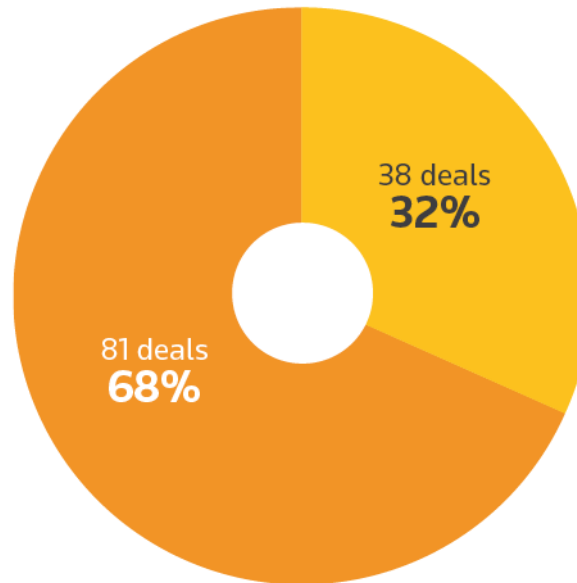


# Termination and Remedies: Force the Vote

---

**FIGURE N** Agreements with a Termination Right for Superior Proposal

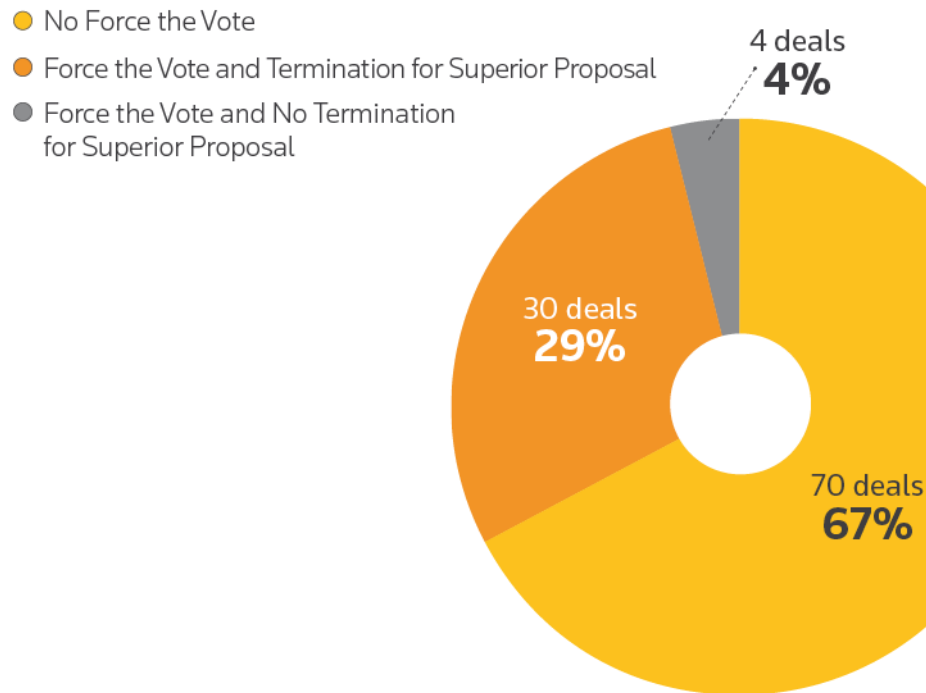
- Includes a Force the Vote Covenant
- No Force the Vote Covenant



# Termination and Remedies: Force the Vote

---

**FIGURE 0** Cash Deals and Force the Vote Provisions



# Termination and Remedies: Break-up Fees

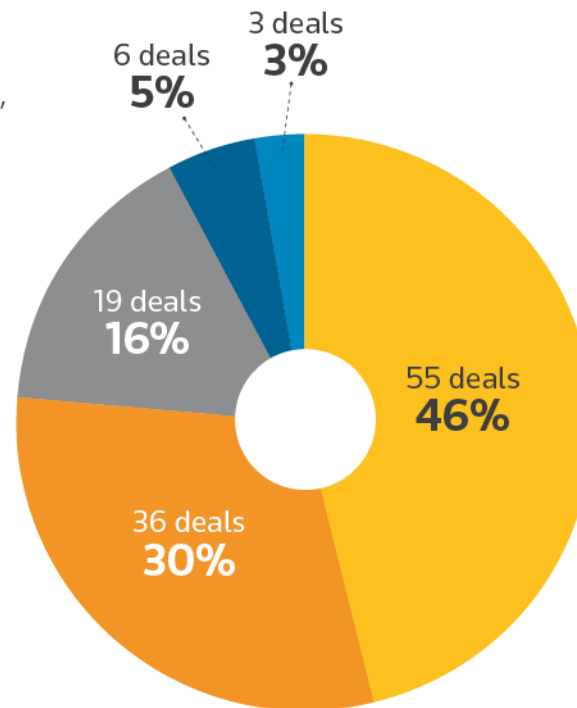
---

- Of 137 agreements in the study sample, 136 contain a break-up fee payable in some circumstance.
- All 136 require payment for a change of recommendation.
- Two of the 136 charge a higher fee if the change of recommendation is specific to an intervening event.
- Six charge a lower fee if the change of recommendation is specific to an acquisition proposal announced during the go-shop period or defined period of time following the signing. (Another 21 have two-tier break-up fees that hinge on the acceptance of the superior proposal.)
- Nine only charge the fee for a change of recommendation if there is also an announced acquisition proposal (either previously or during a tail period).
- Details on page 18 and in the appendix.

# Termination and Remedies: Break-up Fees

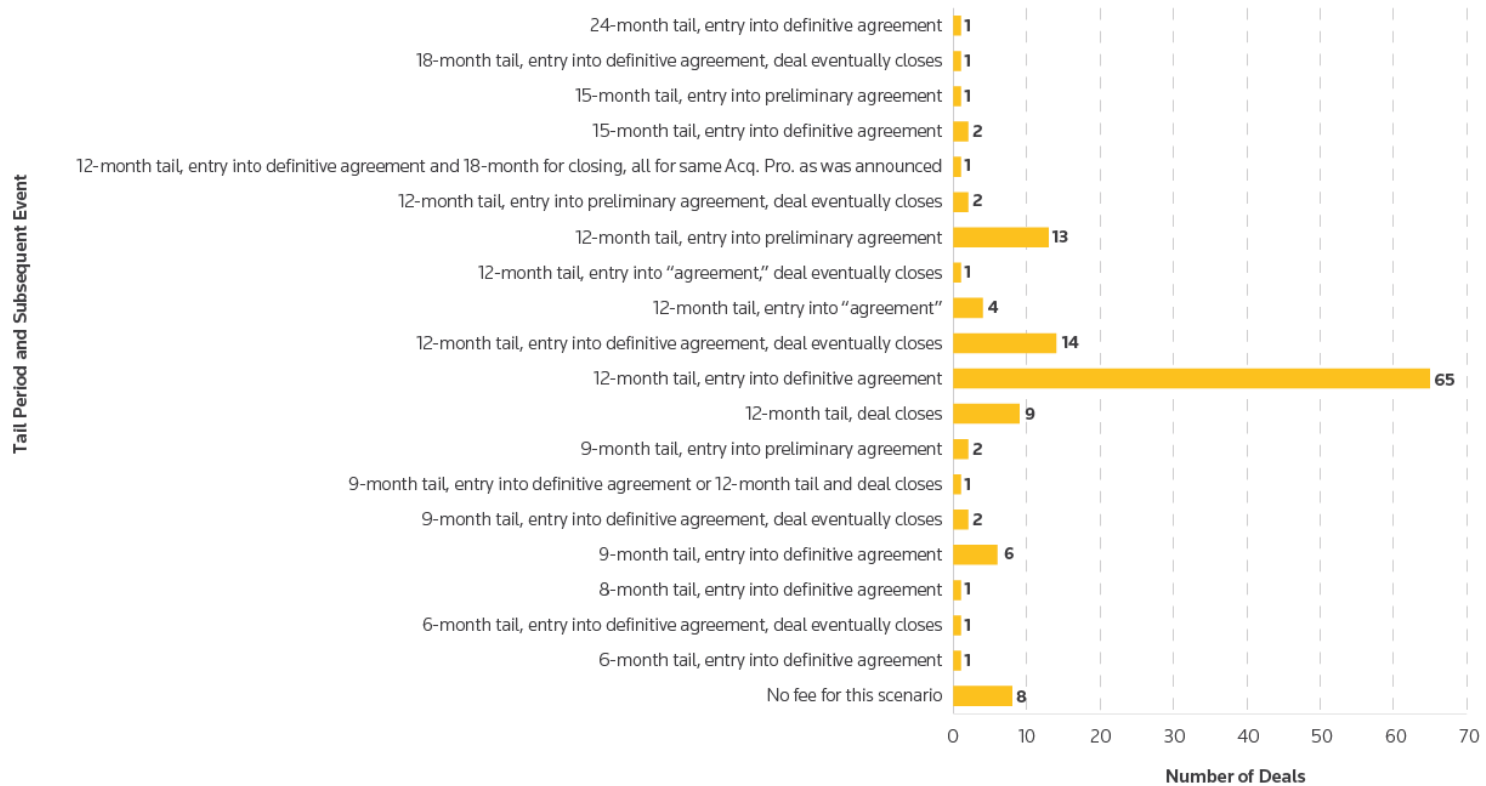
**FIGURE P** Third-party Offer: Fee Triggers

- Preliminary Agreement
- Definitive Agreement
- "Agreement" or "Binding Agreement"
- Enters or Accepts
- Distinguishes between Excluded Party and Others



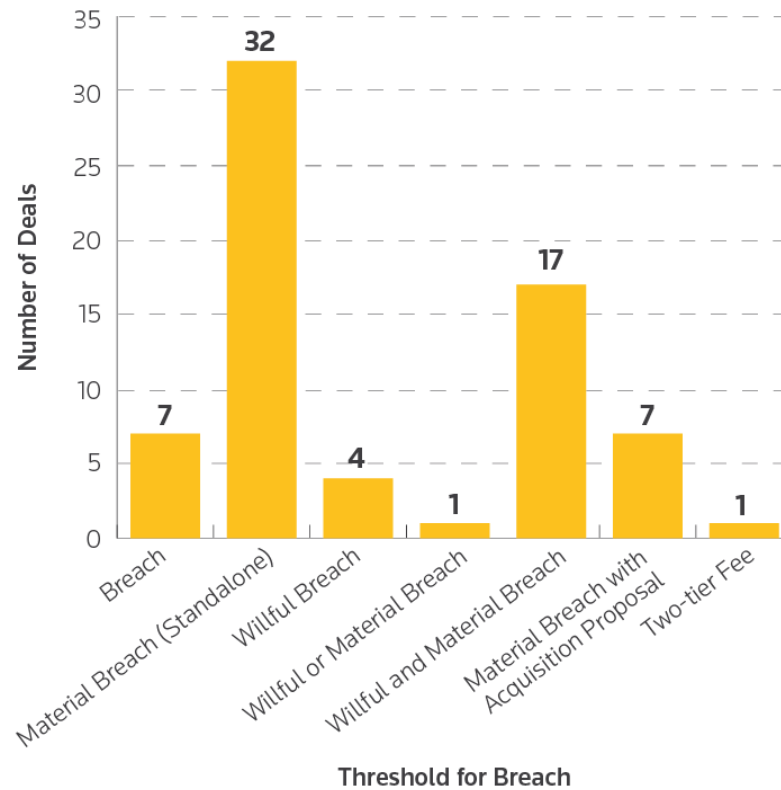
# Termination and Remedies: Break-up Fees

**FIGURE Q** Tail Periods for Break-up Fees



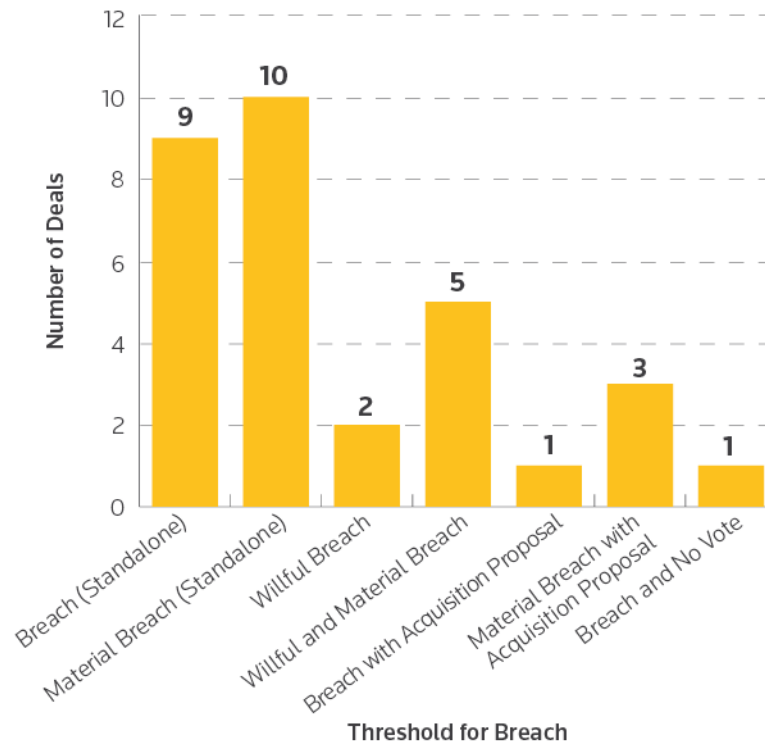
# Termination and Remedies: Break-up Fees

**FIGURE R** Standard for Breach of No-shop



# Termination and Remedies: Break-up Fees

**FIGURE 5** Standard for Breach of Stockholder-meeting Covenant



# Termination and Remedies: Break-up Fees

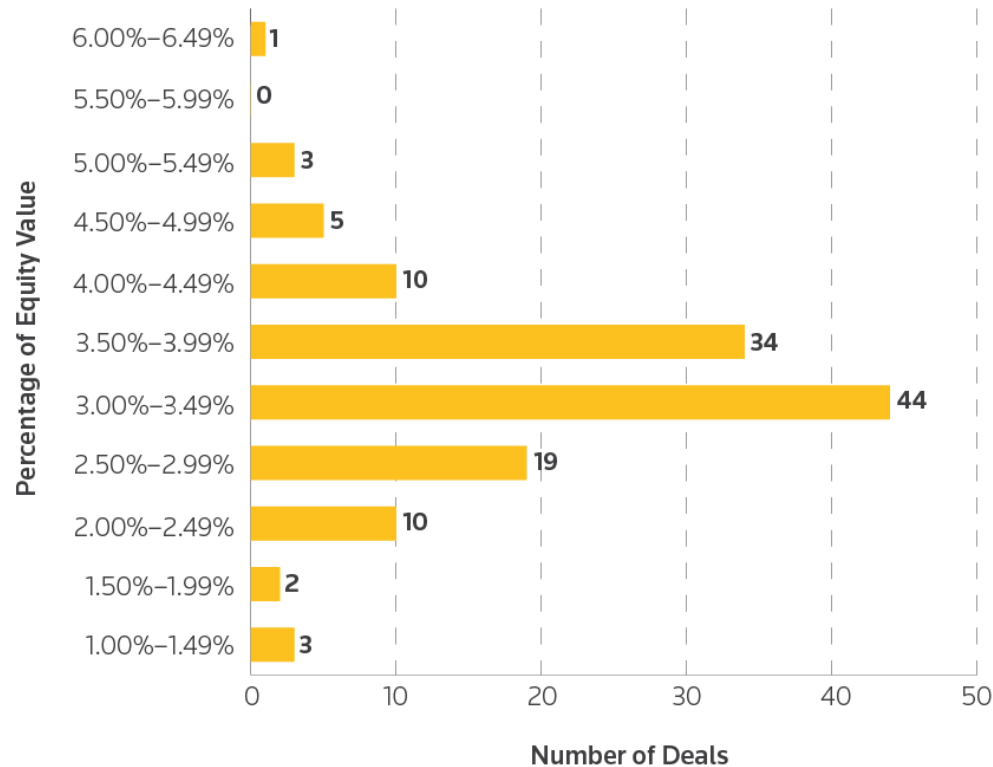
---

- General Breach
  - 35 agreements contained expense reimbursement for any breach.
  - Caps and willfulness/materiality standards included in appendix.
  - Another 5 charged expense reimbursement for breach if an acquisition proposal had been announced.
  - 5 charged full break-up fee for any breach that causes failure of a closing condition, also to varying standards of willfulness/materiality.
- Naked No Vote
  - 35 agreements contained expense reimbursements.
  - Another 11 charged expense reimbursements if an acquisition proposal had been announced.



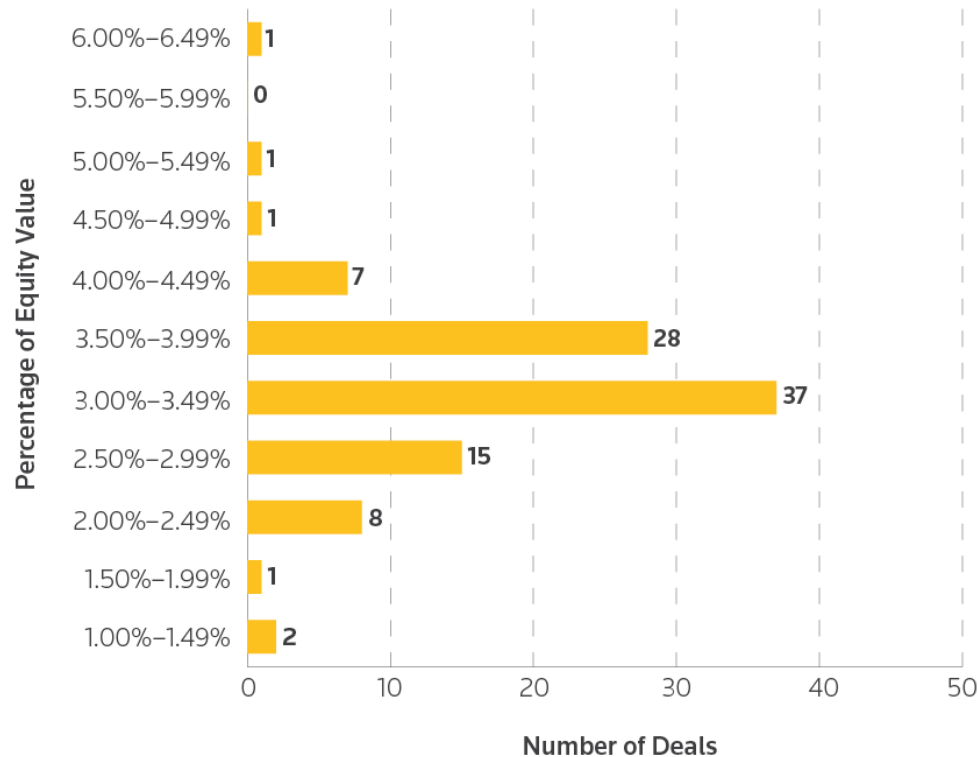
# Termination and Remedies: Break-up Fees

**FIGURE T** Break-up Fee Percentages



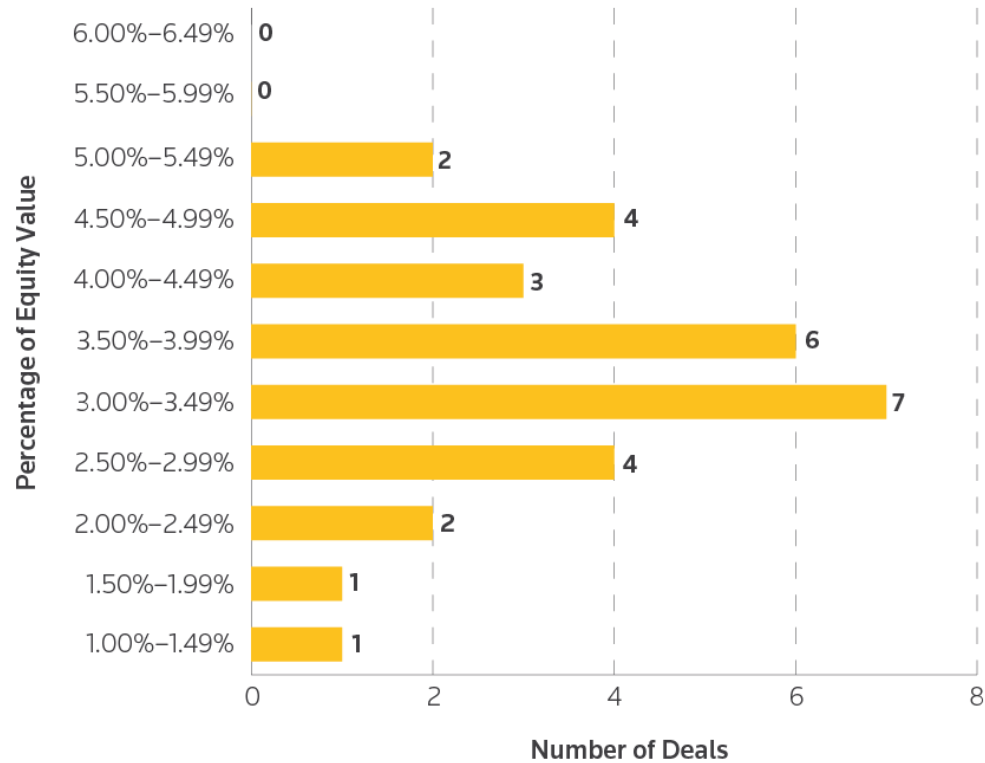
# Termination and Remedies: Break-up Fees

**FIGURE U** Break-up Fee Percentages in Cash Deals



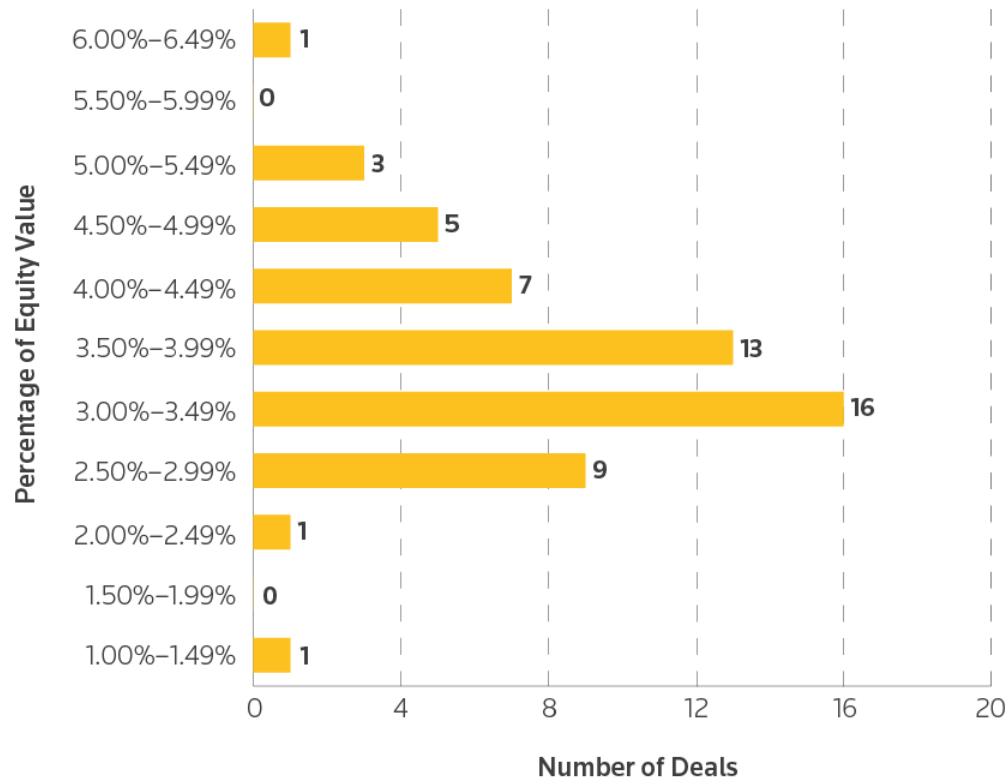
# Termination and Remedies: Break-up Fees

**FIGURE V** Break-up Fee Percentages in Stock Deals



# Termination and Remedies: Break-up Fees

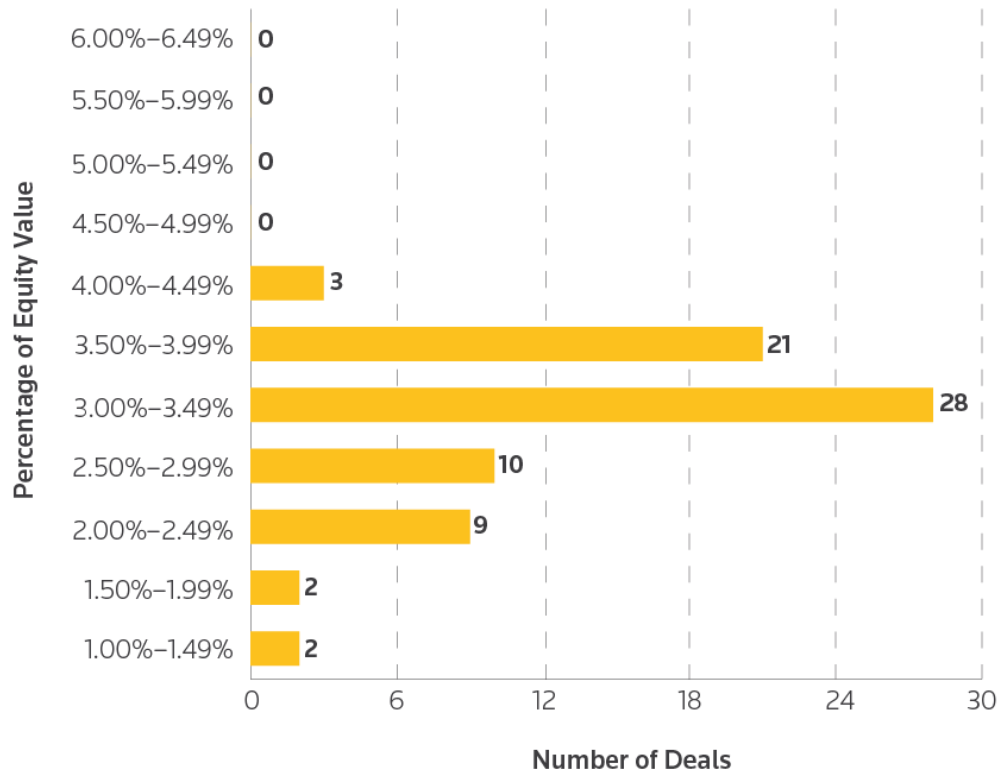
**FIGURE W** Break-up Fee Percentages in Deals below \$500 Million



Corresponding page 25

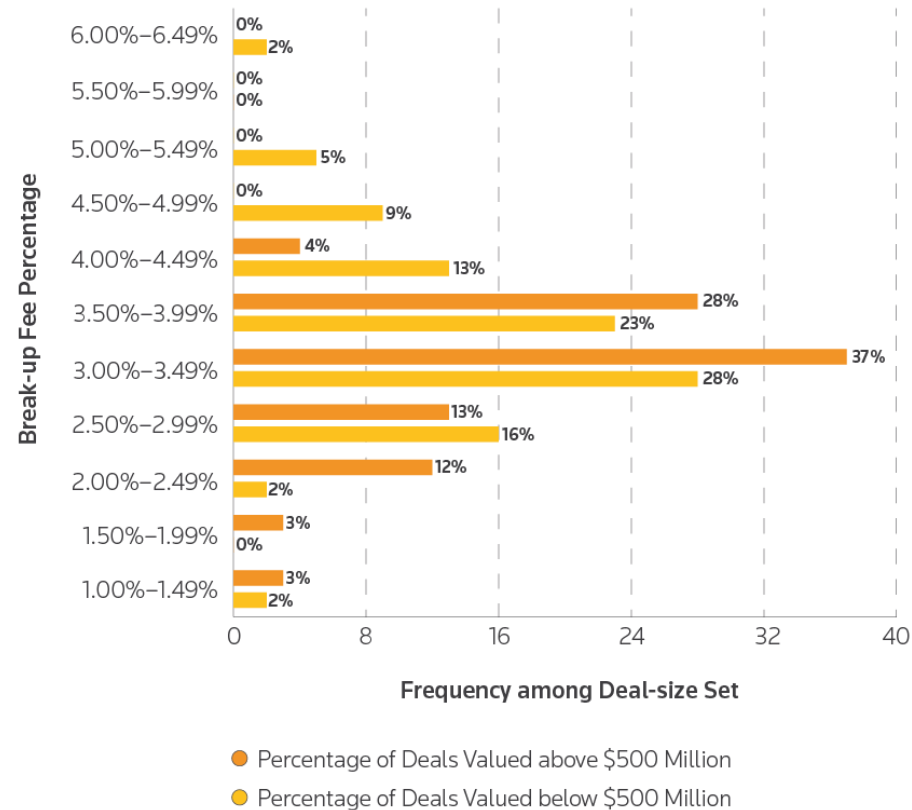
# Termination and Remedies: Break-up Fees

**FIGURE X** Break-up Fee Percentages in Deals above \$500 Million



# Termination and Remedies: Break-up Fees

**FIGURE Y** Break-up Fee Percentages by Deal Value





# Deal-Protection Packages

# Deal-Protection Scores: Methodology

**FIGURE Z** Deal-Protection Score Methodology

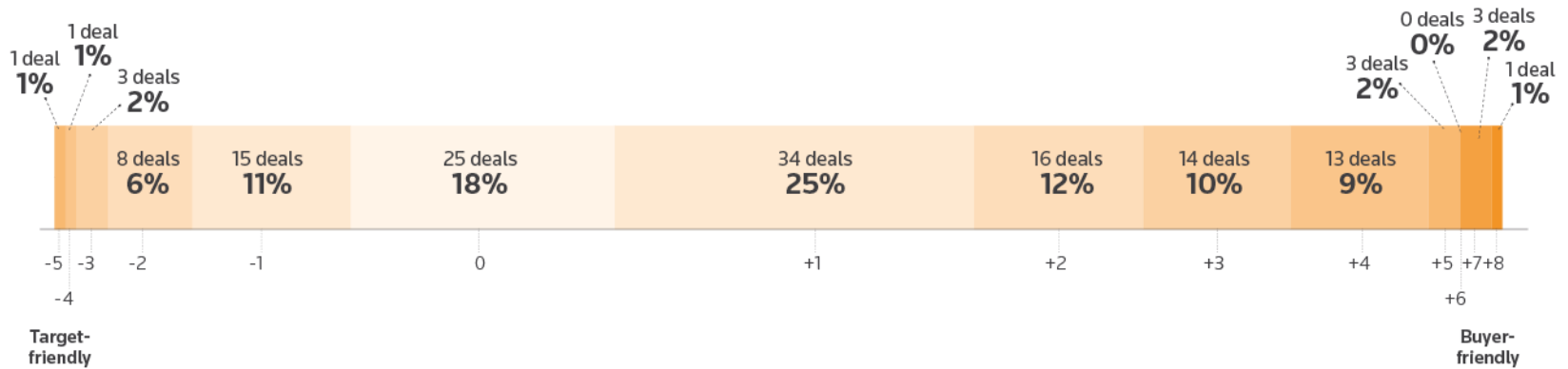
| MERGER AGREEMENT PROVISION  | SCORE            |
|---|------------------|
| <b>Window-shop Conditions</b>   |                  |
| Determination before exercise of the window-shop that failure to take action would constitute a breach of the board's fiduciary duties              | One point        |
| Window-shop exception only for acquisition proposals that are already a superior proposal or made for a majority of the stock of the target company | One point        |
| <b>Go-shops and Related Provisions</b>  |                  |
| Conventional go-shop provision (regardless of length)   | Minus two points |
| A limited go-shop or other modification to the break-up fee to incentivize post-signing offers  | Minus one point  |
| <b>Fiduciary Out</b>  |                  |
| Fiduciary out for superior proposal only  | One point        |
| Fiduciary out for superior proposal or intervening event  | Zero points      |
| Fiduciary out for general fiduciary duties  | Minus one point  |
| <b>Matching Rights</b>  |                  |
| Five-day initial matching right   | One point        |

| MERGER AGREEMENT PROVISION  | SCORE            |
|---|------------------|
| <b>Matching Rights</b>  |                  |
| No initial matching right   | Minus two points |
| No last-look matching right   | Minus one point  |
| Last-look matching right for superior proposals for at least three days | One point        |
| <b>Termination</b>  |                  |
| No termination right for superior offer                                 | Two points       |
| Force the vote provision  | One point        |
| <b>Break-up Fee</b>   |                  |
| Break-up fee above 5.00% of equity value                                | Three points     |
| Break-up fee between 4.00% and 4.99% of equity value                    | Two points       |
| Break-up fee between 3.50% and 3.99% of equity value                    | One point        |
| Break-up fee between 3.00% and 3.49%                                    | Zero points      |
| Break-up fee between 2.00% and 2.99%                                    | Minus one point  |
| Break-up fee below 2.00%  | Minus two points |



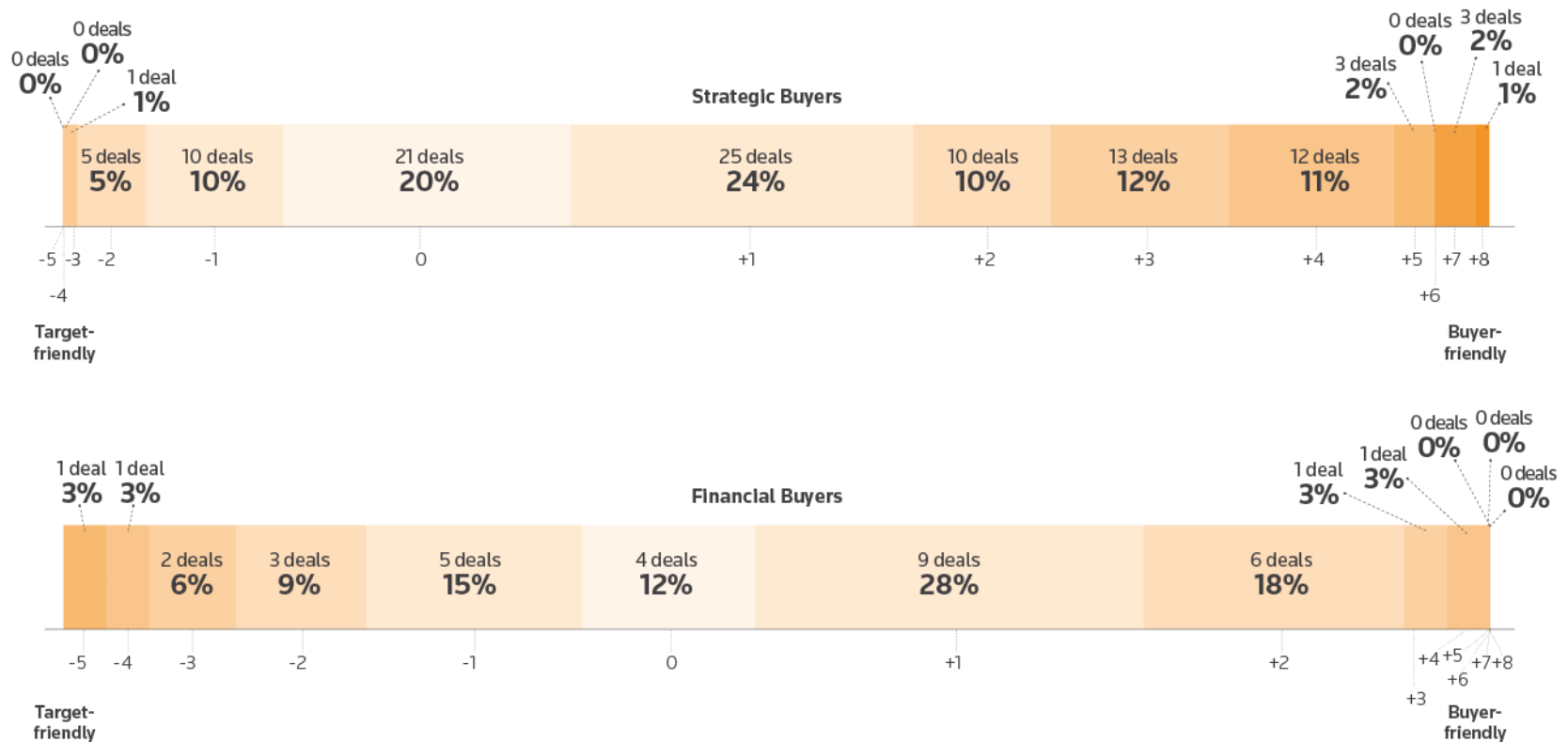
# Deal-Protection Scores: Overall

**FIGURE AA** Deal-Protection Scores



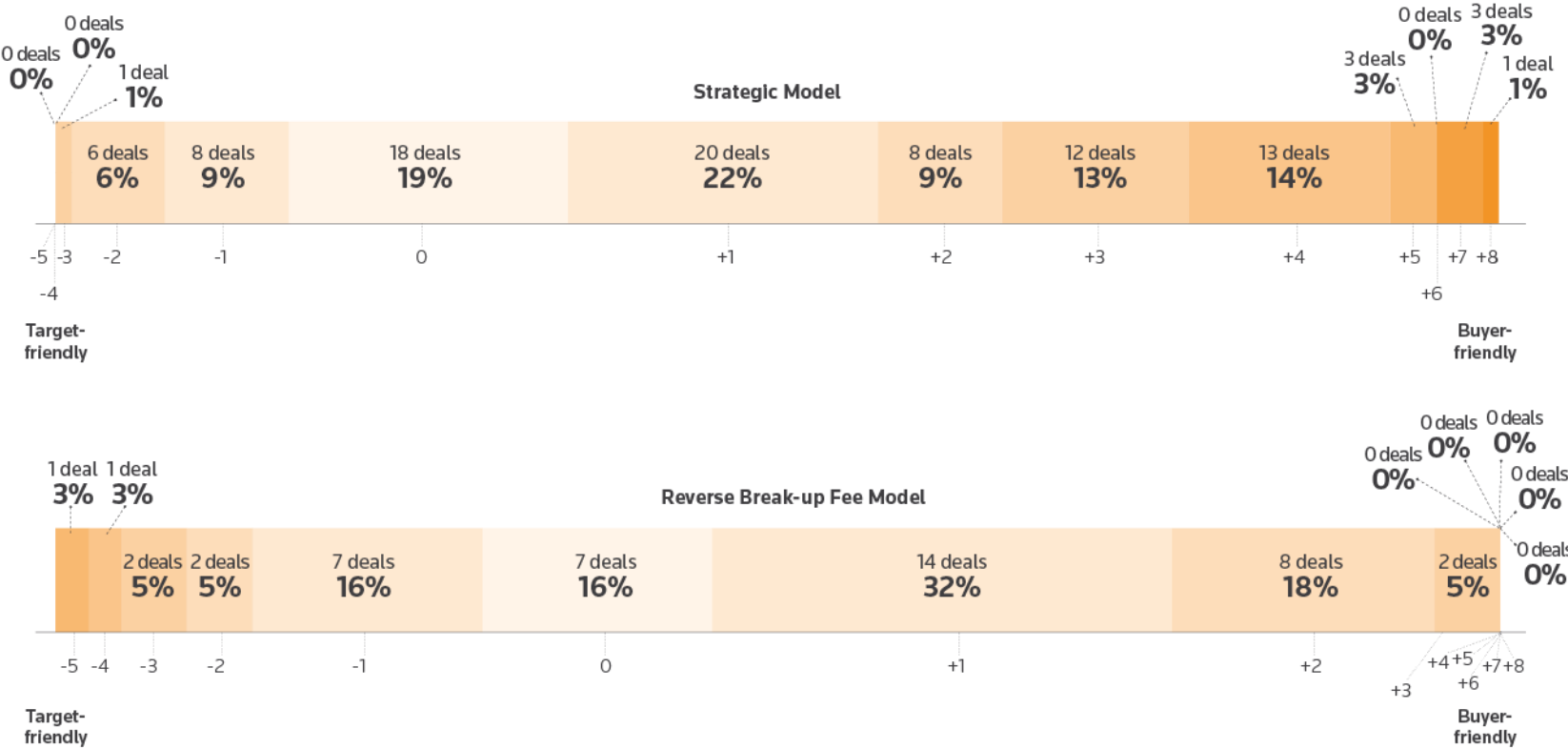
# Deal-Protection Scores by Buyer Type

**FIGURE BB** Deal-Protection Scores by Buyer Type



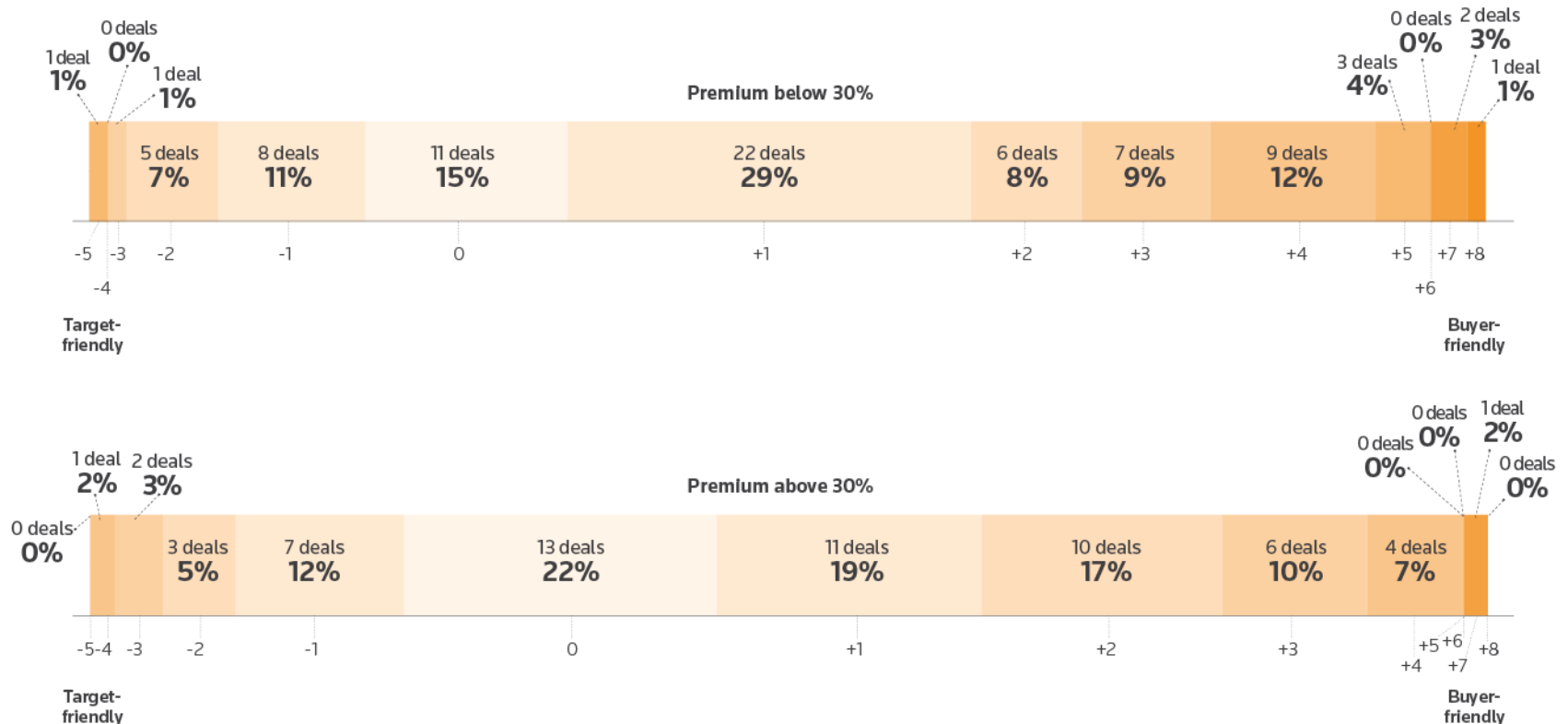
# Deal-Protection Scores by Buyer Remedy

**FIGURE CC** Deal-Protection Scores by Remedy for Buyer Breach



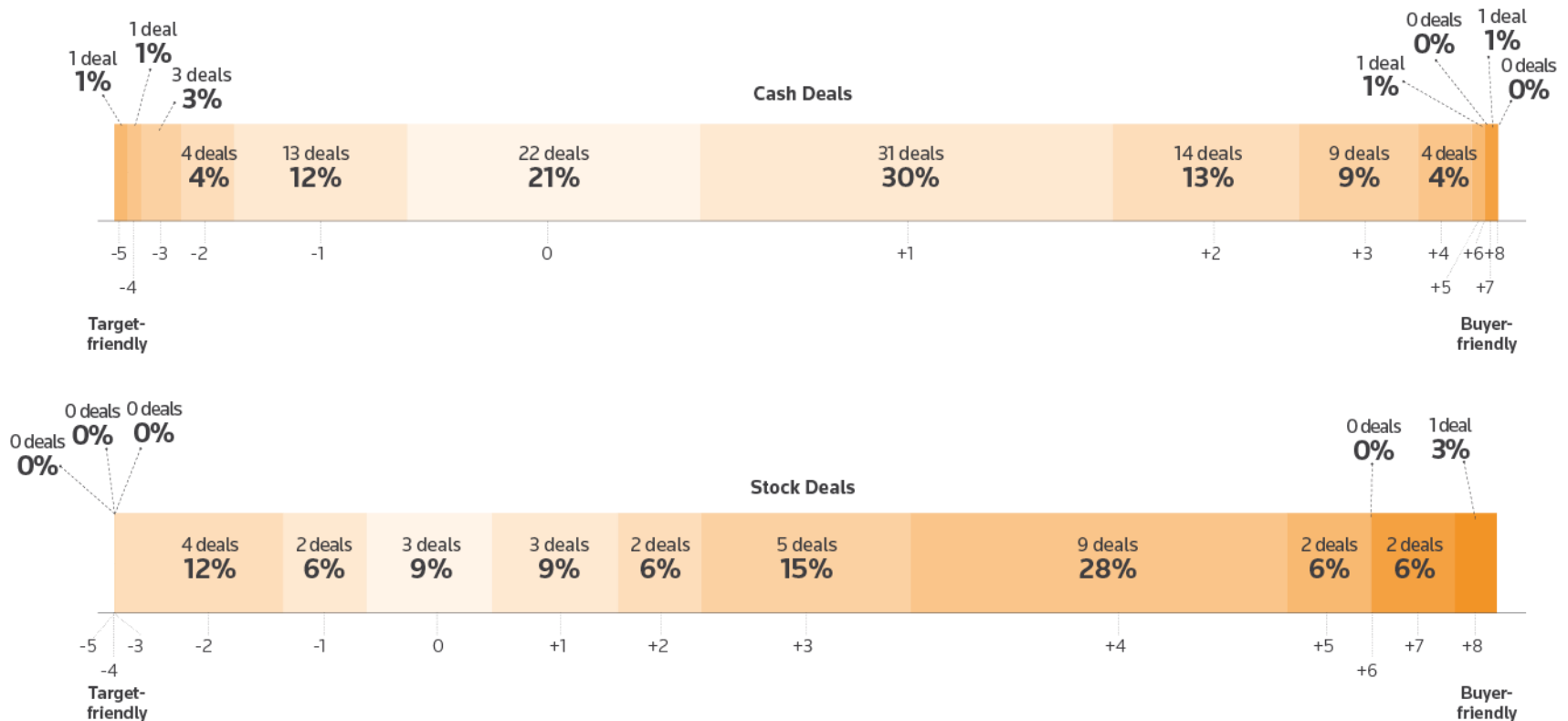
# Deal-Protection Scores by Premium

**FIGURE DD** Deal-Protection Scores by Premium



# Deal-Protection Scores by Consideration Type

**FIGURE EE** Deal-Protection Scores by Consideration Type



Corresponding page 35

# Questions

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

---

- Standstill Agreements in Public M&A Deals
- Merger Agreement (Tender Offer, Pro-Buyer)
- Tender Offer Timeline (With Section 251(h) Merger)