

Practical Law™

# DEAL PROTECTIONS AND REMEDIES

A Study of Public Merger  
Agreements in 2016



the answer company™  
**THOMSON REUTERS®**

Legal know-how  
means taking leaps  
instead of steps.

## Thomson Reuters Practical Law

**Legal know-how to cover more ground in less time.**

Practical Law™ helps you make more of your limited time with trusted answers when you need them most. With standard documents, practice notes, checklists, and more, you can respond faster to client requests, quickly familiarize yourself with new practice areas, and stay on top of key changes in the law. Practical Law – designed to make you even better at your job, so you can move on to what's next.

**TRY IT FREE at [TryPracticalLaw.com](https://www.TryPracticalLaw.com)**



the answer company™

**THOMSON REUTERS®**

# CONTENTS

---

## STUDY OVERVIEW

Executive Summary

Study Sample

## POST-SIGNING MARKET CHECK

The No-Shop Covenant

- Mutual No-Shop Covenant

Go-Shop Rights

- Go-Shop Terms
- Strategic vs. Financial Buyers

The Window-Shop Exception

- Threshold for Acquisition Proposal
- No-Shop Compliance Condition
- Window-Shop Fiduciary Determination
- Waivers of Standstills

## FIDUCIARY OUTS AND MATCHING RIGHTS

The Fiduciary Out

- Fiduciary Out Triggers
- Threshold for Superior Proposal
- No-Shop Compliance Condition

- Knowledge Threshold for Intervening Event
- Exceptions from Intervening Event
- Fiduciary Determination

Matching Rights

- Initial Matching Rights for Superior Proposal Fiduciary Out
- Initial Matching Rights for Intervening Events and General Compliance
- "Last-Look" Matching Rights
- Mutual Fiduciary Outs and Matching Rights

## TERMINATION AND REMEDIES

Termination Rights

Force-the-Vote Covenant

Break-Up Fee Triggers

- No-Vote Expense Reimbursement
- General Breach
- Change of Recommendation
- Agreement for Superior Proposal
- Breach of No-Shop and Stockholder-Meeting Covenants
- Tail-Period Transactions

Break-Up Fee Amounts

- All Transactions
- Cash vs. Stock Deals
- Break-Up Fees by Deal Size
- Buyer Fiduciary Break-Up Fees

## APPENDIX

Table A: All Transactions

Table B: Post-Signing Market Check

Table C: Fiduciary Outs and Matching Rights

Table D: Termination and Break-Up Fees

## IN THIS VOLUME

Executive Summary

Go-Shop Rights in 2016: Excerpt

Study Sample

Appendix: Excerpt

## EXECUTIVE SUMMARY

This is the eighth edition of Practical Law's annual survey of public merger transactions presented at the American Bar Association Business Law Section's annual spring meeting. It is also our fourth survey of deal-protection measures binding target companies in public M&A deals. In this study we analyze the provisions that parties negotiate to balance a buyer's desire for deal certainty with a target company board's need to change its merger recommendation in order to satisfy its fiduciary duties. This book provides a snapshot of the full deal-protections study; you can find and download the full study at [PracticalLawDealStudy.com](https://www.practicallaw.com/dealstudy).

This year's study comes at an inflection point in M&A dealmaking. The Delaware Supreme Court's seminal 2015 decision in *Corwin v. KKR* heralded a new era of Delaware M&A jurisprudence, in which the affirmative vote of the informed, disinterested stockholders in favor of a merger transaction now restores the presumptions of the business judgment rule in favor of the target company's board of directors. Subsequent rulings in 2016 and 2017 confirmed that the *Corwin* principle applies equally to transactions structured as front-end tender offers. The Delaware Supreme Court also held that the standard for director liability after the stockholder vote is waste—a standard that as a practical matter means dismissal of typical *Revlon* claims. This year's study provides an initial snapshot of how practitioners have begun responding to the Delaware judiciary's increased deference toward director decision-making in M&A.

Although we primarily focus on the deal-protection provisions binding target companies, we also review the deal protections negotiated by buyers who require their own stockholder vote. This analysis has two goals: to learn how frequently those buyers agree to symmetrical

deal-protection measures, and to determine how reciprocally binding covenants and remedies affect the deal protections agreed to by the target company.

Unique among the existing literature and surveys of deal-protection provisions, the Practical Law study examines how various deal characteristics—including buyer type, form of consideration, deal size, and financing—affect the negotiations and ultimate agreement between the transaction parties.

## Post-Signing Market Check

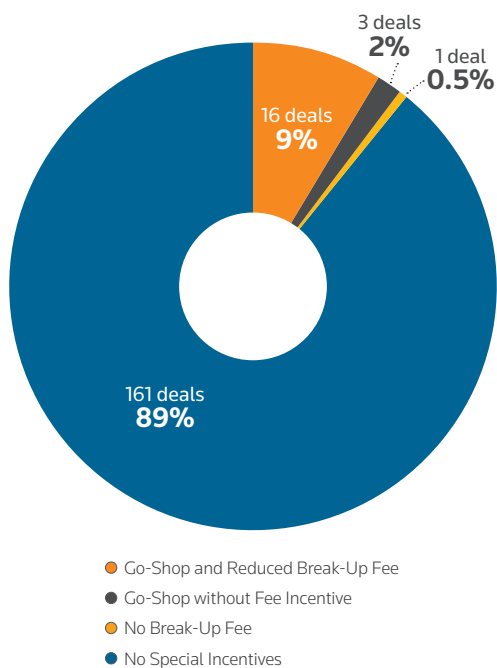
We organize the deal protections according to the chronological phases of the post-signing process. On that basis, we analyze in the first section of the study the provisions that govern the target company's immediate post-signing interaction with third-party bidders—namely, the no-shop covenant and its associated exemptions. The focus in this section is on:

- Mutual no-shop covenants binding buyers in deals that require approval by the buyer's own stockholders.
- Whether the agreement provides the target company with a go-shop right, and if so, the length of the go-shop period and the favorable contractual treatment for parties who submit bids during the go-shop period.
- The window-shop exception to the no-shop.

To illustrate the study's analysis of deal protections, the following is a sample of the discussion of go-shop rights in 2016.

*Figure B* illustrates the number of agreements in this year's study sample with any form of go-shop right and other reduced-fee incentive.

**FIGURE B** Go-Shops and Reduced-Fee Incentives



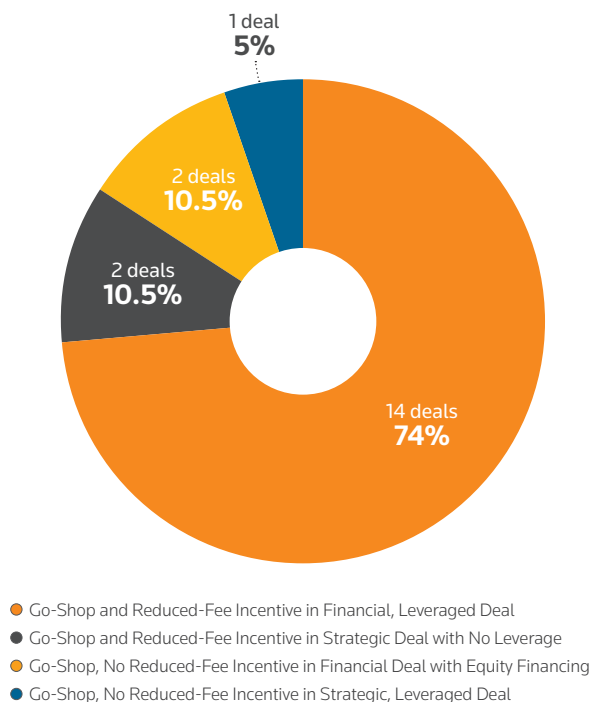
As shown in *Figure B*, parties usually (if not always) adhere to the practice of tying the go-shop right to a two-tier break-up fee structure. Of the 19 agreements with a go-shop, 16 included a two-tier break-up fee and three did not. These latter three agreements gave the target company an affirmative right to seek third-party bidders, but did not otherwise incentivize third parties to submit an acquisition proposal by reducing the break-up fee.

Significantly, this year's edition of Practical Law's deal-protections study is the first in which the study did not observe any agreements with a reduced-fee incentive without an affirmative go-shop right. In 2015, the study identified three public merger agreements out of 187 that provided for a reduced-fee incentive without granting the target company a right to actively solicit bids. This followed seven similar agreements out of 150 total agreements in the 2014 study sample and six out of 137 in 2013. The disappearance of stand-alone reduced-fee incentives in 2016 may be taken as preliminary evidence that post-*Corwin*, dealmakers feel less of a need to find creative ways for target boards to incentivize third-party bids for the sake of satisfying their fiduciary duties.

Go-shops tend to be the domain primarily of private equity transactions. Private equity buyers, with exceptions, have historically preferred to avoid a full-blown auction, sensing a disadvantage in an auction against strategic buyers who can offer other competitive advantages to the target company. Strategic buyers, by contrast, usually contend that the rationale for their mergers is to take advantage of operational synergies that cannot be matched merely with a higher per-share bid, and that they therefore should not be subject to further market checks.

The split between strategic and financial buyers for the 19 deals with go-shop rights is shown in *Figure E* (see next page).

The results from 2016 illustrate a return to historical practice, before the advent in recent years of reduced-fee incentives without affirmative go-shop rights and of strategic buyers agreeing to go-shops. The most common transactions for a go-shop with a reduced-fee incentive were leveraged buyouts by private equity buyers. In these deals, where *Revlon* duties are active before the stockholder vote and the closing depends on third-party financing, the board of the target company has the strongest argument for a right to induce third-party bids that might be superior to the signed agreement.

**FIGURE E** Go-Shops by Buyer Type and Financing

In 2016, only three strategic buyers agreed to any form of go-shop right, with or without a reduced-fee incentive. This compares to 11 out of 162 strategic buyers in 2015 who agreed to a go-shop, plus another two strategic buyers who agreed to a reduced-fee incentive without a go-shop. In 2014, six out of 131 strategic buyers agreed to a go-shop and another six agreed to a reduced-fee incentive without an affirmative go-shop. The near-vanishing of go-shops in strategic deals, as with the complete disappearance of stand-alone reduced-fee incentives, may indicate that post-*Corwin* buyers have a greater willingness to take a more aggressive position in rejecting go-shops and similar devices in public merger negotiations.

## Fiduciary Out and Matching Rights

The second section of the study moves on to the stage in which a target company's board wishes to change its recommendation to the stockholders to approve the signed merger agreement. Here the study reviews:

- The bases on which the target company can exercise its fiduciary out and change its recommendation for the merger.
- Whether the fiduciary out for a superior proposal includes a condition that the third-party bid not have been the result of a breach of the no-shop covenant.
- The threshold amount of equity or assets of the target company for which a third party must bid, as well as other qualification such as committed financing, for the bid to qualify as a superior proposal and allow the target company to exercise its fiduciary out.
- For agreements that allow a fiduciary out for an intervening event, the knowledge threshold for the definition of a new event and whether the agreement describes any types of changes or developments that do not qualify as an intervening event.
- The formulation of the fiduciary-duties determination that the board must make before exercising its fiduciary out, and how that formulation compares to the window-shop determination, where applicable.
- The matching rights available to the buyer to improve its offer before the target company exercises its fiduciary out.
- The frequency of reciprocal fiduciary outs and matching rights for buyers.

## Termination and Break-Up Fees

The third section of the study focuses on the termination stage, first by reviewing the target company's right to terminate the agreement to accept a superior proposal. Here the study also analyzes:

- How deals with stock consideration and the buyer's own requirement for stockholder approval can affect the negotiation for this termination right.
- Whether the merger agreement includes a "force the vote" covenant that requires the target company to bring the merger

to a stockholder vote (unless the merger agreement has been terminated), even though the board of directors of the company no longer recommends the merger.

This section of the study also analyzes break-up fees, including their triggers and amounts. In analyzing the triggers for payment of a fee, the study reviews:

- Whether the target company must make any payment to the buyer—typically no more than a reimbursement of the buyer's expenses, up to a negotiated amount—if the agreement is terminated on the basis of the target company's shareholders rejecting the merger (colloquially known as a "naked no-vote").
- The frequency of including a change of recommendation and acceptance of a superior proposal as triggers for payment of the break-up fee.
- The different formulations of the trigger for entering into a superior proposal during a tail period following termination.
- The frequency of triggers for breach of the no-shop and stockholder-meeting covenants and the standard of breach in each of those events.
- Whether a fiduciary break-up fee is payable by the buyer for reasons similar to the target company. (This does not contemplate reverse break-up fees payable by the buyer for reasons of breach, financing failure, antitrust failure, or other failure to close the merger when required.)

The study also reviews the sizes of break-up fees across the study sample. Here the study not only presents the sizes of the fees overall, but compares them in cash versus stock deals, in stock deals where the buyer also pays a fiduciary break-up fee, and on the basis of deal size.

## STUDY SAMPLE

The study sample consists of merger agreements for acquisitions of US reporting companies in 2016 with equity values at signing of \$100 million or more, as tracked by Practical Law's What's Market database (excluding certain parent/subsidiary and inversion transactions). What's Market summarizes merger agreements on an ongoing basis for acquisitions of reporting companies (excluding REITs and debt-only issuers) incorporated in a US jurisdiction with an announced deal value of at least \$100 million. Based on these parameters, the survey sample for this year's study consisted of 181 public merger agreements.

### STUDY SAMPLE AT A GLANCE: 181 MERGER AGREEMENTS

#### 144 with Strategic Buyers

- 28 in Q1'16, 42 in Q2'16, 39 in Q3'16, 35 in Q4'16.
- Includes one deal with a consortium of a strategic buyer and two financial buyers.
- Eighty-two buyers offered all-cash consideration, 23 offered all-stock (or other form of equity) consideration, 32 offered a mix of cash and stock, 7 offered a cash/stock election.
- Sixty-three buyers relied on new debt financing to finance the transaction. Three of these also raised equity financing from new investors. Five buyers who offered all-stock consideration raised new debt to refinance existing indebtedness.

#### 37 with Financial/Private Equity Buyers

- 5 in Q1'16, 12 in Q2'16, 12 in Q3'16, 8 in Q4'16.
- Two deals included a rollover with existing stockholders.
- Twenty-four buyers relied on new debt and equity financing; ten relied on new equity financing only, without raising new debt; two financial buyers raised new debt without equity financing; one financial buyer did not raise any new financing.
- Eight agreements were structured as front-end tender offers.
- Two of the agreements were themselves superior offers to agreements that were subsequently terminated.

**Table A:** All Transactions (Chronological Order)

Deals (Buyer/Target)	Equity Value	Buyer Type	Consideration; Structure	New Debt or Equity Financing	Buyer Stockholder Vote	Break-Up Fee (Percentage of Equity Value)
OceanFirst Financial Corp./Cape Bancorp, Inc.	\$208.1 million	Strategic	Cash and stock (15/85 split); single-step RTM followed by upstream merger and merger of banking subsidiaries	None	Yes	\$7.2 million (3.46%)
Thermo Fisher Scientific Inc./Affymetrix Inc.	\$1,447.50 million	Strategic	All cash; single-step RTM	None	None	\$55 million (3.80%)
Shire plc/Baxalta Incorporated	\$30,951.74 million	Strategic	Cash and stock (40/60 split); single-step RTM	Debt financing	Yes	\$369 million (1.19%) and an expense reimbursement of up to \$110 million (0.36%)
Old National Bancorp/Anchor BanCorp Wisconsin Inc.	\$461 million	Strategic	Cash/stock election (capped at 40/60 split); single-step forward merger followed by merger of banking subsidiaries	None	None	\$15 million (3.25%) and an uncapped expense reimbursement
Microchip Technology Incorporated/Atmel Corporation (topping bid)	\$3,560 million	Strategic	Cash and stock (86/14 split); single-step RTM	None	None	\$137.3 million (3.86%) and an expense reimbursement of up to \$20 million (0.56%)
Chemical Financial Corporation/Talmer Bancorp, Inc.	\$1,097.22 million	Strategic	Cash and stock (10/90 split); single-step forward merger followed by merger of banking subsidiaries	None	Yes	\$34 million (3.10%) and an expense reimbursement of up to \$3 million (0.27%)
Huntington Bancshares Incorporated/FirstMerit Corporation	\$3,337.79 million	Strategic	Cash and stock (25/75 split); single-step RTM followed by upstream merger and merger of banking subsidiaries	None	Yes	\$100.6 million (3.01%)
Lockheed Martin Corporation and Abacus Innovations Corporation/Leidos Holdings, Inc.	\$5,929.62 million	Strategic	Cash and stock (30/70 split); Reverse Morris Trust transaction (Lockheed Martin spins off Abacus to its stockholders, Abacus merges with and into a Leidos subsidiary; Lockheed Martin stockholders receive the merger consideration)	Debt financing	None <sup>1</sup>	\$150 million (2.53%) plus an expense reimbursement of up to \$37.5 million (0.63%)
Nexstar Broadcasting Group, Inc./Media General, Inc. (topping bid)	\$2,257.56 million, plus value of CVR	Strategic	Cash and stock (60/40 split) and CVR; single-step RTM	Debt financing	Yes	\$20 million (0.89%) or \$80 million (3.54%)

Deals (Buyer/Target)	Equity Value	Buyer Type	Consideration; Structure	New Debt or Equity Financing	Buyer Stockholder Vote	Break-Up Fee (Percentage of Equity Value)
Pinnacle Financial Partners, Inc./Avenue Financial Holdings, Inc.	\$201.4 million	Strategic	Cash and stock (10/90 split); single-step forward merger followed by merger of banking subsidiaries	None	None	\$8 million (3.97%)
Abbott Laboratories/Alere Inc.	\$5,045.51 million	Strategic	All cash; single-step RTM	Debt financing	None	\$177 million (3.51%)
Dominion Resources, Inc./Questar Corporation	\$4,411.93 million	Strategic	All cash; single-step RTM	Debt financing	Yes	\$99 million (2.24%) and an expense reimbursement of up to \$5 million (0.11%)
CalAmp Corp./LoJack Corporation	\$125.32 million	Strategic	All cash; front-end tender offer	None	None	\$4.5 million (3.59%)
FormFactor, Inc./Cascade Microtech, Inc.	\$352 million	Strategic	Cash and stock (76/24 split); single-step RTM	Debt financing	None	\$10.83 million (3.08%)
Suzhou Dongshan Precision Manufacturing Co., Ltd./Multi-Fineline Electronix, Inc.	\$611.17 million	Strategic	All cash; single-step RTM	Debt financing	Yes	\$18.3 million (2.99%)
The Vistria Group, LLC, Apollo Global Management, LLC, Najafi Companies/Apollo Education Group, Inc.	\$1,083.12 million initially, \$1,140.12 million as amended	Financial	All cash; single-step RTM	Equity financing	None	2.75% of the aggregate merger consideration and an expense reimbursement of up to \$12.5 million (1.15% initially, 1.10% as amended)
Algonquin Power & Utilities Corp./The Empire District Electric Company	\$1,495.46 million	Strategic	All cash; single-step RTM	Debt financing	None	\$53 million (3.54%)
Fortis Inc./ITC Holdings Corp.	\$6,900 million	Strategic	Cash and stock (51/49 split); single-step RTM	Debt and equity financing <sup>2</sup>	Yes	\$245 million (3.55%)
Hampton Roads Bankshares, Inc./Xenith Bankshares, Inc.	\$107.2 million	Strategic	All stock; single-step forward merger followed by merger of banking subsidiaries	None	Yes	\$4 million (3.73%)
Insight Venture Partners/Diligent Corporation	\$632.31 million	Financial	All cash; single-step RTM followed by upstream merger	Debt and equity financing	None	\$19.463 million (3.08%) and an expense reimbursement of up to \$5 million (0.79%) or up to \$7.5 million (1.19%)

Deals (Buyer/Target)	Equity Value	Buyer Type	Consideration; Structure	New Debt or Equity Financing	Buyer Stockholder Vote	Break-Up Fee (Percentage of Equity Value)
Apollo Global Management, LLC/The ADT Corporation	\$7,069.39 million	Financial	All cash; single-step RTM	Debt and equity financing <sup>3</sup>	None	\$87 million (1.23%) or \$228 million (3.23%) and an expense reimbursement of up to \$30 million (0.42%)
Tianjin Tianhai Investment Company, Ltd./Ingram Micro Inc.	\$6,008.96 million	Strategic	All cash; single-step RTM	None	Yes	\$120 million (2.00%)
MKS Instruments, Inc./Newport Corporation	\$908.42 million	Strategic	All cash; single-step RTM	Debt financing	None	\$32.6 million (3.59%)
The Southern Company/PowerSecure International, Inc.	\$426.64 million	Strategic	All cash; single-step RTM	None	None	\$12 million (2.81%) and an expense reimbursement of up to \$1 million (0.23%)
J. F. Lehman & Company/API Technologies Corp.	\$113.45 million	Financial	All cash; single-step RTM	Debt and equity financing	None	\$3.5 million (3.09%)
CCL Industries Inc./Checkpoint Systems, Inc.	\$454.97 million	Strategic	All cash; single-step RTM	None	None	\$13 million (2.86%)
Samsonite International S.A./Tumi Holdings, Inc.	\$1,828.81 million	Strategic	All cash; single-step RTM	Debt financing	Yes	\$54.7 million (2.99%) and an expense fee of \$13.7 million (0.75%)
AMC Entertainment Holdings, Inc./Carmike Cinemas, Inc.	\$756.26 million	Strategic	All cash; single-step RTM	Debt financing	None	\$30 million (3.97%)
Midland Financial Co./1st Century Bancshares, Inc.	\$115.98 million	Strategic	All cash; single-step RTM followed by merger of banking subsidiaries	None	None	\$4.5 million (3.88%) and an expense reimbursement of up to \$1 million (0.86%)
Apollo Global Management, LLC/The Fresh Market, Inc.	\$1,449.00 million	Financial	All cash; front-end tender offer	Debt and equity financing	None	\$17 million (1.17%) or \$34 million (2.35%) plus an expense reimbursement of up to \$4 million (0.28%)
Coherent, Inc./Rofin-Sinar Technologies Inc.	\$935.78 million	Strategic	All cash; single-step RTM	Debt financing	None	\$25.5 million (2.73%)

Deals (Buyer/Target)	Equity Value	Buyer Type	Consideration; Structure	New Debt or Equity Financing	Buyer Stockholder Vote	Break-Up Fee (Percentage of Equity Value)
TransCanada Corporation/ Columbia Pipeline Group, Inc.	\$10,318.18 million	Strategic	All cash; single-step RTM	Debt financing and equity offering	None	\$309 million (3.00%) and an expense reimbursement of up to \$40 million (0.39%)
The Sherwin-Williams Company/The Valspar Corporation	\$9,386.09 million	Strategic	All cash; single-step RTM	Debt financing	None	\$300 million (3.20%)
Alaska Air Group, Inc./ Virgin America Inc.	\$2,618.10 million	Strategic	All cash; single-step RTM	None	None	\$78.5 million (3.00%)
Brocade Communications Systems, Inc./Ruckus Wireless, Inc.	\$1,477.82 million	Strategic	Cash and stock (41/59 split); front- end tender offer	Debt financing	None	\$50 million (3.38%)
Westfield Financial, Inc./ Chicopee Bancorp, Inc.	\$110.76 million	Strategic	All stock; single-step forward merger followed by merger of banking subsidiaries	None	Yes	\$4 million (3.61%) and an expense reimbursement of up to \$750,000 (0.68%)
Handy & Harman Ltd./SL Industries Inc.	\$163.24 million	Strategic	All cash; front-end tender offer	None	None	\$5.265 million (3.23%) and an expense reimbursement of up to \$1 million (0.61%)
Corning Incorporated/ Alliance Fiber Optic Products, Inc.	\$311.92 million	Strategic	All cash; front-end tender offer	None	None	\$10,541,022 (3.38%)
Mitel Networks Corporation/Polycom, Inc. (terminated; break-up fee paid)	\$1,960 million	Strategic	Cash and stock (23/77 split); single- step RTM	Debt financing	Yes	\$60 million (3.06%)
Vista Equity Partners/ Cvent, Inc.	\$1,600 million	Strategic	All cash; single-step RTM	Debt financing	Yes	\$45.3 million (2.75%)
Apex Technology Co., Ltd., PAG Asia Capital, Legend Capital Management Co., Ltd./Lexmark International, Inc.	\$2,000 million	Strategic	All cash; single-step RTM	Debt financing	Yes	\$95 million (3.46%)



For the full study, see  
**PracticalLawDealStudy.com**

# Table B: Post-Signing Market Check

Deals (Buyer/Target)	Buyer No-Shop	Go-Shop; Treatment of Excluded Parties	Break-Up Fee Bid Incentive	Threshold for Acquisition Proposal	Window-Shop Fiduciary Determination	No-Shop Compliance Condition	Waivers of Existing Standstills
Fortis Inc./ITC Holdings Corp.	None	None	None	20% or more	Could be reasonably likely to be inconsistent with fiduciary duties	No material breach	Can waive standstills to the extent necessary to allow an acquisition proposal to be made if failure to do so could be reasonably likely to be inconsistent with fiduciary duties
Hampton Roads Bankshares, Inc./ Xenith Bankshares, Inc.	Yes	None	None	15% or more	Would be more likely than not to result in a violation of fiduciary duties	Bid must be "unsolicited"	Silent
Insight Venture Partners/ Diligent Corporation	None	None	None	20% or more	Would reasonably be expected to be inconsistent with fiduciary duties	No breach	Can waive standstills if failure to do so would reasonably be expected to be inconsistent with fiduciary duties
Apollo Global Management, LLC/ The ADT Corporation	None	Yes, 40 days; no deadline on negotiations with Excluded Parties whose proposals the board determines would reasonably be expected to lead to a superior proposal	38% of the regular fee for entering into a definitive agreement for a superior proposal with an Excluded Party	20% or more	Would be inconsistent with fiduciary duties	No material breach	Silent during window-shop, but waiver expressly permitted during go-shop period
Tianjin Tianhai Investment Company, Ltd./Ingram Micro Inc.	None	None	None	20% or more	None	No violation	Waivers not permitted and must terminate any waiver previously granted <sup>1</sup>
MKS Instruments, Inc./ Newport Corporation	None	None	None	15% or more	None	No breach	Waivers not permitted <sup>1</sup>
The Southern Company/ PowerSecure International, Inc.	None	None	None	10% or more	Would reasonably be expected to be inconsistent with fiduciary duties	No violation	Can waive standstills to the extent that failure to do so would be inconsistent with fiduciary duties
J. F. Lehman & Company/API Technologies Corp.	None	None	None	More than 15%	Would be inconsistent with fiduciary duties	No material breach	Can waive standstills if failure to do so would be inconsistent with fiduciary duties

Deals (Buyer/Target)	Buyer No-Shop	Go-Shop; Treatment of Excluded Parties	Break-Up Fee Bid Incentive	Threshold for Acquisition Proposal	Window-Shop Fiduciary Determination	No-Shop Compliance Condition	Waivers of Existing Standstills
CCL Industries Inc./Checkpoint Systems, Inc.	None	None	None	15% or more	None	No material breach	Silent <sup>3</sup>
Samsonite International S.A./Tumi Holdings, Inc.	None	None	None	15% or more	None	No material breach	Waivers not permitted <sup>2</sup>
AMC Entertainment Holdings, Inc./Carmike Cinemas, Inc.	None	None	None	20% or more	Would be inconsistent with fiduciary duties	No material breach	Can waive standstills if failure to do so would be inconsistent with fiduciary duties
Midland Financial Co./1st Century Bancshares, Inc.	None	None	None	15% or more	Would reasonably be expected to constitute a breach of fiduciary duties	No breach	Silent
Apollo Global Management, LLC/The Fresh Market, Inc.	None	Yes, 21 days; no deadline on negotiations with Excluded Parties whose proposals the board determines would reasonably be expected to result in a superior proposal	50% of the regular fee for a change of recommendation made before the end of the go-shop period or for entering into a preliminary agreement with a bidder in respect of a proposal made before the end of the go-shop period and which the board	20% or more	None	No breach	Can waive standstills in company's discretion
Coherent, Inc./Rofin-Sinar Technologies Inc.	None						Waivers not permitted <sup>2</sup>
TransCanada Corporation/Columbia Pipeline Group, Inc.	None	None	None	More than 15%	Would reasonably be expected to result in a breach of fiduciary duties	No breach	Silent



For the full study, see  
**PracticalLawDealStudy.com**

**Table C:** Fiduciary Outs and Matching Rights

Deals (Buyer/Target)	Fiduciary Out Triggers: Initial Matching Rights	Fiduciary Out Triggers: Last-Look Matching Rights	Buyer Fiduciary Out: Matching Rights	No-Shop Compliance Condition	Fiduciary Determination	Threshold for Superior Proposal	Knowledge Condition for Intervening Event	Exclusions from Intervening Event
Pfizer Inc./Anacor Pharmaceuticals, Inc.	Superior Proposal: 3 business days Intervening Event: 3 business days	Superior Proposal: 3 business days Intervening Event: None	None	No breach	Would be reasonably likely to be inconsistent with fiduciary duties	50% or more	Not known to the board, or if known, the consequences of which (or the magnitude thereof) were not known	None
Range Resources Corporation/Memorial Resource Development Corp.	Superior Proposal: 3 business days Intervening Event: 3 business days	Superior Proposal: 24 hours Intervening Event: None	Intervening Event: 3 business days	No material breach	Would be inconsistent with the board's duties	50% or more	Not known (or if known, the magnitude or material consequences of which were not known) to the board	Any event resulting from any action required to be taken pursuant to the merger agreement
NICE-Systems Ltd./inContact, Inc.	Superior Proposal: 4 business days Intervening Event: 4 business days	Superior Proposal: 2 business days Intervening Event: None	None	No violation	Would be reasonably likely to be inconsistent with fiduciary duties	50% or more	Unknown and not reasonably foreseeable to the board	None
Arbor Pharmaceuticals, LLC/XenoPort, Inc.	Superior Proposal: 4 business days Intervening Event: 4 business days	Superior Proposal: 3 business days Intervening Event: None	None	No breach	Would be a breach of fiduciary duties	Majority of the voting power or any business accounting for 50% or more of the assets	No explicit knowledge standard	The announcement of the merger agreement or contemplated transactions; meeting or exceeding internal or analysts' projections
C-III Capital Partners LLC/Resource America, Inc.	Superior Proposal: 4 business days Intervening Event: 4 business days	Superior Proposal: 4 business days Intervening Event: 4 business days	None	No breach	Would be a breach of fiduciary duties	50% or more	Not known to the board, or if known, the consequences of which (or the magnitude thereof) were not known by the board	Changes in the stock's market price or trading volume



For the full study, see  
[PracticalLawDealStudy.com](https://www.practicallaw.com/dealstudy)

## Table D: Termination and Break-Up Fees

Deals (Buyer/Target)	Target Co. Termination for Superior Proposal	Force the Vote Covenant	Naked No-Vote Payment	General Breach Causing Failure to Close	Breach of No-Shop	Breach of Stockholder-Meeting Covenant	Change of Recommendation	Agreement for Superior Proposal	Tail-Period Transaction after Announced Bid	Buyer Fiduciary Break-Up Fee
Great Plains Energy Incorporated/ Westar Energy, Inc.	Yes	None	None	None	None	None	3.26%	3.26%	3.26% for Outside Date/ No-Vote/ Breach, followed by definitive agreement within 12 months that ultimately closes	0.93% for no-vote, 2.09% for reciprocal triggers
Accel-KKR/ SciQuest, Inc.	Yes	Yes	None	None	4.06% and expenses up to 0.78% for intentional and material breach in connection with a superior proposal; 8.12% and expenses up to 0.78% in connection with an intervening event	4.06% and expenses up to 0.78% for intentional and material breach in connection with a superior proposal; 8.12% and expenses up to 0.78% in connection with an intervening event	4.06% and expenses up to 0.78% in connection with a superior proposal; 8.12% and expenses up to 0.78% in connection with an intervening event	1.98% and expenses up to 0.78% during the go-shop period; 4.06% and expenses up to 0.78% after the end of the go-shop period	4.06% and expenses up to 0.78% for Outside Date/ No-Vote/ Willful Breach, followed by definitive agreement within 12 months	None
salesforce.com, inc./ Demandware, Inc.	Yes	N/A	N/A	None	3.52% for willful and material breach	N/A	3.52%	3.52%	3.52% for Outside Date/ Breach, followed by definitive agreement (whether or not for the announced bid) within 12 months that ultimately closes	None



For the full study, see  
**PracticalLawDealStudy.com**



**PRACTICAL LAW** provides legal know-how that gives lawyers a better starting point.

Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service, and add more value.

**REQUEST A FREE TRIAL TODAY** [TryPracticalLaw.com](https://www.practical-law.com) | 888.529.6397