



Getting the Deal (and Protecting the Downside)

Structuring Minority Investments Through Voting
Rights, Transfer Mechanics and Capital Protections

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Agenda


- Market Context
- Key Tensions
- Due Diligence
- Governance Rights
- Economic Protections
- Transfer & Exit Mechanics
- Alternative Structures
- Q&A





The Market Context


The Macro Environment


 Global Trade and Tariff Instability

 Sticky Inflation and Mixed Rate-Cut Expectations


 Geopolitical and National Security Review Risk


 Operational and Supply Chain Uncertainty


 Artificial Intelligence

 Private Equity Exit Backlog

Why Minority Structures?

 Valuation Uncertainty Driving Partial Ownership

 Hot Deals Market – harder to deploy capital, forcing creative deal types

 Partial Exits – PE firms sell down minority but retain upside

 Competitive Auctions

 Portfolio Diversification Across Multiple Assets

The Core Challenge

Balancing Control and Protection

Majority Equityholder

- Operational freedom and day-to-day control
- Strategic decision-making authority
- Flexibility on timing and method of exit
- Minimal governance constraints

Minority Investor

- Protect invested capital value
- Influence or control over exit timing
- Governance rights on material matters
- Anti-dilution and liquidity protections

Pre-Signing Dynamics

Seller Goals	Investor Goals
<p>Accelerated, Front-loaded Processes: Compressed diligence and desire for simultaneous sign-and-close</p>	<p>Robust Due Diligence: Uncover and quantify risks early, assess value, structure protections, and make informed decisions</p>
<p>Closing Certainty: Goal is to eliminate optionality or walk rights following signing</p> <ul style="list-style-type: none">• Key Provisions: Limited and clear closing conditions, MAE definition, representation and warranty bring-down qualifiers, financing commitments, deposits, termination provisions, specific performance, break fees	<p>Meaningful Investor Rights: Focus on negotiating protections going forward:</p> <ul style="list-style-type: none">• Voting rights for key decisions• Economic rights• Exit rights
<p>Creative Deal Structures: Use of minority stakes, alternative capital sources (private credit, “hybrid” capital, family offices) to get the deal done</p>	<p>Creative Deal Structures: Flexible deal structure to bridge evaluation gaps</p> <ul style="list-style-type: none">• Staged acquisitions• Earnouts• Alternative Financings

Post-Closing Protection Framework

Seller Goals	Investor Goals
<p><u>Clean Sales:</u> Strong focus on achieving “clean” sales, frequently using RWI to minimize or eliminate post-closing exposure</p>	<p><u>Maximum Post-Closing Protection:</u> Leveraging diligence findings to negotiate robust protections</p> <p><u>RWI Considerations:</u> Availability, scope, and limitations of RWI for minority positions</p>
<p><u>Limited Post-Closing Entanglements:</u> No survival periods for general reps, smaller escrows</p>	<p><u>Key Tension:</u> Who is making the reps and who will be responsible for the reps</p>
<p><u>Retaining Operating Control:</u> Focus on continuing control over operations and day-to-day management of the company</p>	<p><u>Ongoing Governance Rights:</u> Voting, board, information, and exit rights that persist throughout the investment lifecycle</p>

Rightsizing Due Diligence

- Rightsizing diligence based on investment size
 - *What is “material”?*
 - *Reputational risk*
 - *Sensitivities of existing business*
- AI-enabled diligence tools improving speed and issue detection



Key Areas of Focus

Financial Health

Historical financials, working capital, off-balance sheet liabilities

Governance Documents

Articles of association, existing shareholder agreements, board procedures

Existing SHAs

Prior investor rights, drag/tag provisions, transfer restrictions already in place

Material Contracts

Key commercial agreements, change-of-control triggers, termination rights

Cap Table Analysis

Share classes, options, convertible instruments, dilution mechanics

Regulatory & Compliance

Sector-specific approvals, antitrust clearances; FDI considerations (CFIUS scrutiny even where foreign investors are indirect or passive)

Leveraging Due Diligence Findings

- Solutions for issues uncovered in diligence:
 - *Purchase price reduction*
 - *Corrective action as a condition to closing*
 - *Longer survival periods*
 - *“Line Item” indemnities*
 - *Escrows/Holdbacks*
 - *Enhanced protective covenants (e.g. step-in rights, information rights)*



Representation & Warranty Insurance (RWI)

- RWI protects parties against financial losses resulting from breaches of reps and warranties in purchase agreement
- Included in more than half of all private M&A transactions and is standard in PE exits
- Sell-side RWI can protect passive and minority sellers who were not involved in day-to-day operations

Effect on Indemnity Terms:

- Non-reliance and “no further representations” clauses
- No-survival provisions for general reps
- Double materiality scrapes
- Smaller general-purpose escrows, replaced by special-purpose escrows targeted at risks excluded from RWI coverage

Deal Term	2023 Study	2025 Study	Trend
Deals referencing RWI	55%	63%	↑ 17
No-survival	30%	41%	↑ 18
Double materiality scrapes	69%	82%	↑ 19
Indemnity for "alleged" breaches	17%	27%	↑ 18
Use of earnouts	26%	18%	↓ 20

RWI Costs & Limitations

Cost of RWI:

Metric	Typical Range
Premium	~2.5-6% of insured amount + ~\$50k underwriting fee
Deductible	~0.5-2% of purchase price
Policy Limit	~10% of purchase price

Limitations of RWI:

- **Minority Investor Protections:** RWI coverage for a minority investment is typically prorated to the amount of the investor's post-closing equity stake, which may not adequately compensate investor for target-level losses
- **Adds complexity pre-signing:** underwriting, diligence tie-outs, negotiating exclusions, and limited carrier availability add steps to potentially competitive and fast-moving process
- **Adds time and complexity post-closing:** the presence of RWI can add time and complexity to indemnification claims, and dispute resolution runs approximately 46% longer

Meaningful Investor Rights

 Voting Rights

 Board Representation

 Information Rights

 Anti-Dilution & Preemptive Rights

 Transfer Rights & Liquidity Protections

 Economics: Dividends, Distributions & Waterfalls

 Capital Calls & Funding Protections

 Related-Party & Conflict-of-Interest Protections

 Indemnification, Insurance & Liability Protections

Consent Rights and Blocking Rights

(A Non-Exhaustive List)

Governance & Structural	<ul style="list-style-type: none">• Amendments to charter, bylaws, or other governing documents• Change-of-control transactions or sales of all/substantially all assets• Material changes to the business or entry into new business lines
Capital Structure & Equity Issues	<ul style="list-style-type: none">• Issuance of equity or convertible securities• Includes debt that could become equity in the future or that shares features of equity
Material Debt & Financial Matters	<ul style="list-style-type: none">• Incurrence of material indebtedness or non-ordinary-course debt• Approval of annual/quarterly budgets and strategic plans• Changes to accounting policies or practices
M&A, Investments & Major Transactions	<ul style="list-style-type: none">• Acquisitions, joint ventures, investments, or business combinations• Entry into, amendment, or termination of material agreements
Related Party & Conflict Transactions	<ul style="list-style-type: none">• Transactions with affiliates or competitors of investor
Capital Allocation & Distributions	<ul style="list-style-type: none">• Declaration or payment of dividends or other equity holder distributions• Capital expenditures above agreed thresholds
Operational & Administrative Matters	<ul style="list-style-type: none">• Changes in auditors, accountants, counsel, or key advisors• Entry into non-ordinary-course transactions• Issuance of press releases or public announcements mentioning investor• Initiation of litigation, material claims, or settlements
Solvency & Wind Down Decisions	<ul style="list-style-type: none">• Voluntary bankruptcy, insolvency, dissolution, or winding up

Board Representation

Board Seat	One appointee at 15%+ ownership; may increase with higher stakes
Board Observer	Voice but no vote; access to board materials and discussions
Committee Membership	Participation on audit, compensation, technical or special committees
C-Suite Consultation	Right to be consulted on senior appointments (less common)
Special Approvals	Approval/Blocking rights with respect to enumerated items (more on this later)
Information Rights	Information rights tied to board materials
Process	Procedures for convening meetings and action by written consent



Practice tip: *Fiduciary Duty Tension: Investor-appointed directors owe fiduciary duties to the company, not to the appointing equityholder, which can create conflicts when the investor's interests diverge from those of the company.*

Step-In Rights & Default Events

Default Event Triggers

- Material breach of SHA
- Failure to meet financial covenants
- Insolvency / liquidity events
- Breach of non-compete or exclusivity
- Failure to deliver information rights

Enhanced Rights

- Increased voting rights (disenfranchising other shares or activating non-voting shares)
- Additional board appointment / removal rights
- Emergency non-preemptive funding (subject to catch-up rights)
- Operating drag-along without conditions (e.g., no delay, no value floor)
- Appointing third-party advisers to advise on strategic options

Step-in rights are dormant in good times, activated by breach – they provide negotiating leverage even if never exercised.

Information Rights

Financial Reporting

- Monthly management accounts
- Quarterly board packs
- Annual audited financials
- Variance analysis vs. budget
- Inspection rights: books & records, site visits

Planning & Strategy

- Annual budget approval
- Business plan updates
- Capital expenditure plans
- Enhanced reporting for adverse events (regulatory, litigation, covenant breaches)

Key Considerations

- NDA / confidentiality ring
- Competitor information barriers
- Limited to board-level data
- Audit rights (limited scope)

Delaware SB 21 (2025): Statutory inspection rights now limited to formal records only; access to emails, texts, and informal communications requires “compelling need” and “clear and convincing evidence.”

Texas SB 29 (2025): Categorically excludes emails, texts, and social media from shareholder inspection rights (unless they effectuate official corporate action) and permits covered corporations to deny inspection demands entirely from shareholders involved in active or anticipated litigation against the company.

Practice tip: Negotiate robust contractual information rights in the SHA rather than relying on statutory access.

Anti-Dilution

- **Preemptive rights** on future equity issuances
- **Restrictions on issuing senior or pari-passu securities** (debt or equity)
 - Preserve the capital structure and investor’s place in the waterfall
- **Price-based anti-dilution mechanisms:** full ratchet vs. weighted average (broad-based vs. narrow-based).
- **Pay-to-play provisions** requiring investors to participate in future rounds to retain protections.
- **Carve-outs** for employee equity plans, existing convertibles, and strategic issuances
- **Key distinction** between preemptive rights (protecting ownership percentage) and anti-dilution ratchets (protecting economic value per share)



Practice Tip: Sunset/Step-down Provisions: Voting rights, board seats, and information rights may scale back if ownership declines. Common structure: full rights above 15%, reduced rights 10-15%, minimal/no special rights below 10%. Map governance rights against anti-dilution protections – if preemptive rights are not exercised, governance rights may be lost.

Transfer Restrictions

- Right of First Refusal (ROFR)
- Right of First Offer (ROFO)
- Restrictions on transfers that would create adverse tax consequences

Right of First Refusal

- Seller obtains third-party offer first
- Must offer to existing holders at same price/terms
- Can deter serious buyers ("stalking horse" risk)
- Stronger protection for existing holders

Right of First Offer

- Seller must approach existing holders first
- If no deal, seller can go to market
- More flexible – less buyer deterrent
- Weaker protection but more commercially practical
- Often preferred by majority sellers



Practice tip: *A note on procedural compliance:* Strict adherence to notice periods and other formalities is critical, as non-compliance can invalidate the ROFR/ROFO process or lead to disputes.

Tag-Along

Minority can join majority's sale on same terms

- Pro rata participation right
- Must cover indirect transfers at holdco level
- Same price, same terms, same conditions
- Notice and exercise period provisions

Put Options

Minority can force repurchase

- Set price/formula (e.g., EBITDA multiples, book value, or independent appraisal)
- Typically after holding period (e.g., 5 years)

Drag-Along

Majority can compel minority to sell

- Minimum price thresholds
- Delay periods before exercise
- Shareholder acceptance thresholds
- ROFO before drag triggered

Call Options

Majority can buy out minority

- Minimum price thresholds
- FMV or premium requirement

Dispute Resolution & Deadlock

Escalation Pathway

1. **Board Escalation** – senior executive good-faith negotiation period
2. **Mediation** – structured facilitation by neutral party; non-binding
3. **Buy-Sell Mechanism** – “Russian roulette” or “Texas shoot-out” to resolve deadlock
4. **Arbitration** – binding resolution; expertise in M&A valuation; confidential

Additional Considerations

- Expert determination preferred for valuation disputes (speed + expertise)
- Arbitration advantages: procedural flexibility, confidentiality, international enforcement
- Include detailed terms specifying pricing formula, timing of valuation, and adjustments for exceptional circumstances

Economic Protections

Dividends, Distributions & Waterfalls

- Dividend/distribution policy (minimum, formulaic, or pro-rata)
- Protective provisions against up-streaming value to other stakeholders
- Clear waterfall structures in LLCAs /LPAs
- Restrictions on special distributions that might benefit the majority

Capital Call & Funding Protections

- Anti-dilution or premium equity if majority forces capital calls
- Caps on annual capital commitments
- Mechanism for non-consenting investors to avoid punitive dilution

Related Party & Conflict Transactions

- **Disclosure obligations:** Require disclosure of both the transaction terms and the nature of the conflict, at the time of the transaction and in periodic filings.
- **Approval mechanisms:** Disinterested shareholder or independent director approval, with conflicted parties excluded from the vote; independent auditor review before approval.
- **Director accountability:** Clear rules on liability when related-party transactions are prejudicial, including derivative suit rights and disgorgement of profits.
- **Arms-length benchmarking:** Requirement that all affiliate transactions be on market terms, with independent valuation if above a threshold.

Recent Legislative Developments

Delaware SB 21 (March 2025)

- BJR applies to controlling stockholder transactions if approved by EITHER independent committee OR majority-of-minority vote
- Previously required BOTH under MFW / Match Group
- Going-private transactions still require both mechanisms
- Upheld as constitutional: *Rutledge v. Clearway* (Del. Sup. Ct., Feb. 2026)

Texas SB 29 (May 2025)

- Codifies BJR (TBOC §21.419): presumption directors/officers act in good faith, informed basis, in corporation's interest
- Covers duty of loyalty AND duty of care – rejects “entire fairness” and “enhanced scrutiny” review
- Plaintiff must plead fraud, intentional misconduct, ultra vires, or knowing violation of law with particularity
- Corporation may petition TX Business Court for binding pre-determination of committee independence



Practice tips: *Contractual Rights More Important than Ever:* Minority investors' ability to challenge controlling stockholder transactions is now more limited – making contractual protections (veto rights, step-in rights, information rights, exit mechanics) negotiated at the outset even more critical.
Choice of Jurisdiction Matters: Texas goes further than Delaware: no procedural safe harbor required to invoke BJR; entire fairness effectively eliminated.

Indemnities, Insurance & Liability

- **D&O insurance structure:** Confirm that investor-appointed directors are covered; address capacity exclusion issues where PE sponsors serve dual roles (GP-level and portfolio company board).
- **Tail policies:** Requirement for run-off coverage in the event of a change of control.
- **Investor liability limitations:** Caps on investor liability in the capital structure (e.g., no liability beyond committed capital); indemnification of investor-appointed directors by the portfolio company.
- **Special indemnities for known risks:** Link back to diligence findings – known issues excluded from RWI are usually addressed via specific indemnities supported by escrows or separate caps

Alternative Structures

Flexibility is critical to successful dealmaking



Staged Acquisitions (Phased / Tranche Investments)

Initial minority position with options to increase ownership over time

Valuation bridge tool in uncertain markets

Reduces upfront risk; later tranches tied to performance or project milestones



Earnouts (Performance Based Consideration)

Bridges valuation gaps where future performance is uncertain

Ties a portion of purchase price to financial or operational metrics

Helps investors avoid overpaying for projections they cannot control

Requires strong reporting and dispute resolution mechanisms



Alternative Financing

Alternative financing such as private capital and “hybrid” capital allows for faster execution, flexible structures and leverage levels, fewer regulatory constraints
Creates flexibility when traditional debt markets are tight or expensive

Additional Topics

- **Preferred Stock & Liquidation Preferences**
- **Tax Structuring & Elections**
 - Section 754 elections, tax receivable agreements, partnership vs. corporate tax treatment
- **Securities Law Compliance**
 - Reg D exemptions, accredited investor requirements, blue sky filings
- **Other regulatory Compliance**
 - Antitrust & HSR Filing Requirements, CFIUS & Foreign Investment Review

Questions?

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Thank you!