

M&A Paying Agent Agreements: Who Pays the Fees?

Transaction expenses incurred during the course of an M&A transaction are often deducted and paid at closing via the flow of funds. These transaction expenses often include the fees for paying agent and escrow agent services payable to the paying agent and escrow agent at the time of closing. Since it is always good advice to not over complicate things, this info sheet with data from more than 2,900 Acquiom Financial payments administration engagements from the last five years, helps M&A practitioners keep the mechanics of paying agent fees simple by addressing potential issues up front. Learn more about what services a paying agent can provide [here](#).

M&A Closing Process: Start with the Paying Agent Agreement

M&A deal parties and counsel know all-too-well that there can be a rush of deliverables during the push to close the transaction; finalizing the paying agent agreement (PAA) ahead of time can help avoid delays. In addition to specifying the services that the paying agent will provide, the PAA will include provisions about the paying agent's fees. The paying agent will always look to the PAA with respect to its engagement by the deal parties since the paying agent is not a party to the merger or purchase agreement. The prevailing practice is to have the buyer be contractually obligated in the PAA, although we see some emerging, yet subtle, trends that deal parties are taking a more case-by-case approach.

Who Pays the Paying Agent Fees?

	2024 (Q1-Q3)	2023	2022	2021	2020
Buyer	63%	57%	63%	61%	68%
Sellers	25%	30%	23%	26%	21%
50/50 Split	8%	7%	10%	10%	6%
Other	4%	5%	3%	3%	5%

**Percentages may not sum to 100% due to rounding.*

It is important to note that while the PAA sets forth which party(ies) are contractually obligated to the paying agent, the deal parties often address who is ultimately responsible for transaction expenses in the merger or purchase agreement. For example, the PAA might specify that the buyer pays all of the paying agent's fees, but the merger agreement might categorize such fees as a transaction expenses, which could be split evenly between buyer and the sellers or deducted from the purchase price. In practice, any fees payable at closing are often accounted for in the flow of funds, and the paying agent simply deducts its fees from the closing wire(s).

The team at SRS Acquiom has observed shifts in the traditional relationship between buyer, sellers, and the paying agent, and the data suggests an emerging trend of sell-side parties taking a larger role in that relationship.

Deal parties using an even split approach has grown in recent years to as high as 10% of SRS Acquiom paying agent engagements.

While paying agents are likely willing to agree to this arrangement in the PAA, deal parties should know that the PAA may allow the paying agent to still collect the full amount from one party if the other party has not paid. This can lead to very small yet frustrating indemnification issues between the deal parties post-closing.

Account for Any Post-Closing Distributions

M&A transactions often call for post-closing distributions to sellers such as purchase price adjustments, escrow releases, and earnout payments. These subsequent distributions often incur additional fees; deal parties should consider the mechanics of how such fees will be paid.

The "Other" category from the data above includes the approach where fees payable at closing are treated differently than fees payable post-closing for subsequent distributions. Often, the buyer is responsible for fees payable at closing and the sellers are responsible for any fees incurred post-closing, commonly via an expense fund held by the shareholder representative.



Three Things to Remember About Paying Agent Fees

- 1 Who is ultimately responsible for M&A transaction expenses is often governed by the language and mechanics set forth in the merger or purchase agreement. Deal parties should ensure that whatever contractual obligations to the paying agent that are included in the PAA will have the intended outcomes consistent with the mechanics of the merger or purchase agreement.
- 2 For M&A deals with potential post-closing distributions, deal parties should ensure the mechanics for paying transaction expenses addresses any fees that may become payable post-closing. In practice, such fees are often offset from the aggregate amount being distributed.
- 3 When sell-side is directly responsible for fees pursuant to the PAA, ensure an adequately funded expense fund is established at closing.

Navigating PAAs doesn't have to be difficult.
Contact the SRS Acquiom team to help if you have questions.