



SRS ACQUIOM

2022 M&A Deal Terms Study

An analysis of deal terms in private-target
M&A transactions that closed between 2016–2021

Please direct inquiries to: dts@srsacquiom.com

A Smarter Way to Run Deals Through the Entire Lifecycle

Since 2007, we have helped sophisticated deal parties reduce administrative drag, enabling them to focus on building great businesses and maximizing value.

Mergers and Acquisitions



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Choose our intuitive, streamlined virtual data room and gain the efficiency of a single partner from first document in to last dollar out.



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A better M&A escrow experience, period. Simple, fast engagement, streamlined KYC, online Deal Dashboard™, and a dedicated team.



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AN EXPERIENCED PARTNER TO REDUCE DEAL COMPLEXITY

SRS Acquiom delivers a smarter way to run deals, with solutions that reduce the administrative burden throughout the entire deal lifecycle.

We pair tailored, expert service with game-changing data and technology, making complex deals as efficient as possible.

10%+
of all U.S. M&A
transactions served*

6,300+
deals engaged on

\$775B+
aggregate deal value

415K+
shareholders represented
in more than 140 countries

\$600B+
in payments

99%
of shareholders are
paid within 24 hours†

500K+
total shareholders
paid

1M+
data room users‡

**Statistics contained herein are derived from publicly available sources;*

†Consideration given to those that have completed a Letter of Transmittal (LoT);

‡Data room technology, established in 2010, acquired by SRS Acquiom in 2021.

ABOUT THIS STUDY AND THE DATA

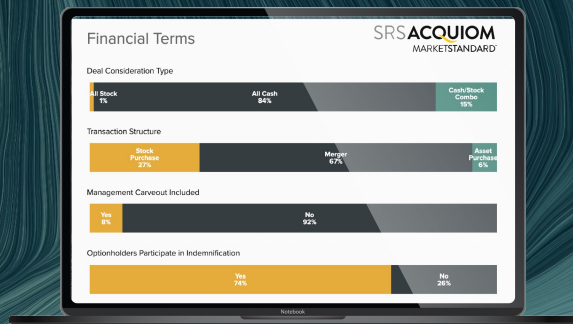
The 2022 M&A Deal Terms Study is powered by SRS Acquiom MarketStandard®, a tool to analyze our proprietary database of more than 3,400 private-target M&A deals with customizable searches best suited to your specific transaction.

SRS Acquiom continually updates our databases for reporting deal-term data for 2016 through 2020. Therefore, results for prior years' data that is included in prior-year studies may in some cases differ in immaterial amounts from the 2021 SRS Acquiom Deal Term Study. This study includes the most comprehensive and updated data available for all years. Sample sizes are larger in more recent years as a result of our growth. Medians are presented in addition to averages to counterbalance the effect of outliers. Some charts do not sum to 100% due to rounding. Data is presented on a calendar-year basis and is tied to the deal closing date.

To benefit study users comparing data from different sources, this study presents similar data and terms with similar formatting and structure to the Private Target Deal Points Study published by the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section, available at: https://www.americanbar.org/groups/business_law/committees/ma/deal_points/

- This study analyzes more than 1,900 private-target acquisitions (\$425 billion) that closed from 2016 through 2021, including more than 500 deals that closed in 2021.*
- SRS Acquiom provided professional and financial services on these deals; the vast majority of these are not publicly reported.*
- Representations and Warranties Insurance (RWI) was identified on approximately 44% of 2021 deals in this study; buyers do not always disclose the presence of a buy-side RWI policy, and “no RWI identified” data subsets in this study likely include a small number of deals with RWI policies.*

THE INDUSTRY'S
MOST POWERFUL
DEAL ANALYTICS TOOL



01

THE MOST COMPREHENSIVE VIEW OF
DEAL-TERM OUTCOMES

- More than a decade of private-target M&A deal terms in a simple, powerful, visual, interactive online platform.

02

DETERMINE “WHAT’S MARKET”

- Compare market data to your deal terms.
- Filter data to more closely resemble the deal you’re negotiating.
- Draw information from more than 3,400 deals—with more added quarterly.

03

CUSTOMIZE YOUR VIEW OF THE DATA

- You determine what is relevant to your deal to negotiate with real-time knowledge.
- Dynamically filter, sort, and explore more than 150 attributes with five different filters.

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REPRESENTATIVE DEALS

APTUS

acquired by

THOMABRAVO

EllieMae

acquired by

ICE

ENGORE VISION
Restoring Near Focus

acquired by

NOVARTIS

flatiron

acquired by

Roche

iZettle

acquired by

PayPal

BODYARMOR

acquired by

Coca-Cola

KaNDy
Pharmaceuticals

acquired by

BAYER

LORD

acquired by

Parker

MIRROR

acquired by

Ω

m*Modal

acquired by

3M

OpenLending

acquired by

NEBULA
Acquisition Corp

CEDAR CX
TECHNOLOGIES

acquired by

precisely

PROMACH

acquired by

IG & P

PROTECTWISE

acquired by

verizon

DRIZLY

acquired by

Uber

POWER FACTORS

acquired by

VISTA
EQUITY PARTNERS

wave

acquired by

H&R BLOCK

suja
ORGANIC

acquired by

PAINE SCHWARTZ PARTNERS

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Deal Volumes

- 2021 was a record year for global M&A, with a 64% increase in deal volume from the prior year pushing aggregate deal value over \$5.8 trillion, \$2.5 trillion of which is attributed to U.S. deals.* Growth in the SRS Acquiom data set outpaced the market including more deals with transaction values of more than \$100 million, nearly 50% of deals we service ([Slide 11 ►](#)).

Effect of COVID-19

- The market appears to be settling on how to deal with COVID-19 or pandemic-related matters. Some data trends, such as earnouts ([Slide 24 ►](#)) and termination fees ([Slide 88 ►](#)), are returning to pre-COVID directions, but certain effects remain. Examples include carveouts to the definition of Material Adverse Effect for COVID-related items ([Slide 32 ►](#)), COVID-related seller representations ([Slide 42 ►](#)), and a carveout for COVID to the covenant to conduct business in the ordinary course ([Slide 43 ►](#)).

Effect of Representations and Warranties Insurance (RWI)

- The presence of RWI can materially affect certain deal terms, including use of a separate purchase price adjustment escrow ([Slide 23 ►](#)), certain seller representations ([Slide 38 ►](#) and [Slide 41 ►](#)), survival ([Slide 55 ►](#)), sandbagging ([Slide 57 ►](#)), materiality scrapes ([Slide 59 ►](#)), baskets ([Slide 67 ►](#)), caps ([Slide 74 ►](#)), and escrows ([Slide 80 ►](#)).

**Reported by Reuters*

KEY FINDING



< Click on the “Key Finding” button to return to the Key Findings on pages 8 and 9.

Buyer Types and Consideration Mix

- Higher number of U.S. public buyers in the SRS Acquiom data set for 2021 ([Slide 11 ➤](#)).
- Dramatic increase in M&A deals using buyer stock as consideration ([Slide 15 ➤](#)).

Return on Investment and Exit Timing

- Higher return on investment with a median of 5.2x, compared to 3.5x in 2020 ([Slide 13 ➤](#)).
- The median number of years to exit increased by a full year, up to 7.1 years ([Slide 14 ➤](#)).

Purchase Price Adjustments (PPA)

- Stand-alone PPA provisions continue to rise, up to 86% of all deals, and more than nine out of ten deals include a PPA mechanism—either stand-alone or via indemnification ([Slide 20 ➤](#)).
- One in four deals uses a bespoke approach for accounting methodology, such as an exhibited calculation worksheet ([Slide 21 ➤](#)).

Earnouts (Non-Life Sciences Deals)

- A slight decrease in the number of deals with earnouts, down to 18% ([Slide 24 ➤](#)).
- A corresponding yet larger decrease in the consideration tied to earnouts, down to 31% of the closing payment ([Slide 25 ➤](#)).
- Earnout periods are trending shorter, with the median down to 22.5 months ([Slide 25 ➤](#)).

Survival and Indemnification

- The number of “no survival” deals (both with and without RWI identified) continues to increase, up to 26% of all deals ([Slide 55 ➤](#)).
- When seller representations and warranties do survive closing, the survival periods are trending shorter ([Slide 61 ➤](#)).
- Caps and escrow sizes are holding steady for non-RWI deals, but these can be influenced by the presence of RWI ([Slide 72 ➤](#), and [Slide 78 ➤](#)).



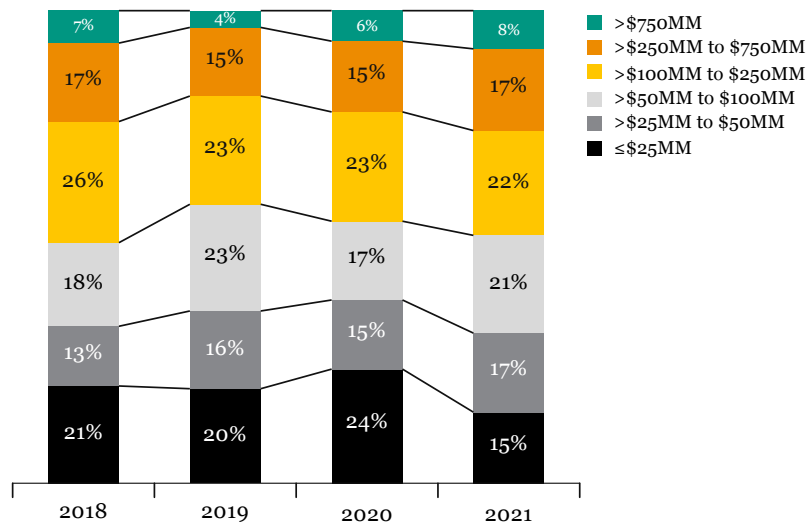
Financial Terms and Provisions

Transaction Values* and Buyer Types

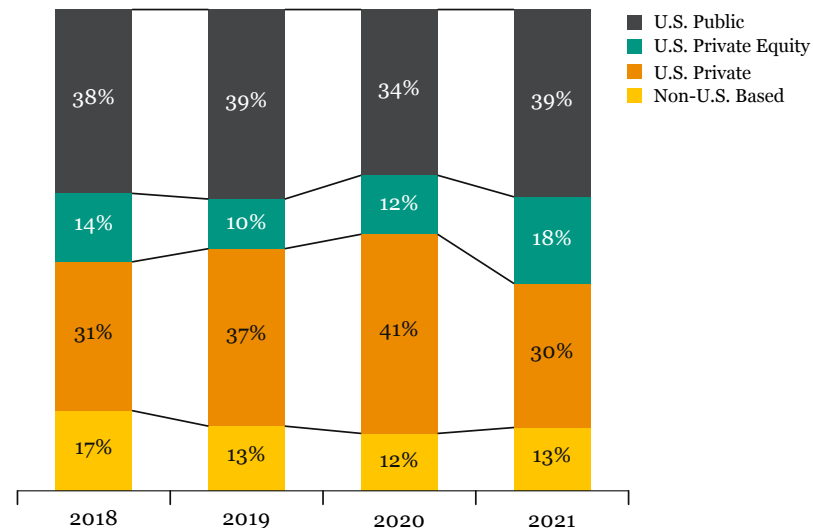
KEY FINDING



Transaction values



Buyer types



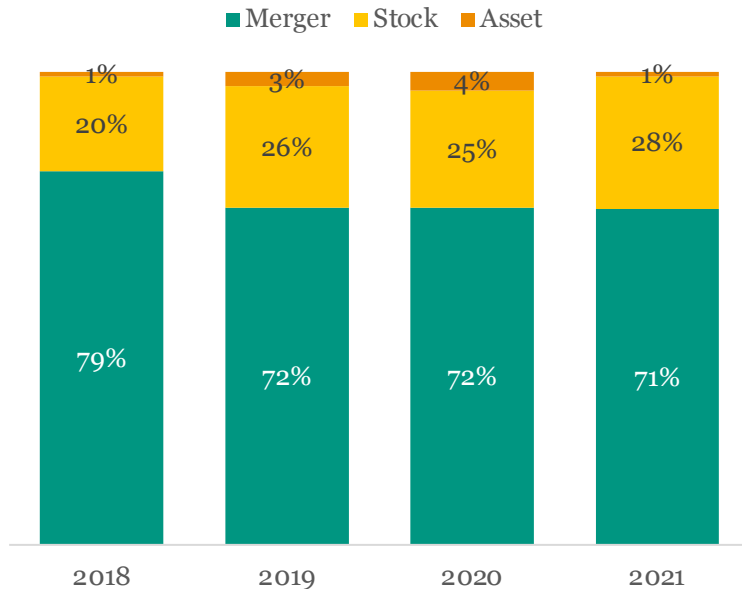
* The term "transaction values" includes escrowed amounts but does not include potential earnout consideration.

Transaction Structure and Sign/Close Timing

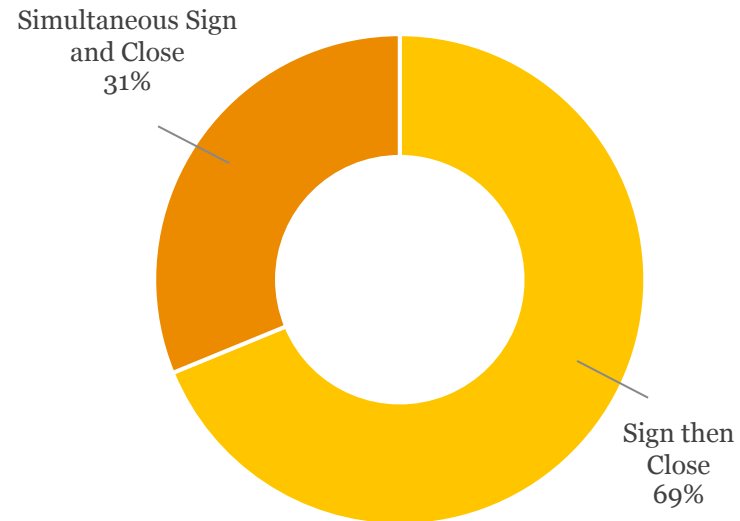
NEW DATA



Transaction structure (2018–2021)



Timing of signing and closing (2021)

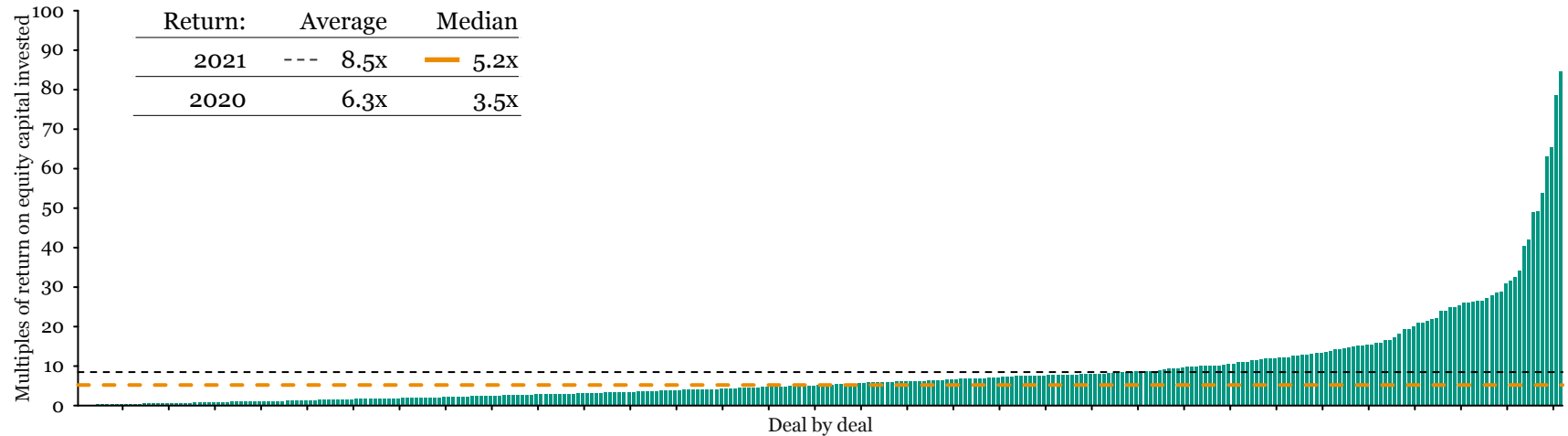


Transaction Values as Multiples of Equity Capital Invested*

KEY FINDING



2021 deals



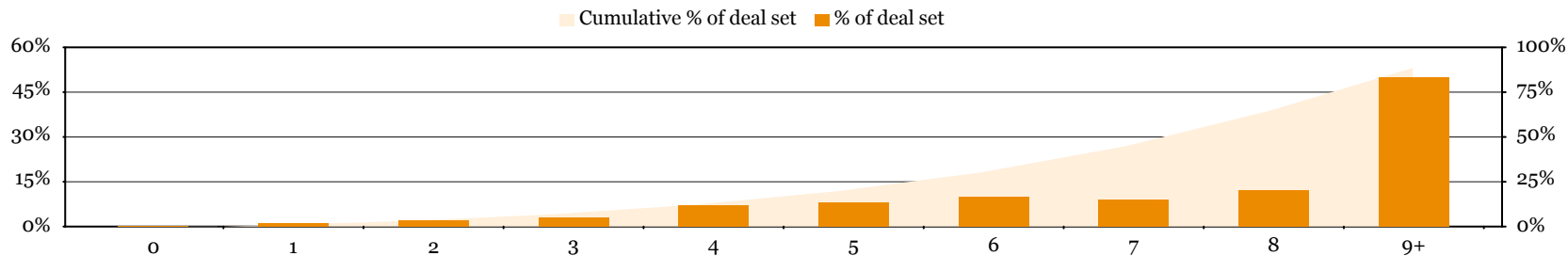
* Provided by S&P Capital IQ™ and other databases.

Investment Exit Timing

KEY FINDING



2021 deals



	Years to exit (from date of first investment*)	Equity financing rounds at exit	Equity capital invested*
Median (2021/2020)	7.1 / 6.1	4.0 / 3.0	\$21MM / \$26MM
Average (2021/2020)	7.4 / 6.9	4.0 / 3.7	\$54MM / \$54MM

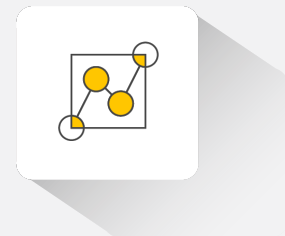
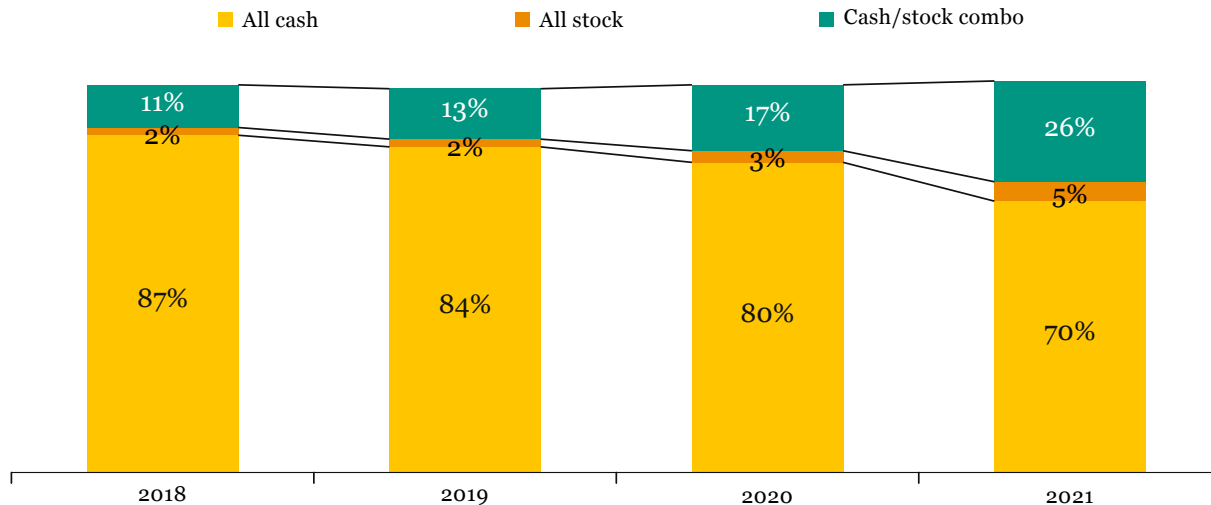
* Provided by S&P Capital IQ™ and other databases.

Closing Consideration Trends

KEY FINDING



Consideration type

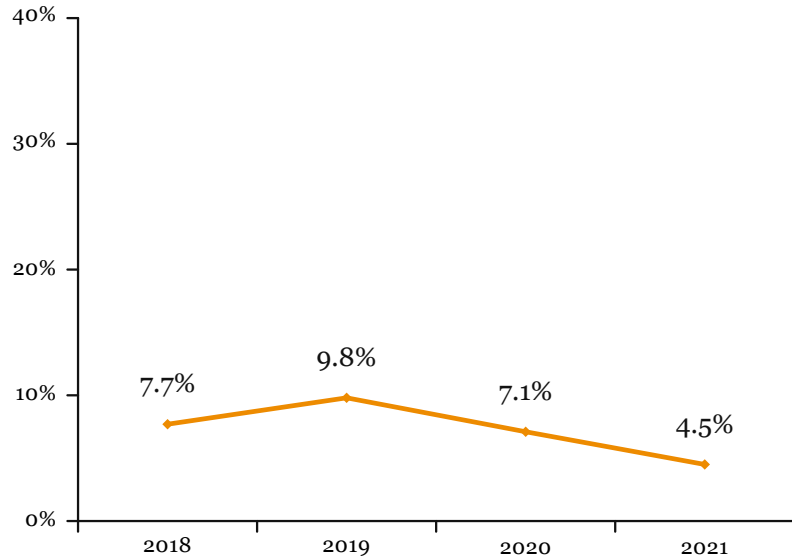


This data point can be influenced by Transaction Value, Buyer Market Cap, and Buyer Type.

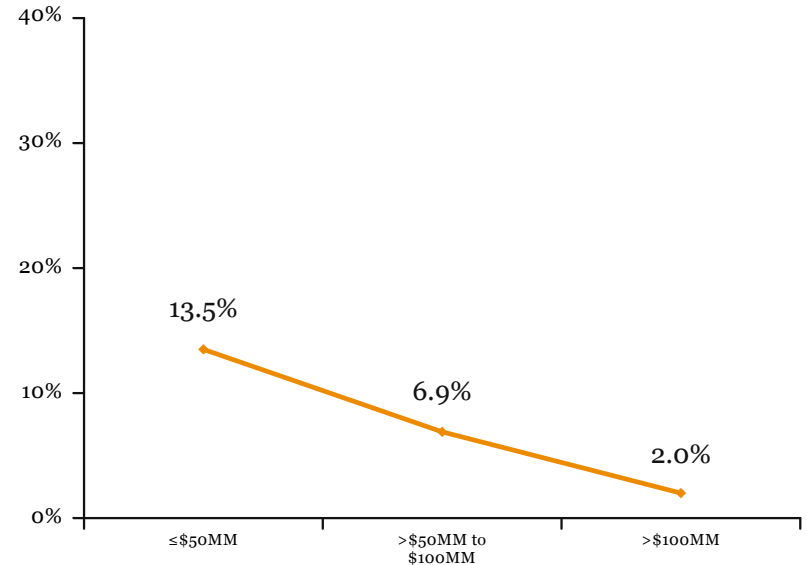
Visit [MarketStandard®](https://www.srsacquiom.com/marketstandard) to learn more.

Management Carveouts*: Frequency

Deals including a management carveout



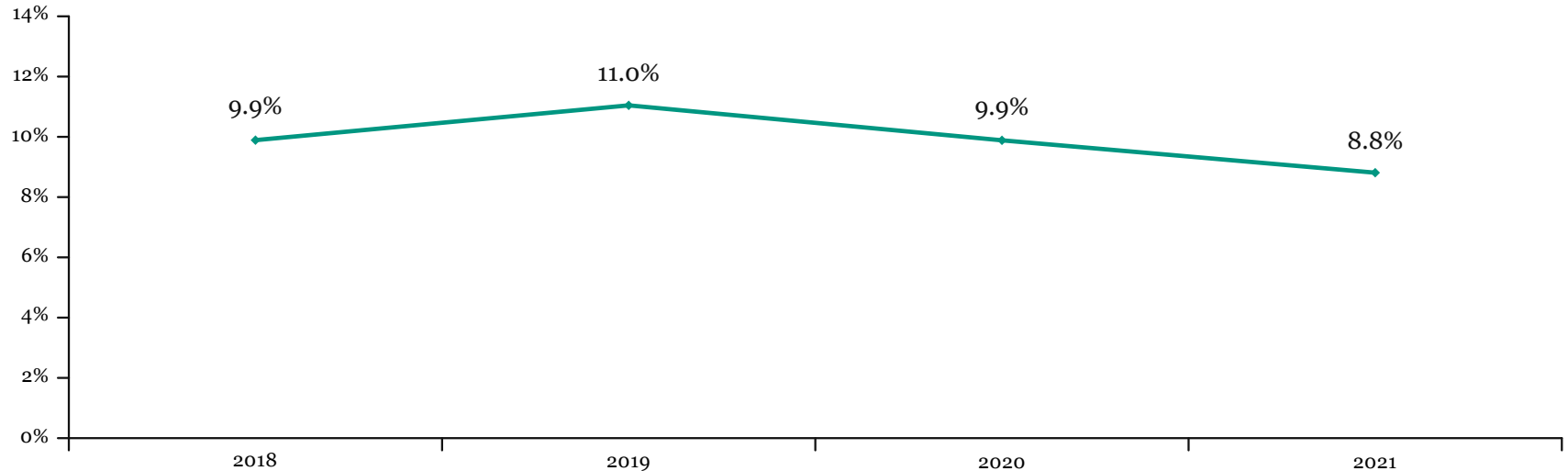
Management carveout frequency by transaction value (2021 deals)



* A “management carveout” in this study is a portion of deal proceeds guaranteed to seller’s management when management would otherwise receive little or nothing for their equity ownership due to liquidation preferences. Transaction bonuses, which often differ materially from management carveouts in size and timing of adoption, are not included above.

Management Carveouts: Size

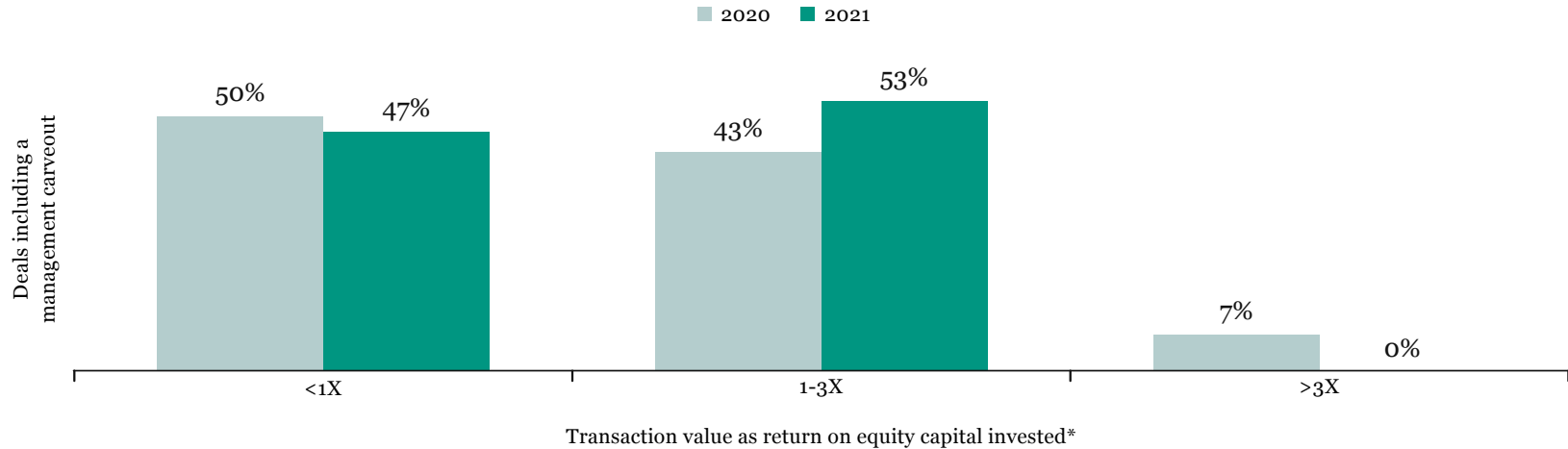
Median size as a percentage of transaction value*



* Measures size of carveout only, disregarding consideration received by seller management in respect of equity ownership (if any).

Management Carveouts: Frequency by Return on Equity Capital Invested

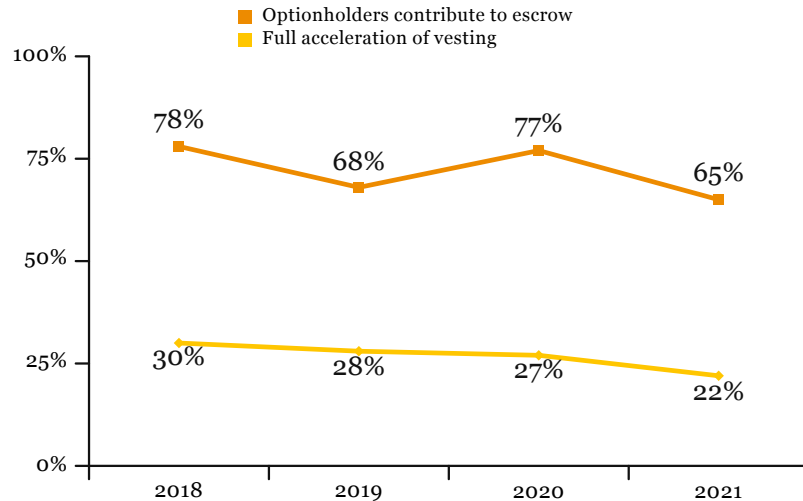
Deals including a management carveout



* Equity capital data provided by S&P Capital IQ™ and other databases.

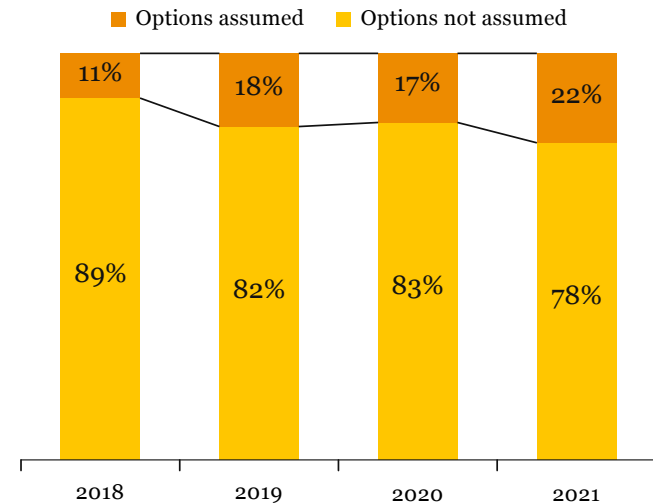
Treatment of Options: Contribution, Acceleration, and Assumption

Contribution and acceleration*



* Excludes deals where optionholders received no consideration.

Assumption of options by buyer

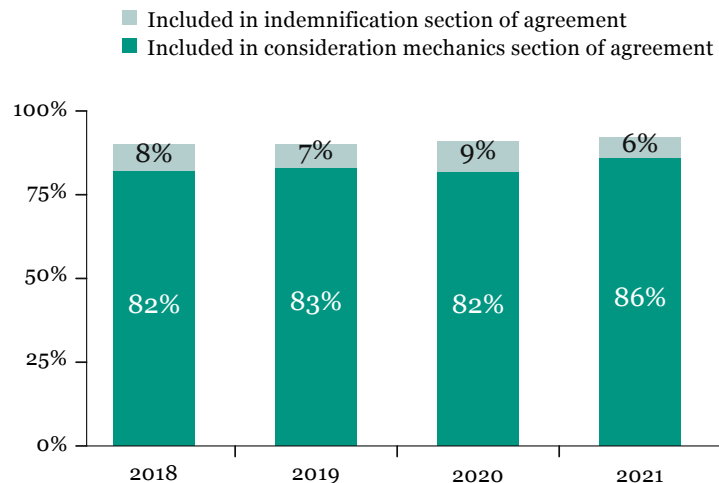


Post-Closing Purchase Price Adjustments

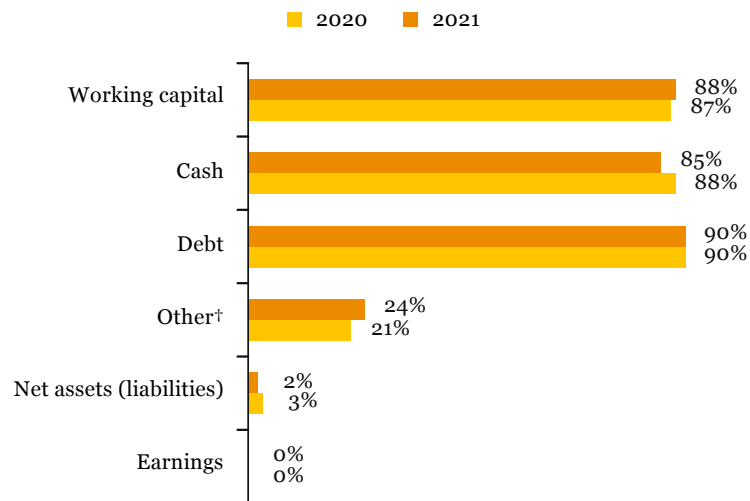
KEY FINDING



Adjustment provision included



Adjustment metrics*



* 94% of post-closing purchase price adjustments in 2021 deals were based on more than one metric.

† Does not include post-closing adjustments for transaction expenses.

Post-Closing Purchase Price Adjustments: Working Capital Excludes Tax-Related Items and Accounting Methodology

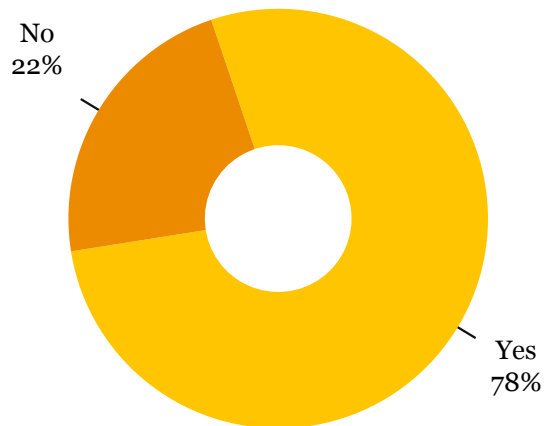
KEY FINDING



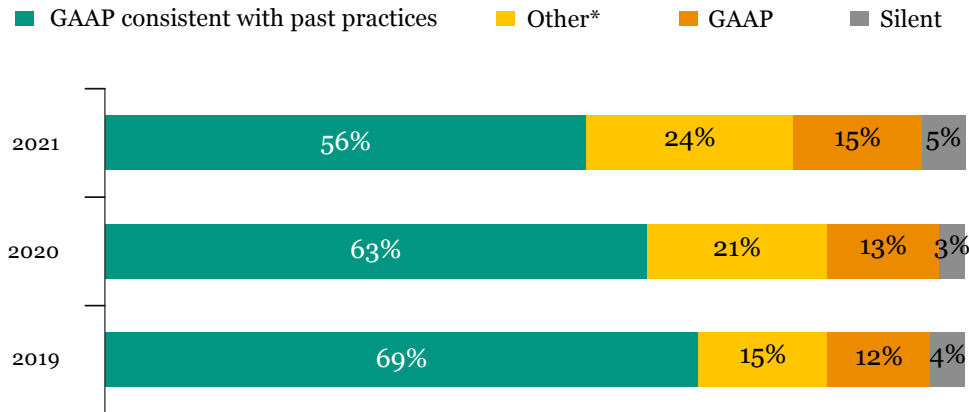
See example terms
on slide 94

Subset: 2021 deals with a Working Capital adjustment

Adjustment excludes tax-related items



Subset: deals with post-closing purchase price adjustments

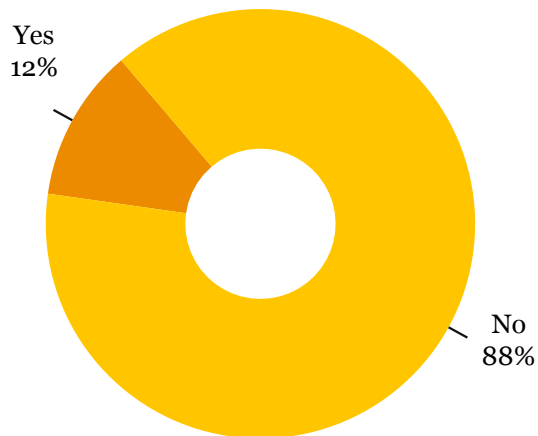


* "Other" methodology most commonly used was GAAP as modified by the principles and changes set forth on a schedule.

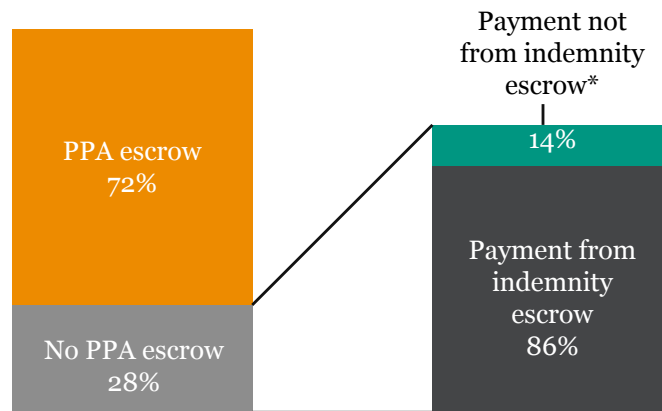
Post-Closing Purchase Price Adjustments: Thresholds and Separate Escrows

Subset: 2021 deals with post-closing purchase price adjustments in the consideration mechanics section of the acquisition agreement
(as opposed to the indemnification section only)

Adjustment only if threshold exceeded



Source of payment if buyer-favorable adjustment



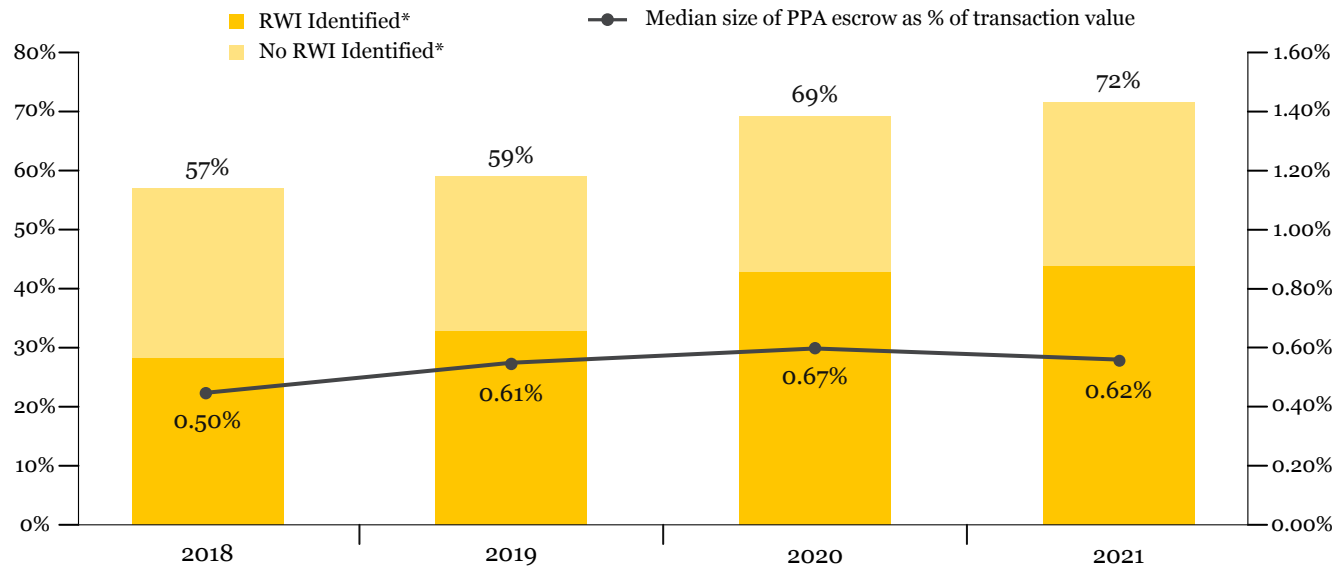
* Generally, payment out-of-pocket from securityholders.

Post-Closing Purchase Price: Separate Escrows

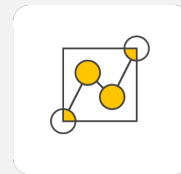
KEY FINDING

NEW DATA

Percentage of all deals with PPA escrow and median sizes



* A separate PPA escrow was included on 42% of 2021 deals with no RWI identified and 85% of 2021 deals with RWI identified.



This data point is influenced by Target Industry and Buyer Type

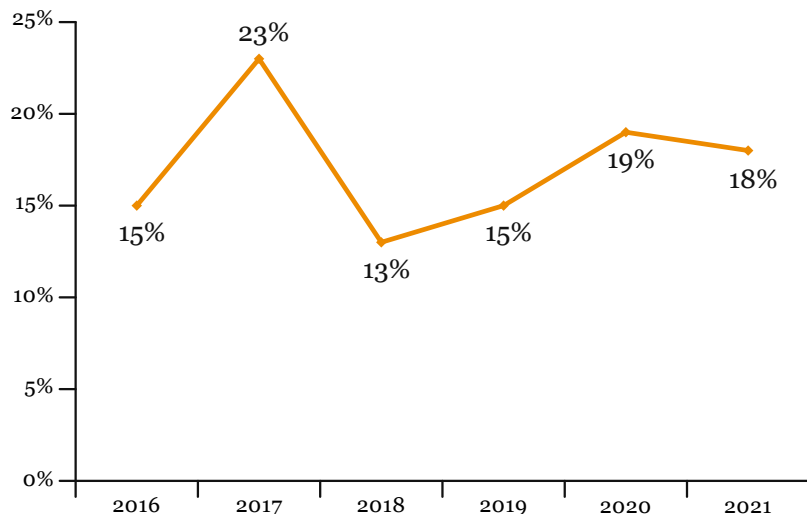
Visit [SRS Acquiom MarketStandard®](https://www.srsacquiom.com/marketstandard) to learn more.

Earnouts (Non-Life Sciences Deals*)

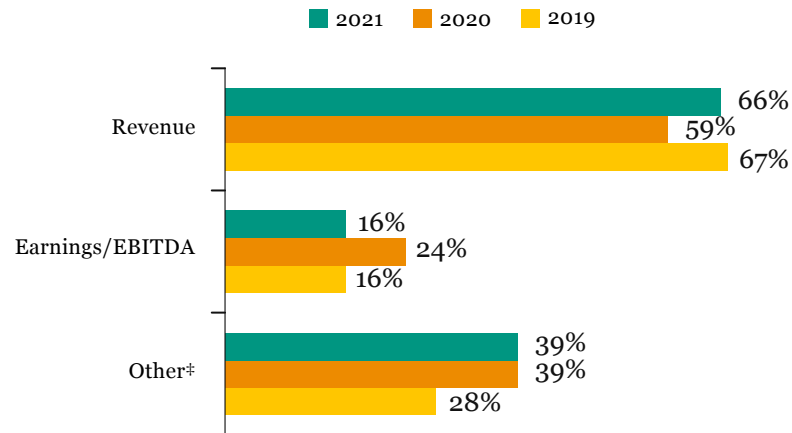
KEY FINDING



Earnout included



Earnout metrics†



* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2021 SRS Acquiom Life Sciences M&A Study.

† Earnouts can include more than one metric, such as a combination of revenue and earnings.

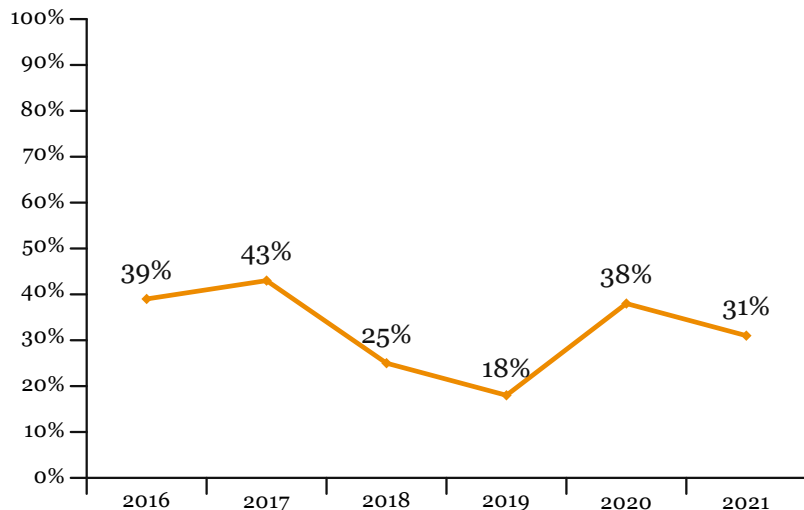
‡ Examples: unit sales, product launches, divestiture of assets.

Earnouts (Non-Life Sciences Deals*)

KEY FINDING



Median earnout potential as % of closing payment†

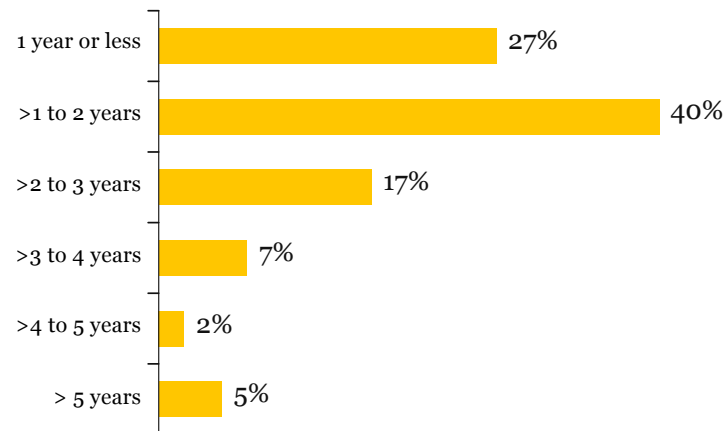


* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2021 SRS Acquiom Life Sciences M&A Study.

† Calculated as the sum of potential earnout payments over the amount paid at closing (including escrowed amounts).

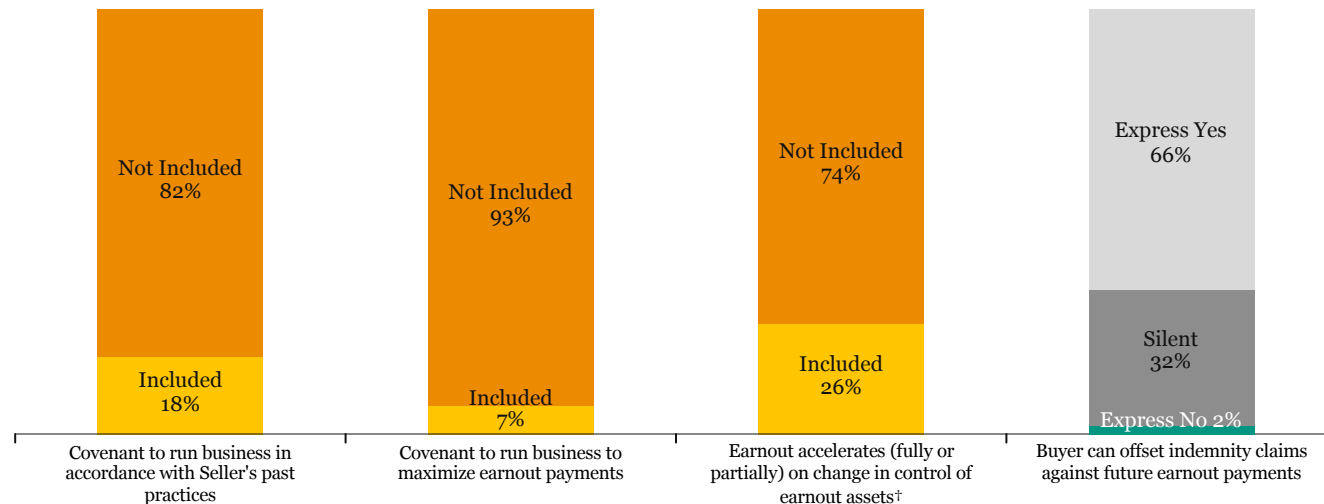
‡ Measured by the date the latest earnout period ends.

Earnout length‡ (2021 median: 22.5 months)

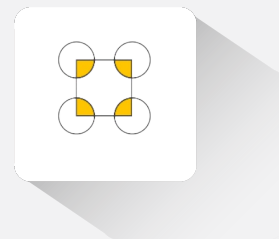


Earnouts (Non-Life Sciences Deals*): Covenants, Acceleration, and Offsets

Subset: 2021 deals with earnouts, excluding life sciences deals



[†] Generally subject to exceptions, such as if the subsequent buyer assumes the earnout obligations.




For more information,
see the SRS Acquiom
white paper:

[A Review of Earnouts in
M&A Transactions](#)

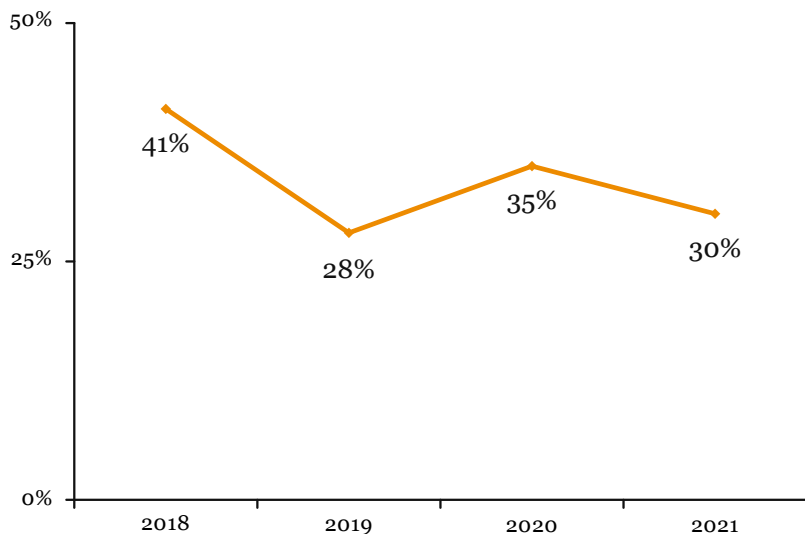
*For a more detailed
analysis of SRS Acquiom
life science deals, please
see the full study:

[2021 SRS Acquiom
Life Sciences M&A Study](#)

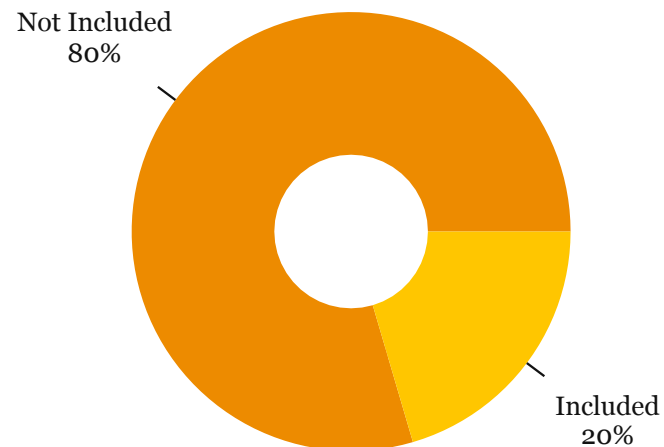
Earnouts (Non-Life Sciences Deals*): Additional Provisions

 [See example terms on slide 94](#)

“Earnout is not a security” provision included



Disclaimer of fiduciary relationship (2021 deals)




** For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2021 SRS Acquiom Life Sciences M&A Study.*



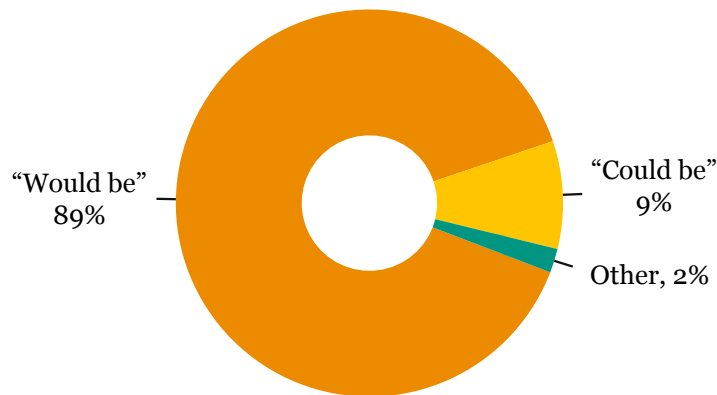
Pervasive Qualifiers

Definition of Material Adverse Effect (“MAE”): “Prospects” Included and Forward-Looking Language

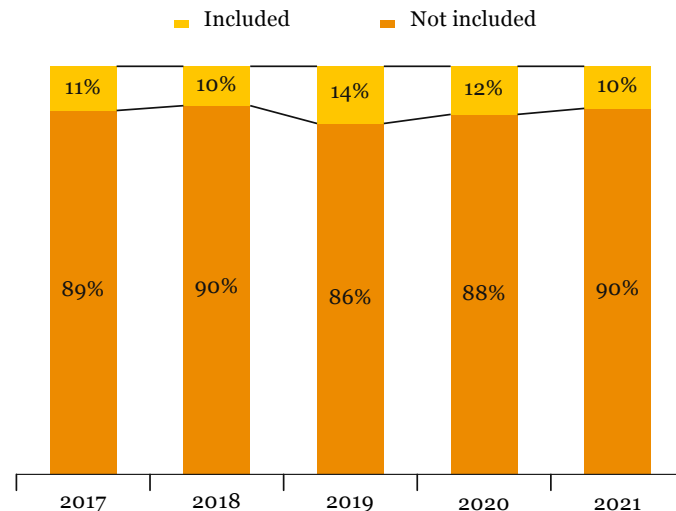
 [See example terms on slide 94](#)

94% of 2021 deals with an MAE definition had forward-looking language*
Subset: 2021 deals with an MAE definition that included forward-looking language

Forward-looking MAE details




Use of “prospects”



* Includes deals where the MAE definition did not include forward-looking language, but forward-looking language was predominantly used in conjunction with the use of the defined term in the body of the agreement.

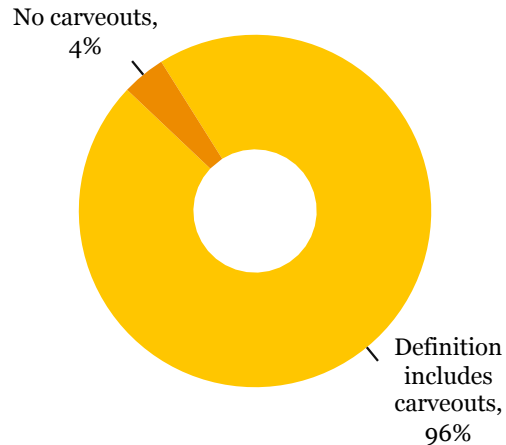
† Definitions in the “Other” category used a combination of “could” and “would” or some other forward-looking standard.

Definition of Material Adverse Effect: Carveouts

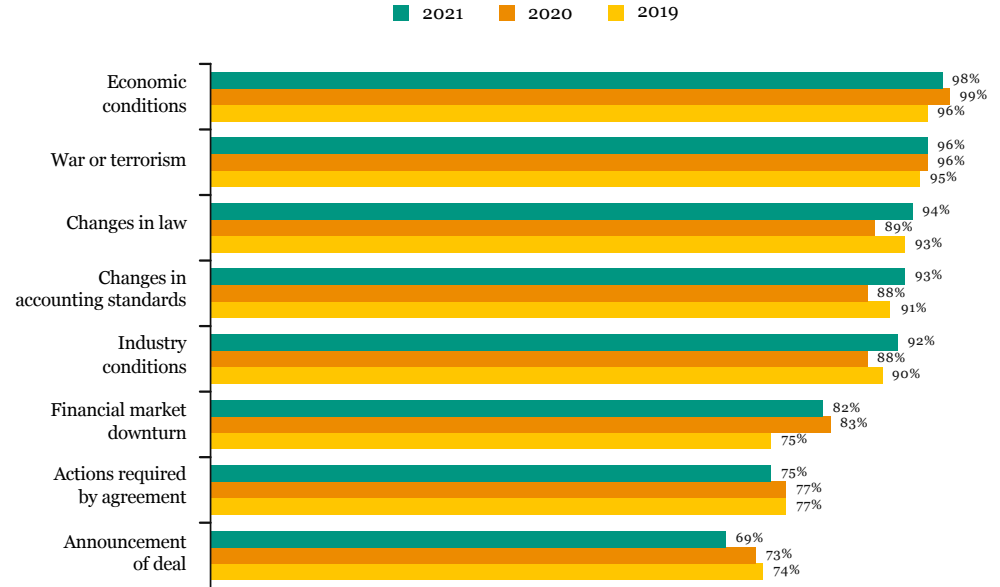
 [See example terms on slide 94](#)

Subset: MAE definition has carveouts

Deals with carveouts (2021 deals)



Carveout frequency (2021 deals)



See COVID-19 carveout data on slide 32.

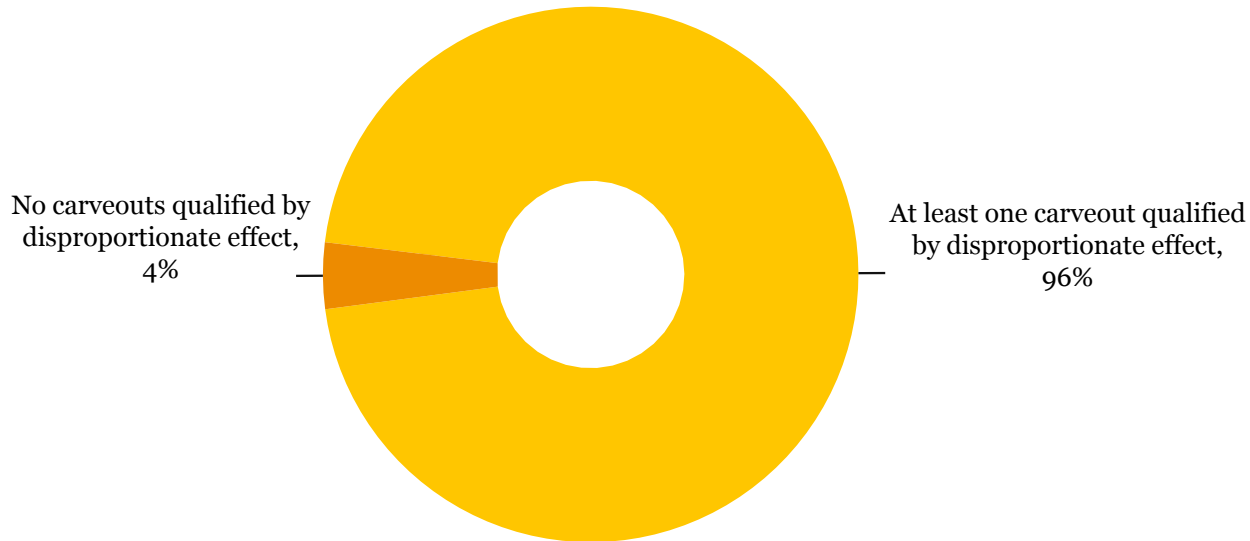
Definition of Material Adverse Effect: Carveouts Qualified by Disproportionate Effect

Subset: 2021 deals with an MAE definition with carveouts



See example terms
on slide 95

Disproportionate effect details



*This data point is
influenced by
Transaction Value.*

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MarketStandard®](#)
to learn more.

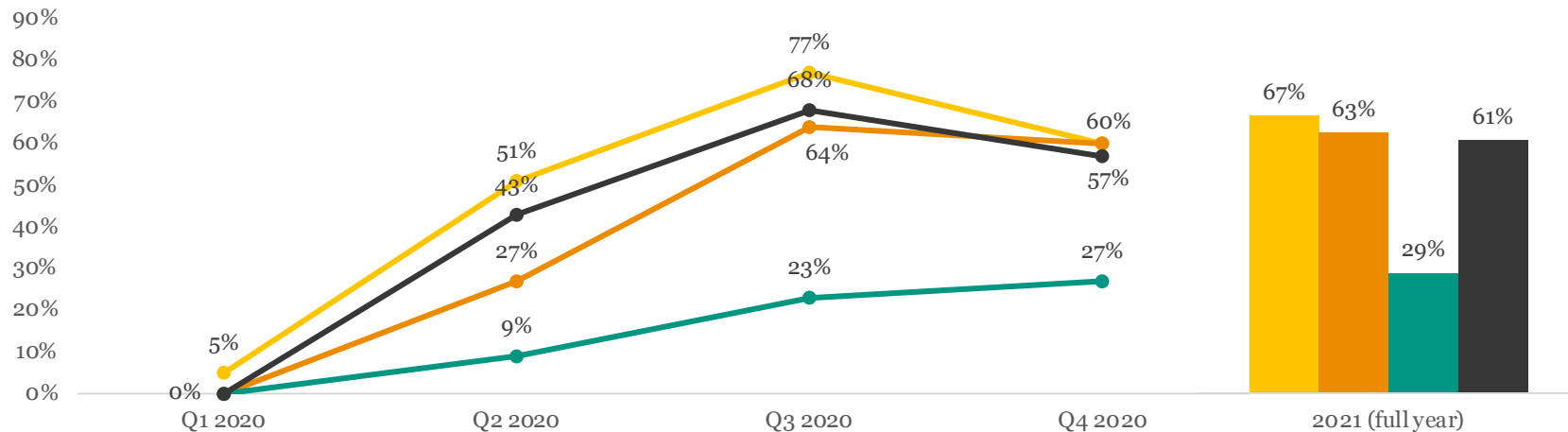
Material Adverse Effects: COVID-19 Variables

KEY FINDING


NEW DATA

2020–2021 deals

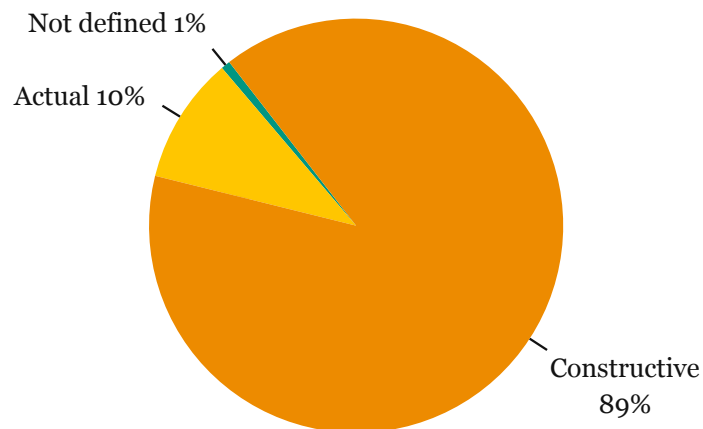
Reference to Pandemic, Epidemic, etc. Reference to COVID-19
Reference to COVID-19 Related Government Actions Exception for Disproportionate Effects



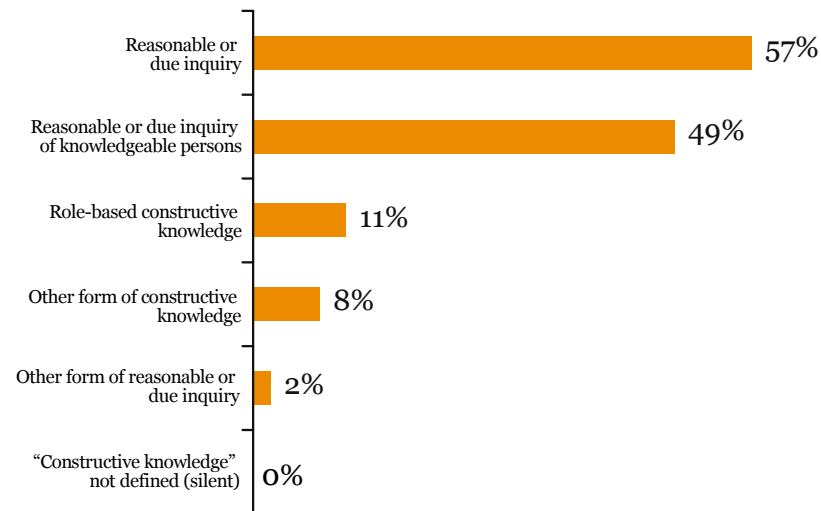
Knowledge Standards

 [See example terms on slide 95](#)

Knowledge definition details (2021 deals)



Subset: constructive*




* 23% of 2021 deals include more than one constructive knowledge element, e.g., a due inquiry requirement as well as role-based deemed knowledge.



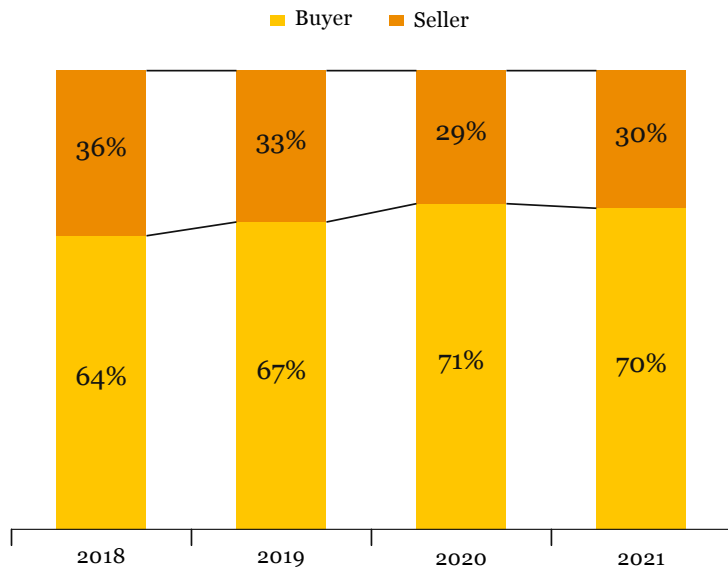
Seller's Representations, Warranties, and Covenants

“No Undisclosed Liabilities” Representation

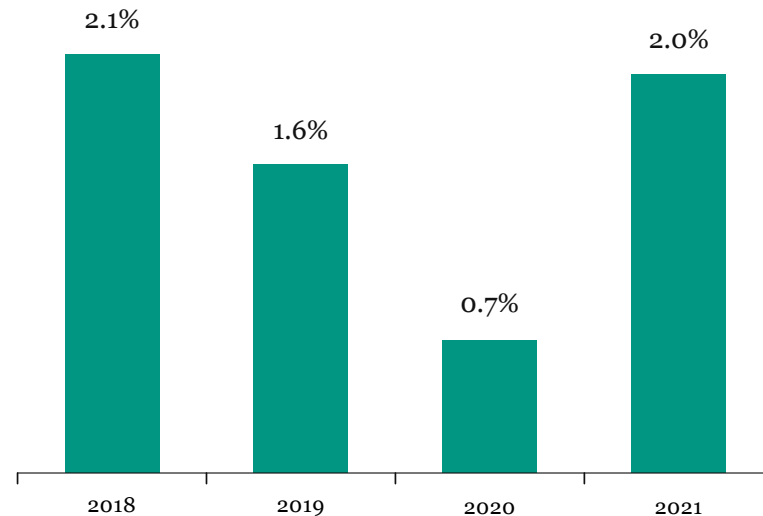
98% of 2021 deals contain “No Undisclosed Liabilities” representation

 [See example terms on slide 95](#)

Party favored by definition




Representation is knowledge-qualified

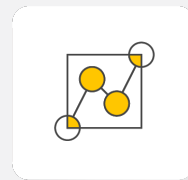
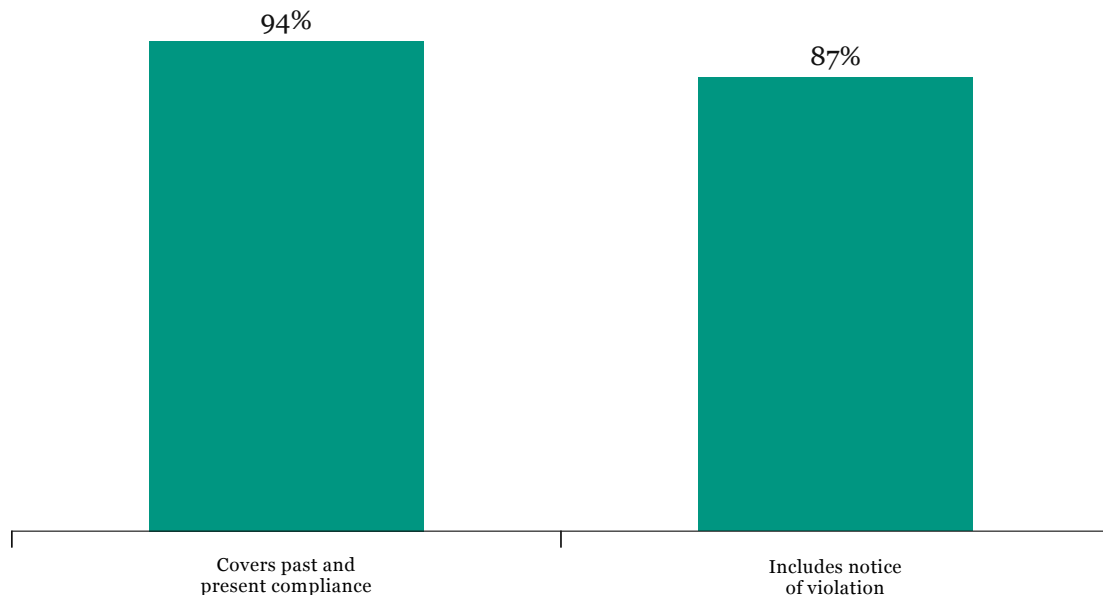


“Compliance with Laws” Representation

100% of 2021 deals included this representation.

 [See example terms on slide 95](#)


“Compliance with Laws” representation details, 2021



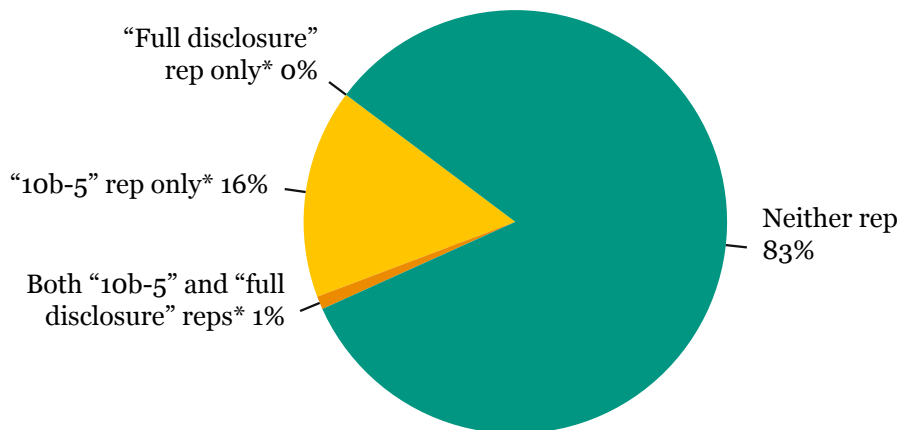
This data point is influenced by Target Industry.

[Visit SRS Acquiom MarketStandard® to learn more.](#)

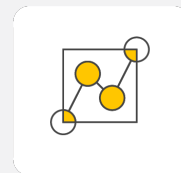
“10b-5” and “Full Disclosure” Representations

 See example terms
on slide 96

Inclusion of representations (2021 deals)



* Does not include representations that apply only to the shareholder information statement (and not the acquisition agreement).



*This data point is
influenced by
Transaction Value
and Buyer Type.*

Visit [SRS Acquiom
MarketStandard®](https://www.srsacquiom.com/marketstandard)
to learn more.

“10b-5” and “Full Disclosure” Representations: Effect of RWI

KEY FINDING

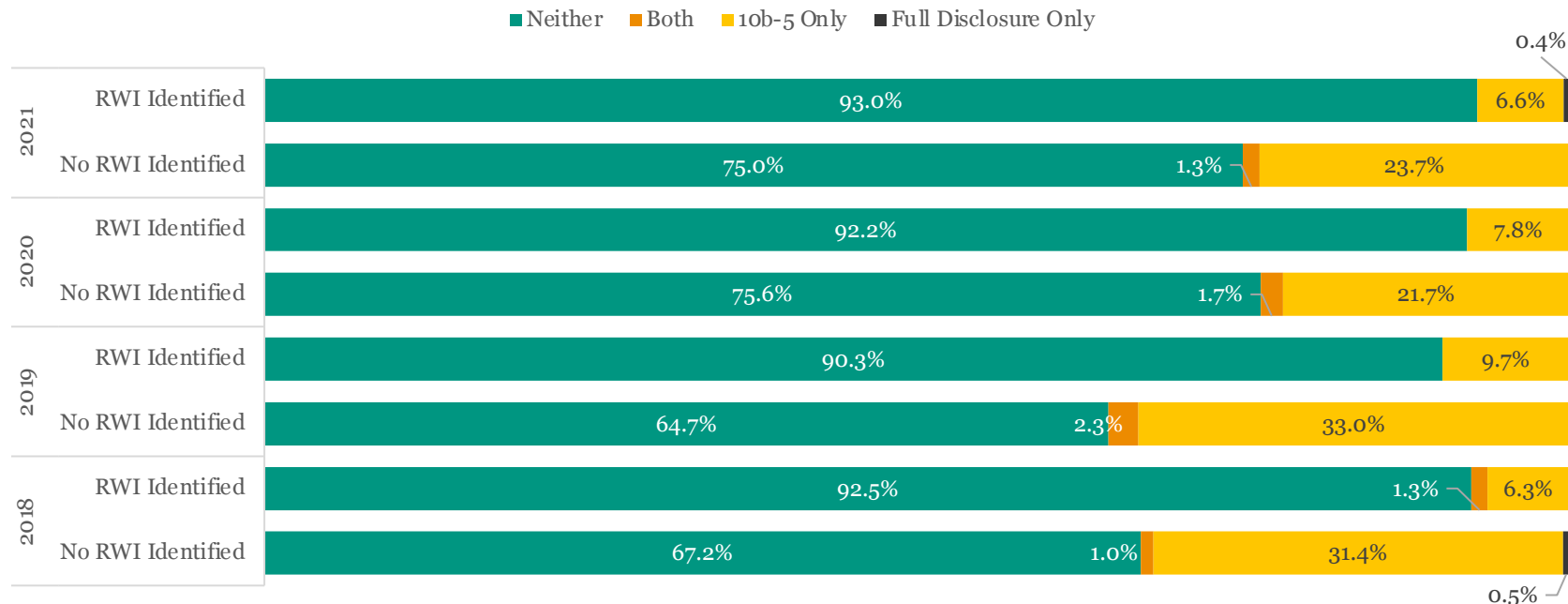


NEW DATA



An acquisition agreement is more likely to contain neither a “10b-5” nor a “Full Disclosure” representation when there is a buy-side RWI policy.

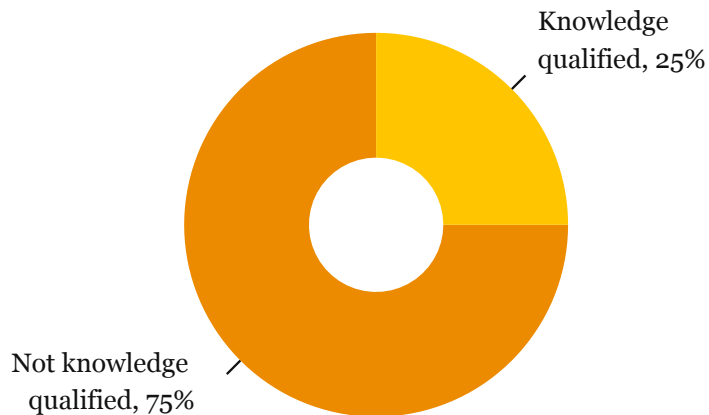
Deal years 2018–2021



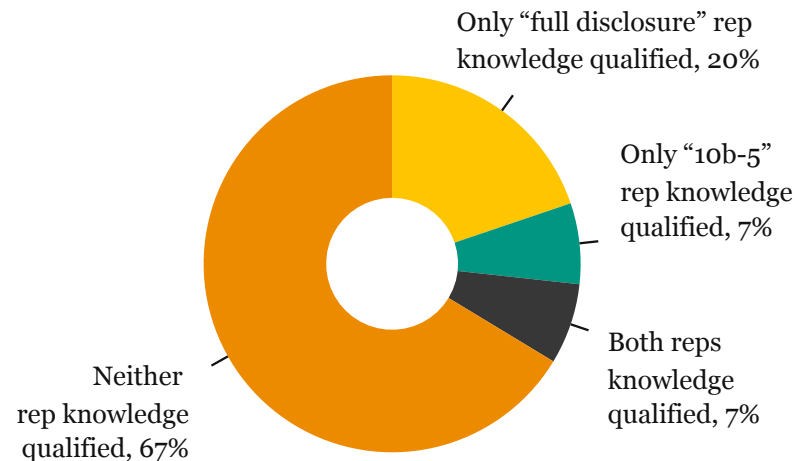
“10b-5” and “Full Disclosure” Representations: Knowledge Qualifiers

Subset: 2018–2021 deals


Subset: “10b-5” rep only



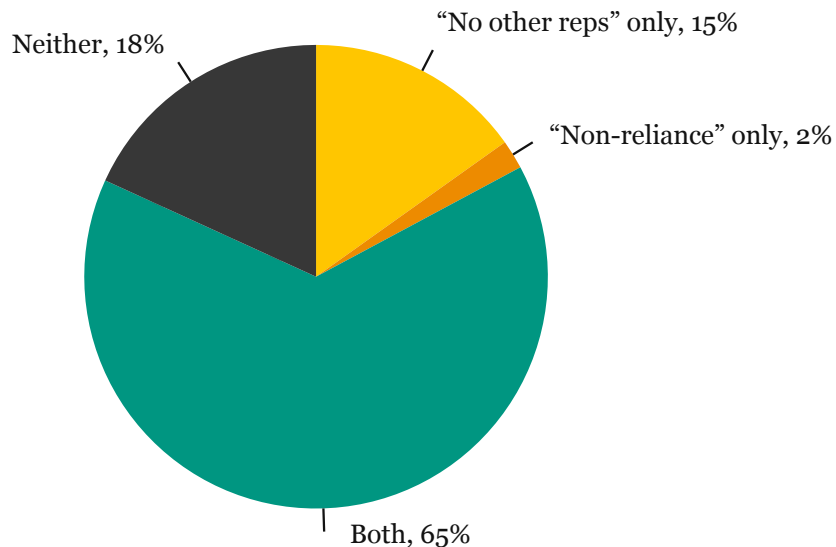
Subset: both “10b-5” and “full disclosure” reps



“No Other Representations” and “Non-Reliance” Clauses

 [See example terms on slide 96](#)

Inclusion of representations (2021 deals)



This data point is influenced by Transaction Value and Buyer Type.

[Visit SRS Acquiom MarketStandard® to learn more.](#)

“No Other Representations” and “Non-Reliance” Clauses: Influence of RWI

KEY FINDING

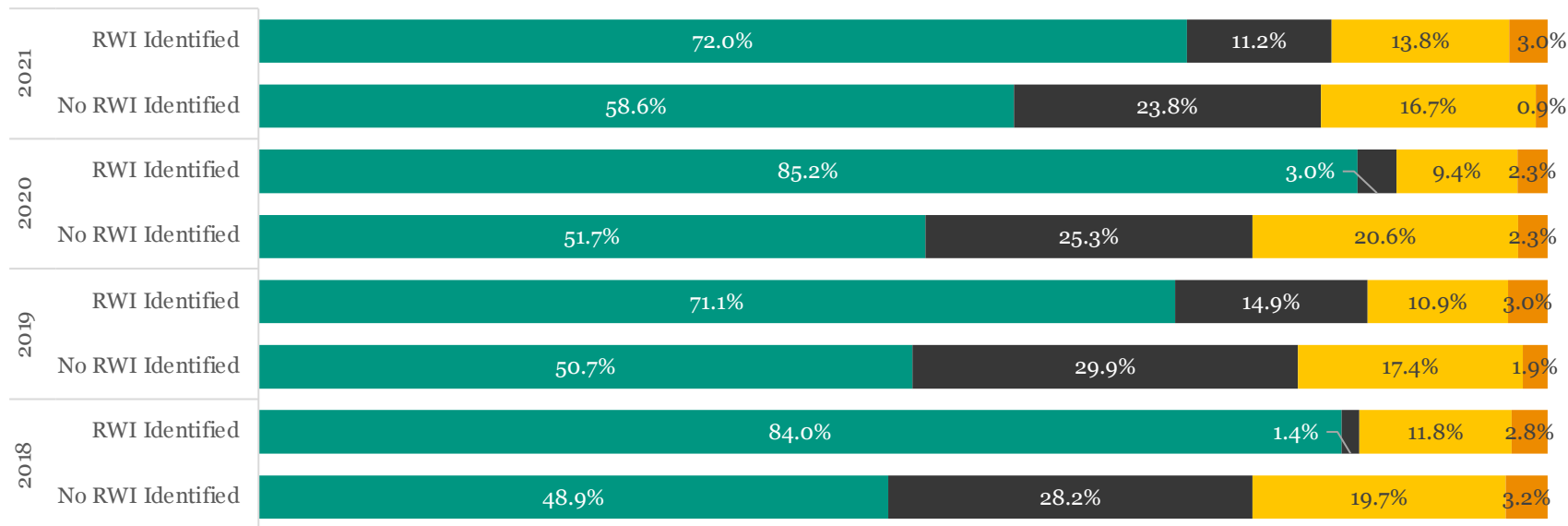


NEW DATA



2018—2021 deals

■ Both ■ Neither ■ No Other Reps Only ■ Non-Reliance Only

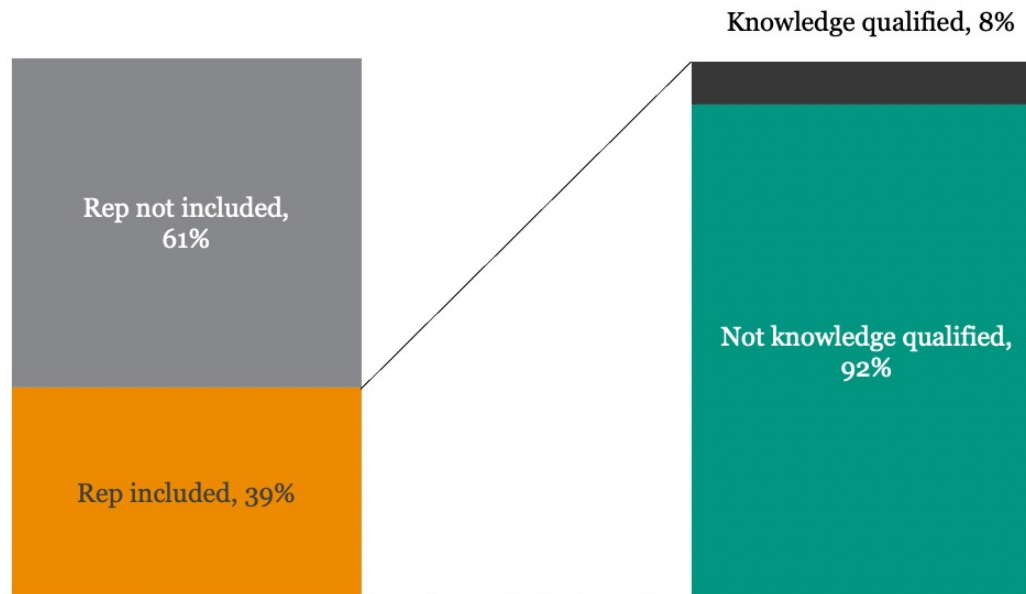


COVID-19 Representation

KEY FINDING

NEW DATA

COVID-19 representation and when it is knowledge qualified (2021 deals)



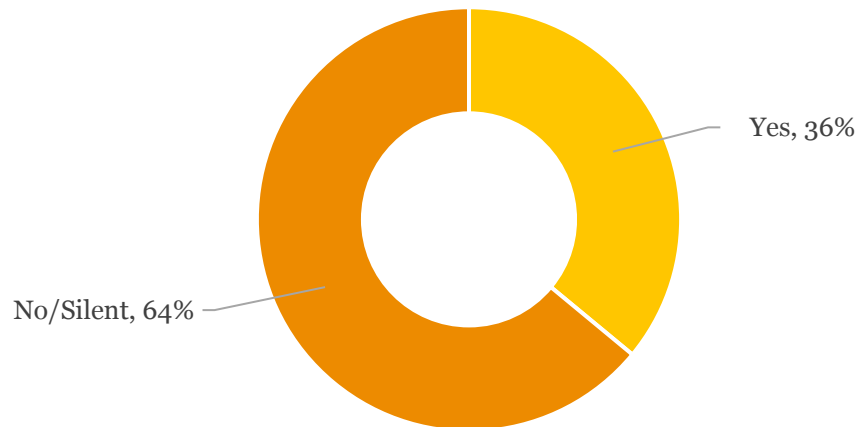
Covenant to Conduct Business in the Ordinary Course: COVID-19 Carveout

KEY FINDING

NEW DATA

Subset: Deals with a covenant to conduct business in the ordinary course.

COVID carveout (2021)

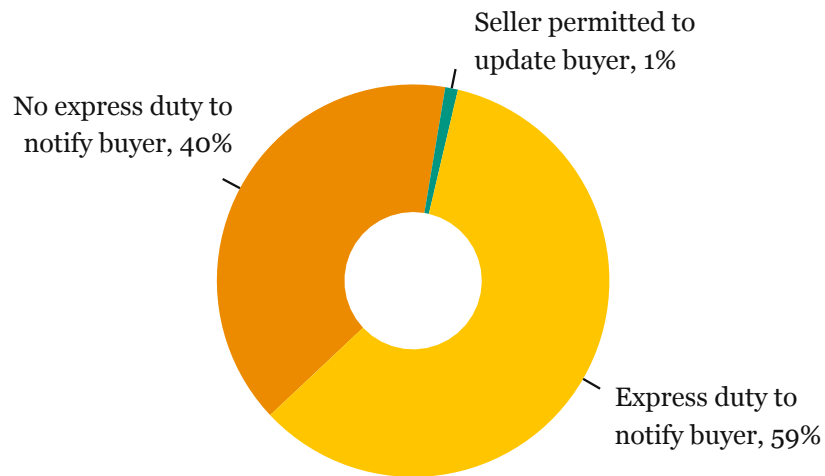


*For more information,
see the SRS Acquiom
report:*

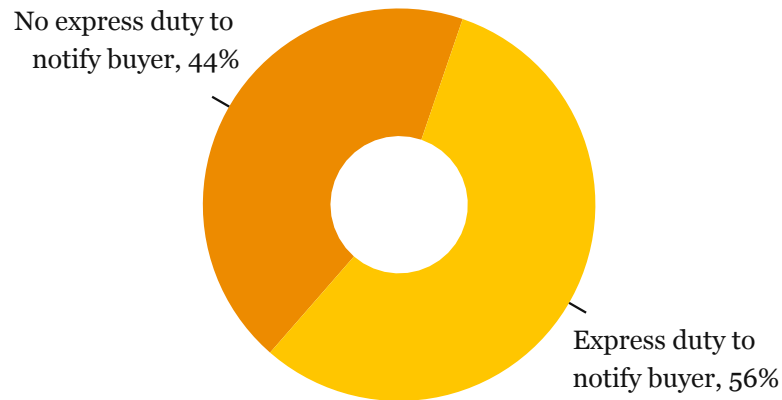
*2020 Review:
COVID-19 Impact on
M&A Transactions*

Covenants: Seller's Duty to Notify Buyer of Pre-Closing Breaches*

Breaches of representations and warranties (2021 deals)



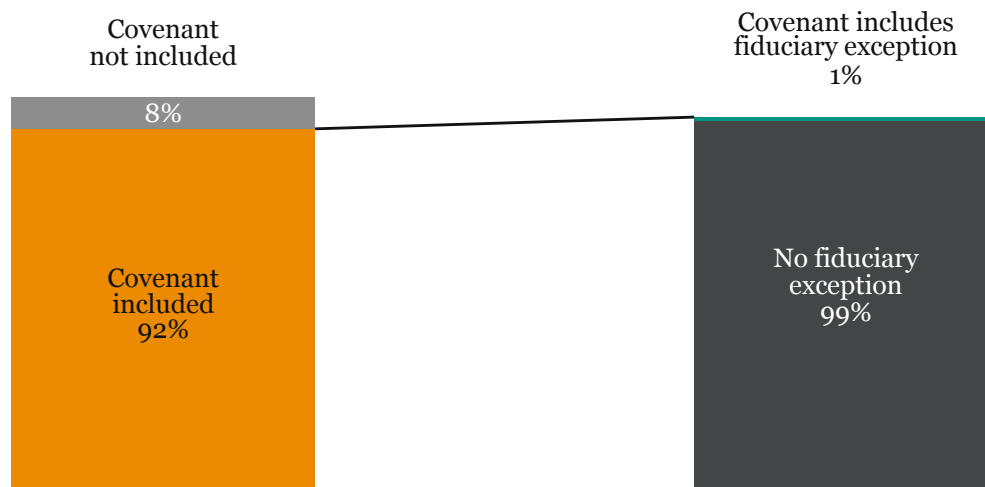
Breaches of covenants (2021 deals)



* Sample excludes "sign-and-close" deals.

Covenants: No-Shop/No-Talk*

No-shop/No-talk covenant inclusion[†] (2021 deals)



* Sample excludes “sign-and-close” deals.


[†] Fiduciary exception subset excludes stock-purchase deals.



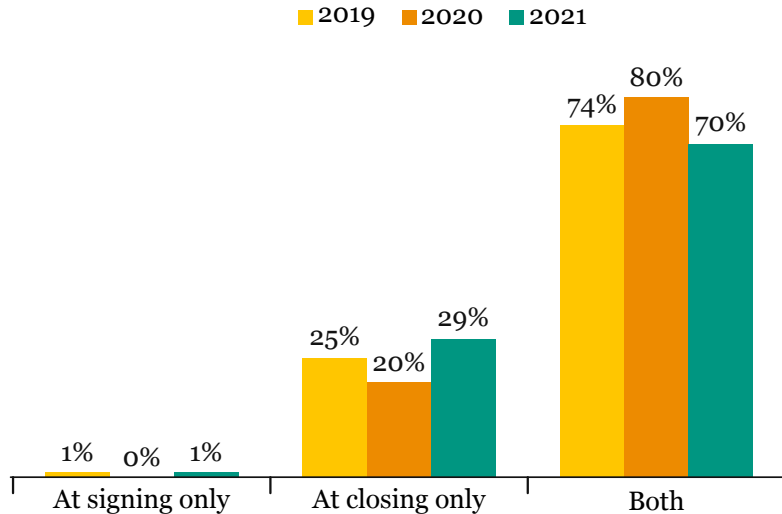
Closing Conditions*

* This section's analyses exclude “sign-and-close” deals.

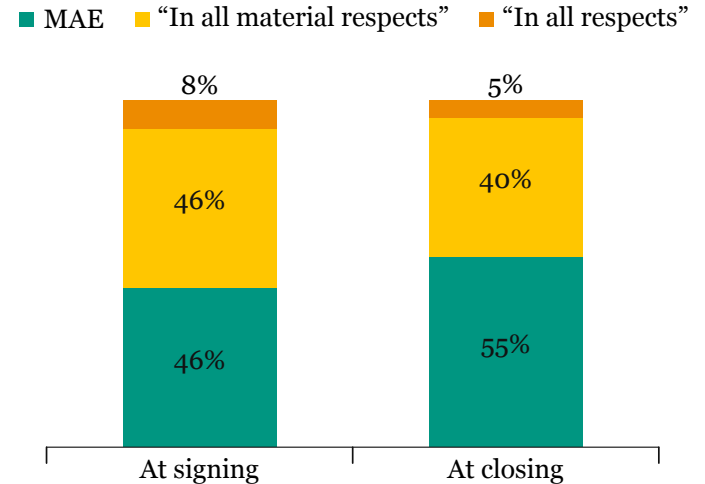
Accuracy of Seller's Representations: Accuracy and Materiality

 See example terms
on slide 96 and 97


Accuracy: timing



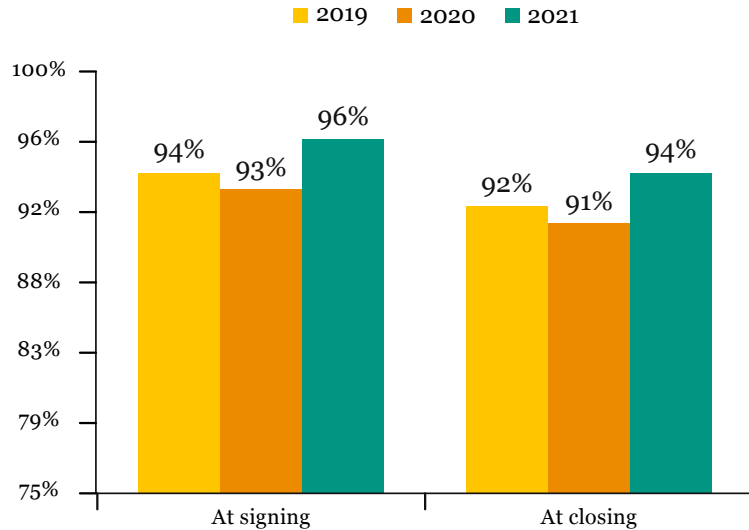
Accuracy: materiality (2021 deals)



Accuracy of Seller's Representations: Materiality

 See example terms on slide 97

MAE qualifier with capitalization representation carveout*




* Subset: Deals with materiality or MAE qualifiers in the "accuracy of representations" condition

† Deals with materiality or MAE qualifiers in the "accuracy of representations" condition

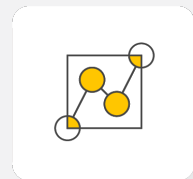
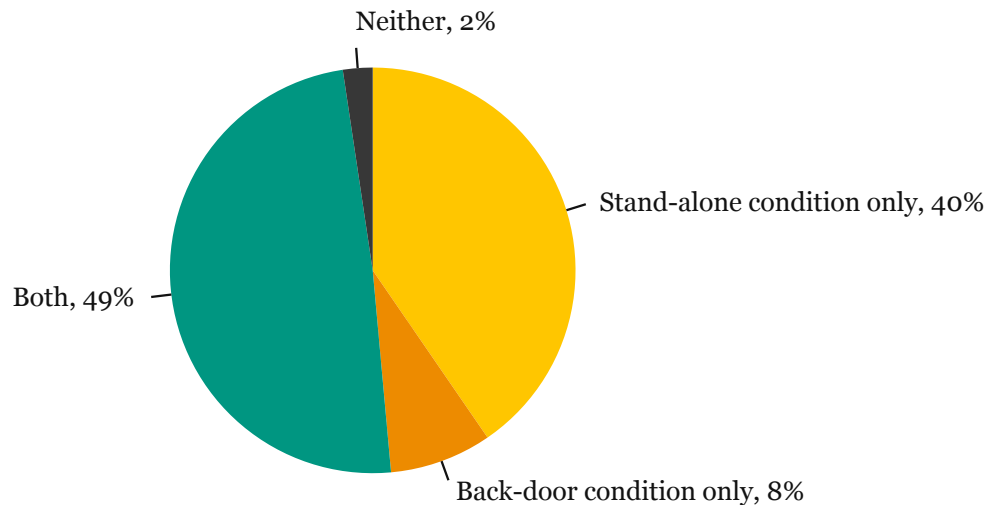
Materiality scrape frequency†



“Material Adverse Change” Condition (“MAC”)

 [See example terms on slide 98](#)


MAC condition details (2021 deals)



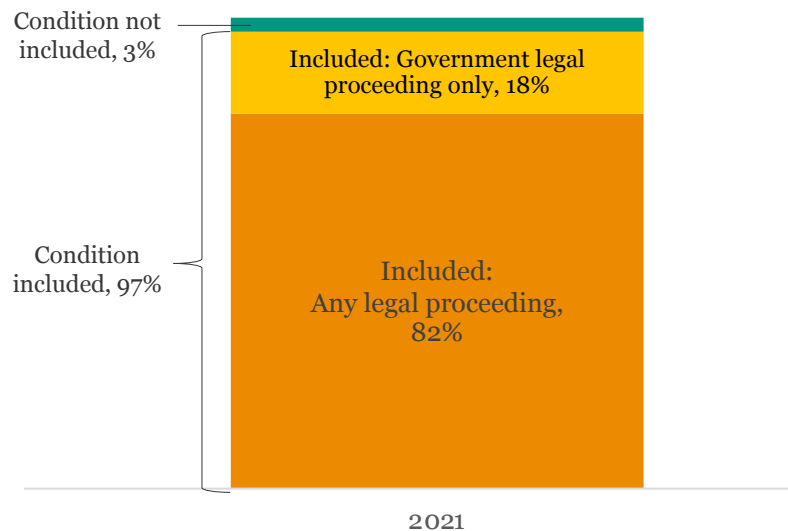
This data point is influenced by Transaction Value and Target Industry.

[Visit SRS Acquiom MarketStandard[®] to learn more.](#)

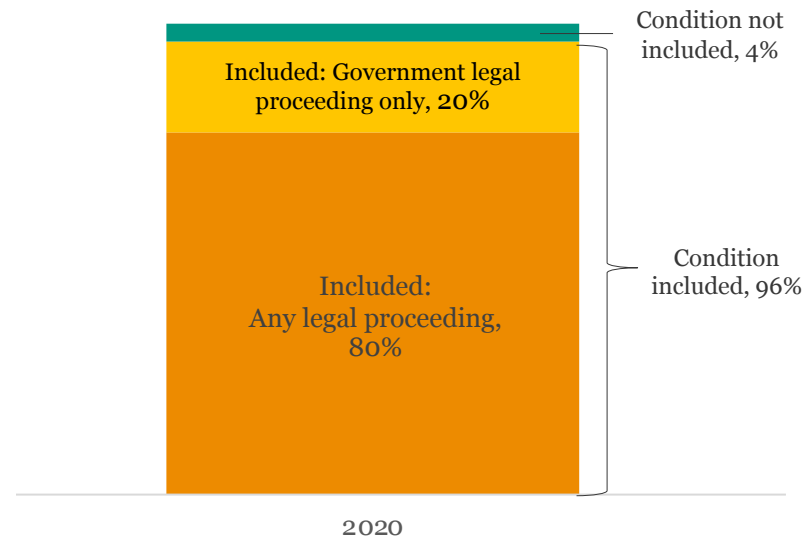
“No Legal Proceedings” Condition

 See example terms
on slide 98

2021 deals

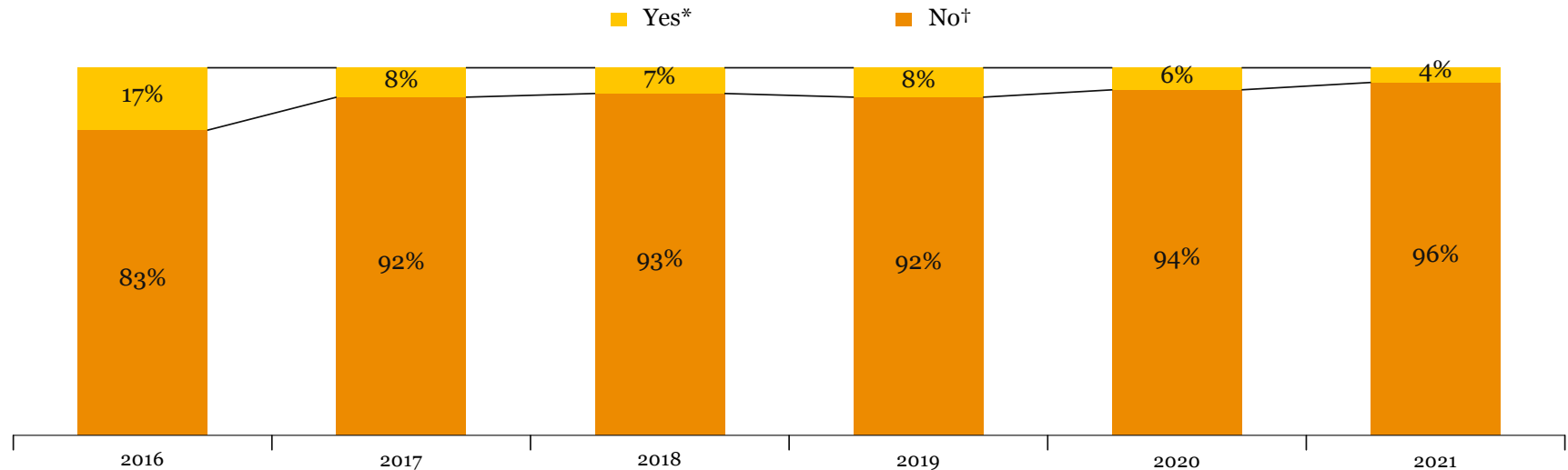


2020 deals



Legal Opinions (Non-Tax) from Seller's Counsel

Opinion required as a condition to closing



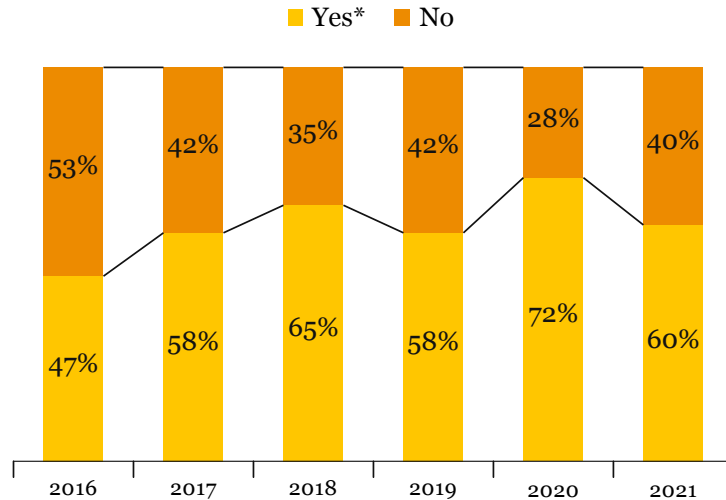
* Includes opinions delivered pursuant to both stand-alone and “closing deliverables” conditions.

† Does not account for opinions that may have been required or delivered outside of the express terms of the agreement.

Appraisal Rights Condition

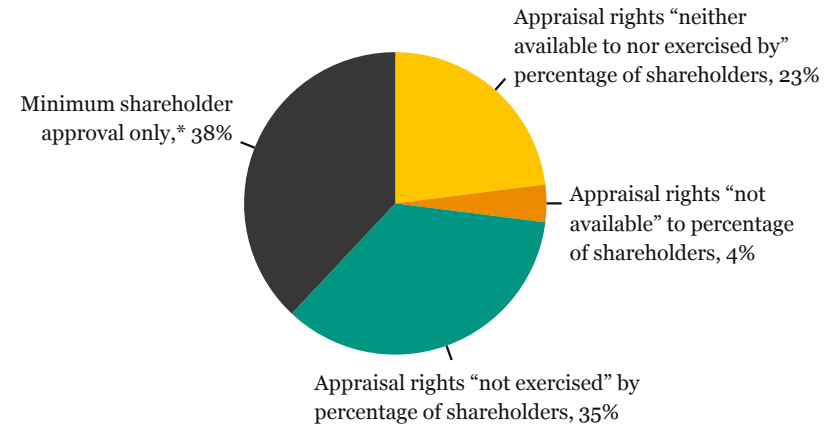
Subset: Mergers

Appraisal rights condition included



* Includes deals without an express appraisal rights condition but with a condition specifying a minimum percentage of shareholder votes (on a fully diluted basis) approving the merger, effectively waiving appraisal rights.

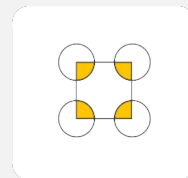
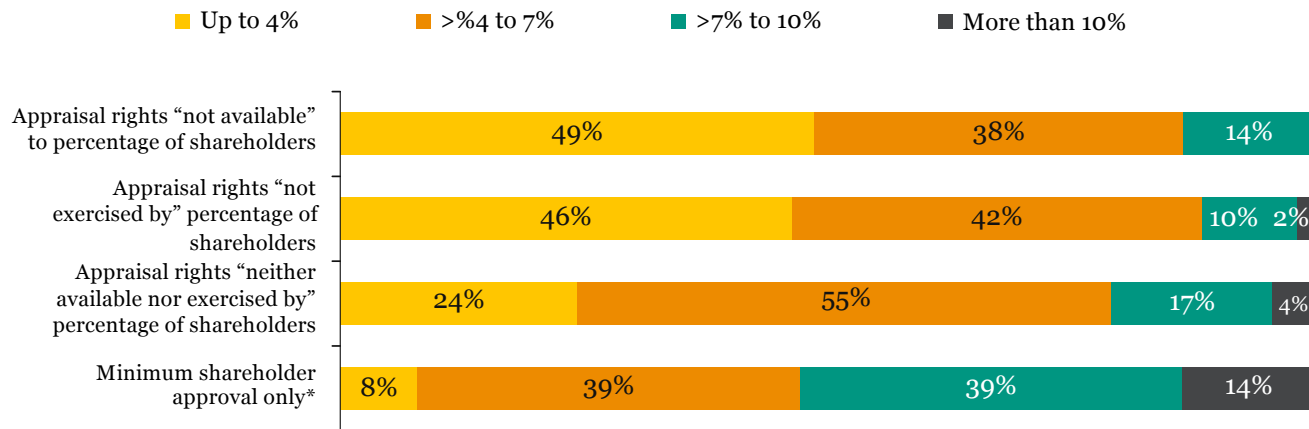
Drafting details (2021 deals including condition)



Appraisal Rights Condition: Thresholds

Subset: Mergers since 2018 with an appraisal rights condition

Condition threshold details



For more information, see the SRS Acquiom white paper:

[Understanding Changes in Shareholder Consent Requirements.](#)



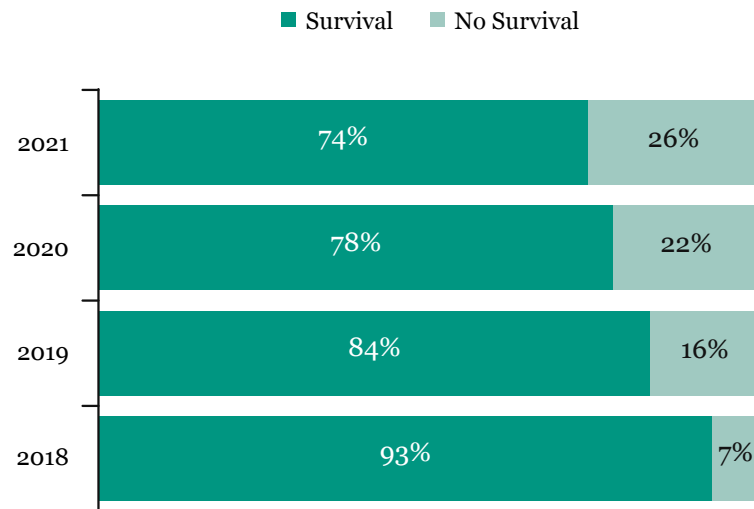
Indemnification

General Survival of Seller's Representations and Warranties

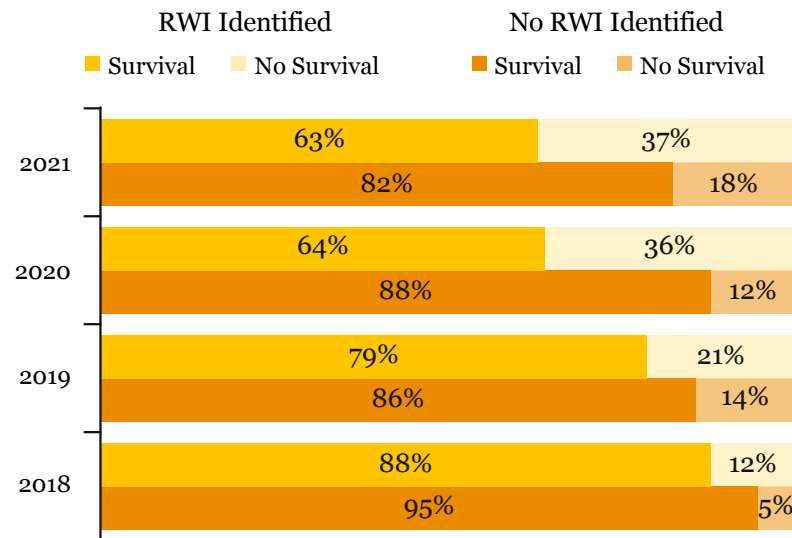
KEY FINDING

NEW DATA

All deals (2018–2021)



Influence of RWI (2018–2021)

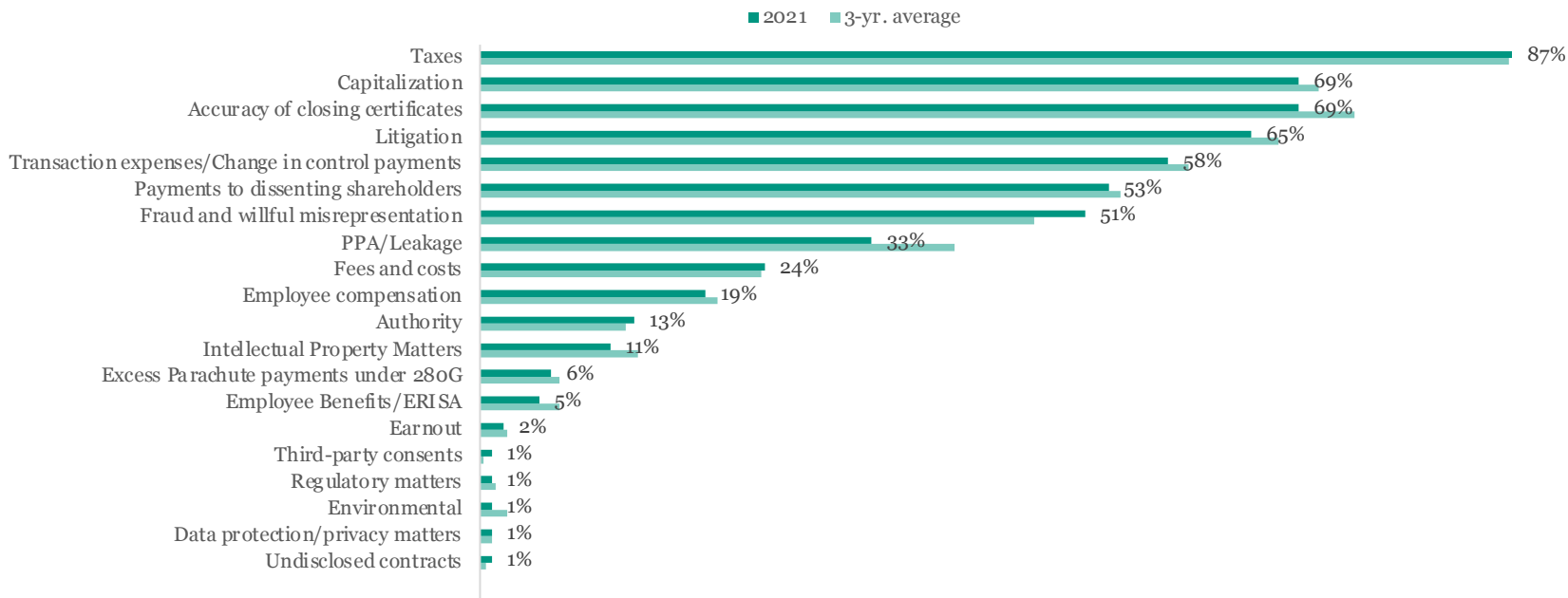


Stand-Alone Indemnities*

NEW DATA



Frequency: 2021 deals compared to 3-year average (2019–2021)†




* Line items for which indemnification is expressly provided beyond the standard line-item indemnities for seller's breaches of (i) representations and warranties and (ii) covenants.

† Percentages are for 2021 deals.

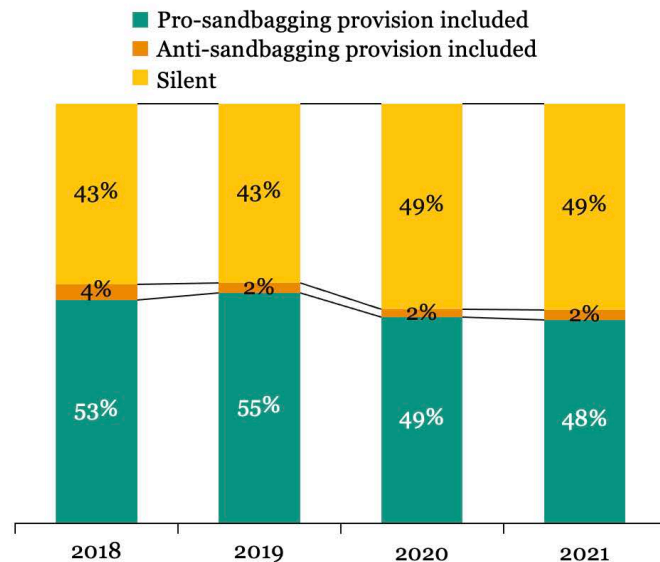
“Sandbagging”

KEY FINDING



 See example terms
on slide 98


Year-over-year trend



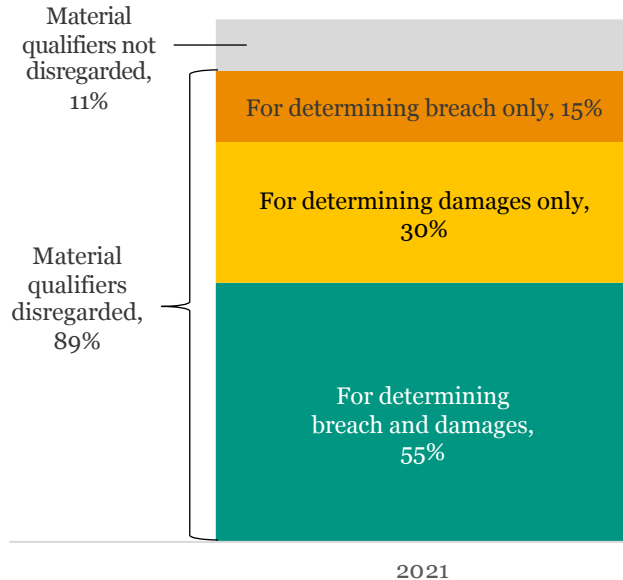
Sandbagging provision, deal years 2018–2021



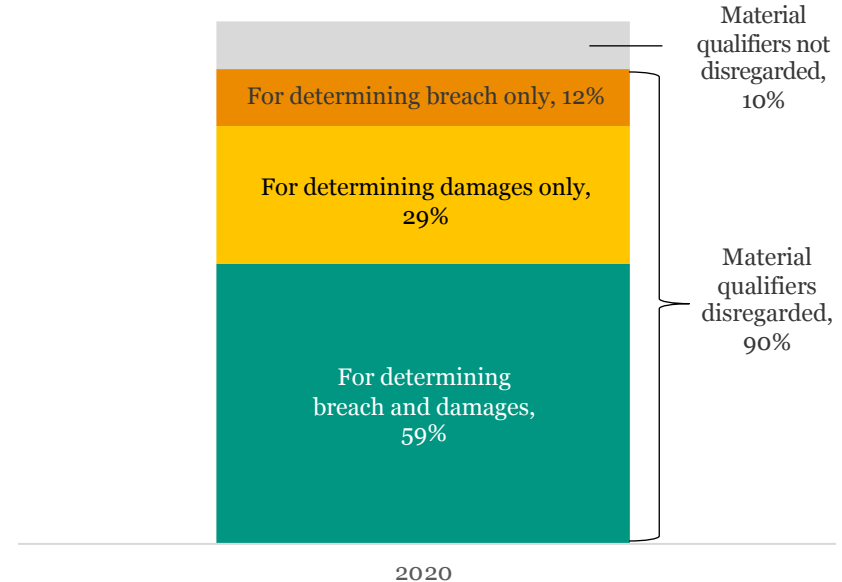
“Materiality Scrape” Inclusion

 See example terms
on slide 99

Subset: 2021 deals



Subset: 2020 deals

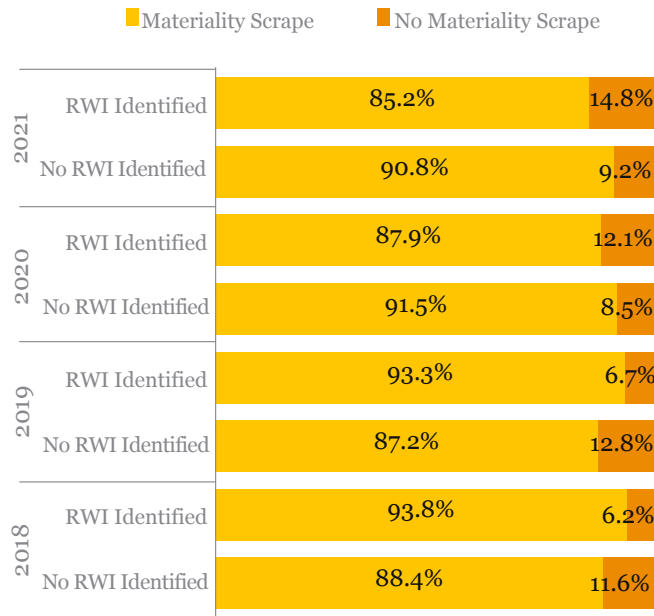


Materiality Scrape: Influence of RWI

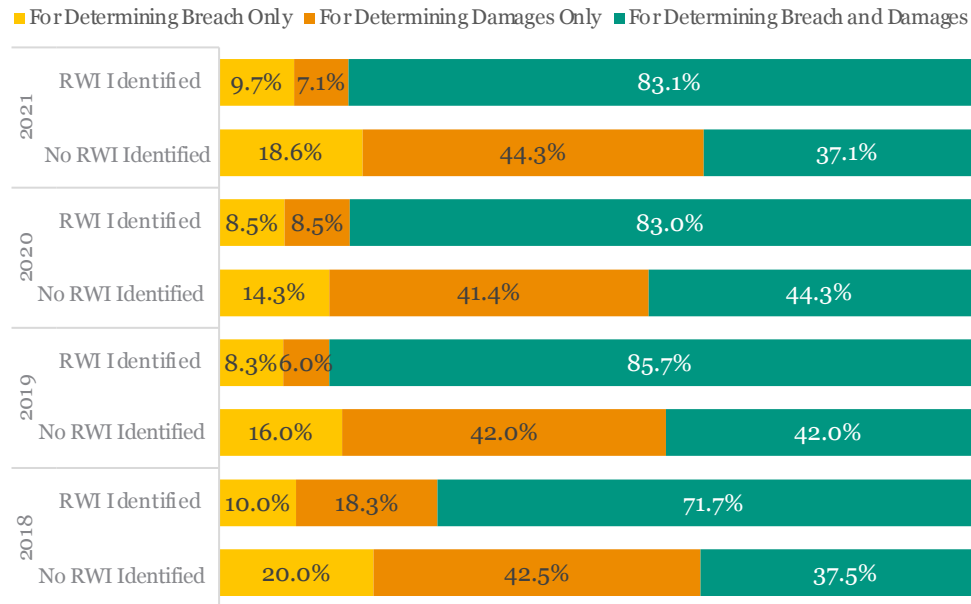
KEY FINDING

NEW DATA


Materiality scrape included (2018–2021)



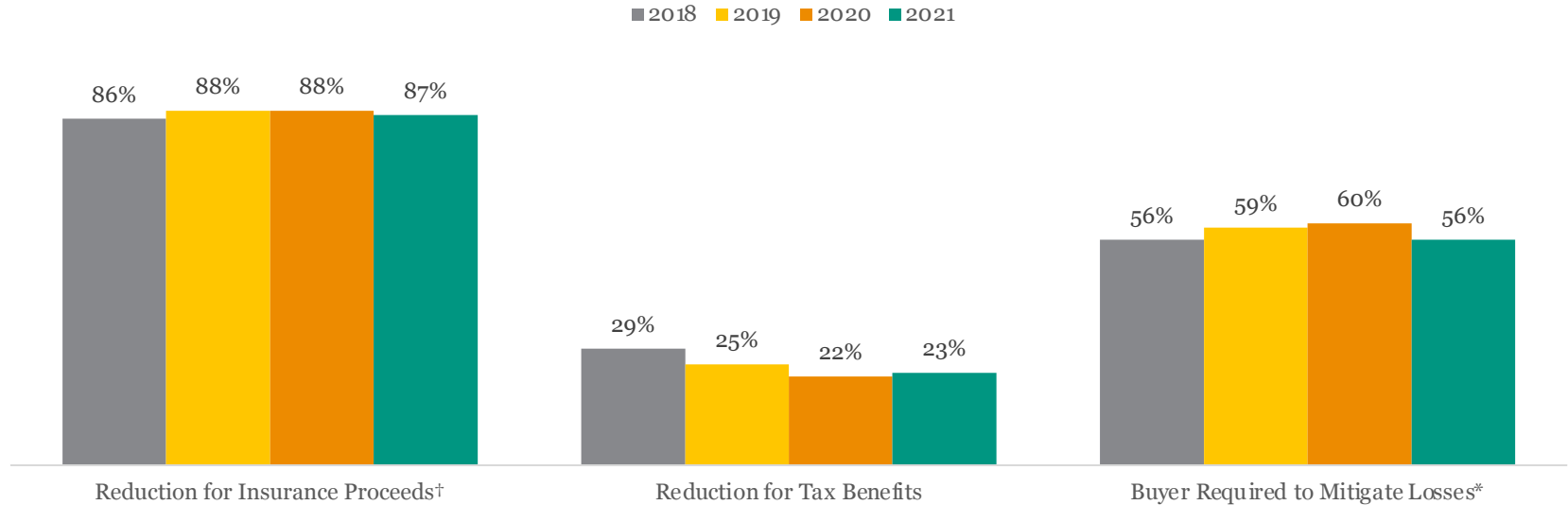
Materiality scrape details (2018–2021)



Reductions Against Buyer's Indemnification Claims

 See example terms on slide 99

Provision included




* Includes agreements requiring the buyer to seek payments under applicable insurance policies.

[†] Insurance policies other than RWI.

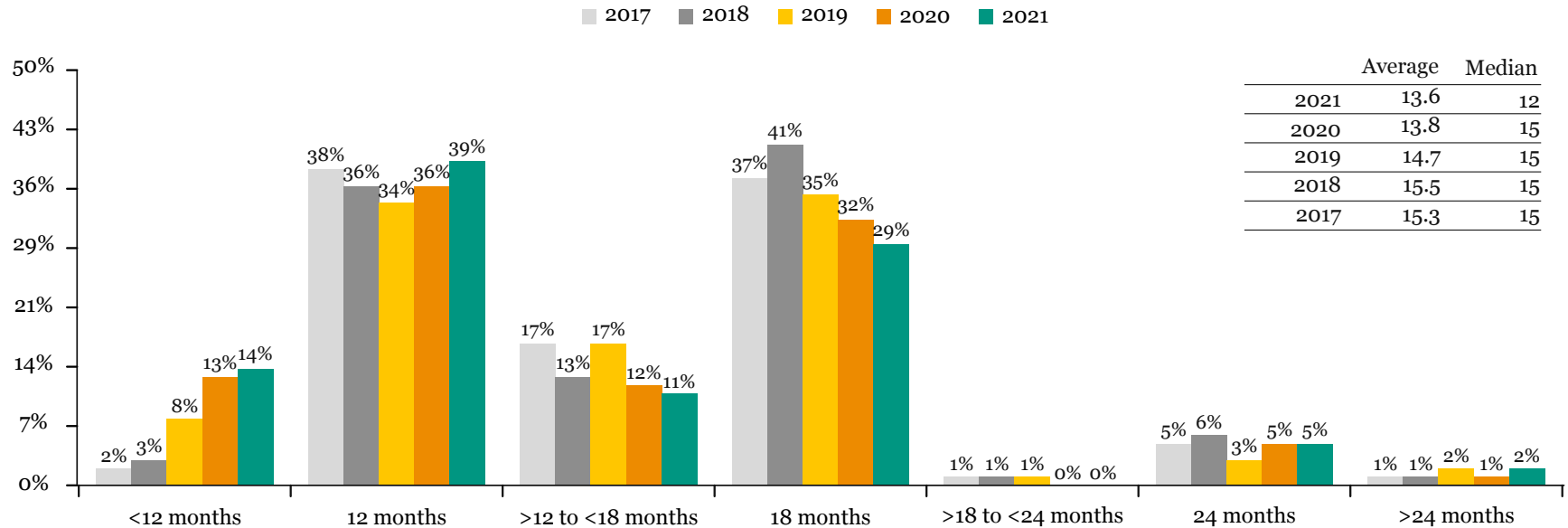
General Survival Period/Time to Assert Claims

KEY FINDING

NEW DATA

 [See example terms on slide 100](#)

Survival period (in months)



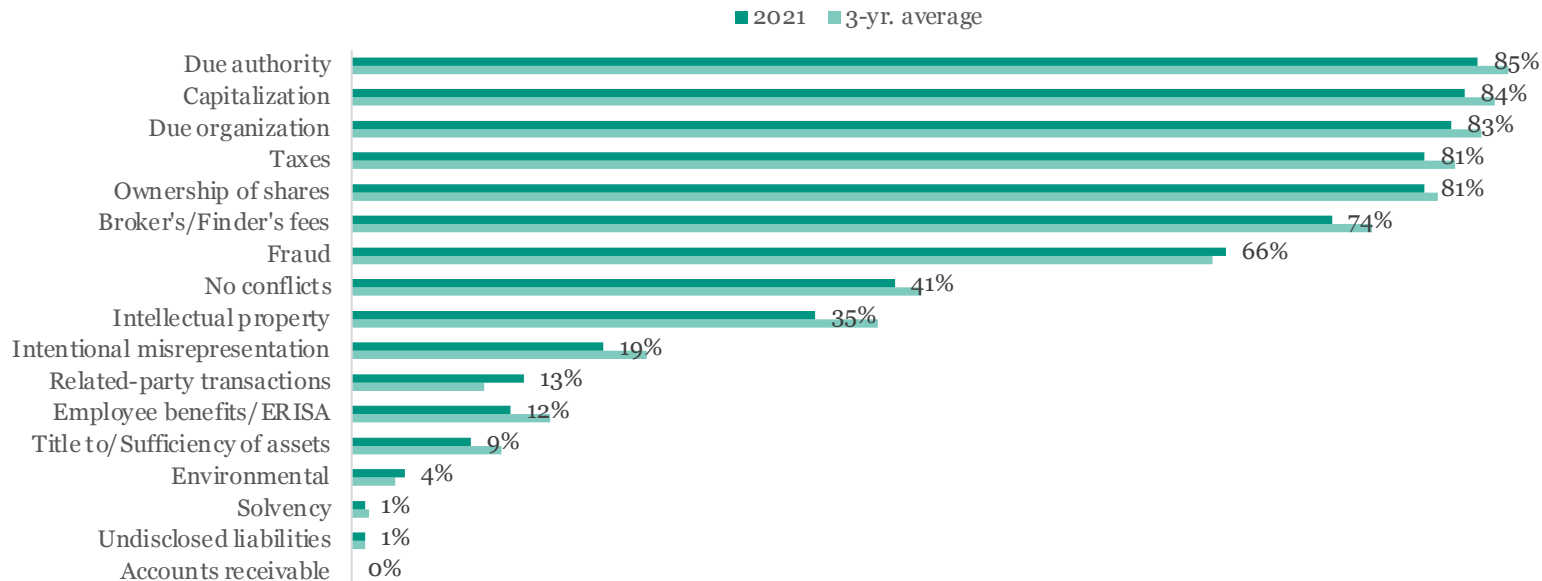
	Average	Median
2021	13.6	12
2020	13.8	15
2019	14.7	15
2018	15.5	15
2017	15.3	15

Survival/Time to Assert Claims: Carveouts to General Survival Period*

NEW DATA



Carveout frequency: 2021 deals compared to 3-year average (2019–2021)†



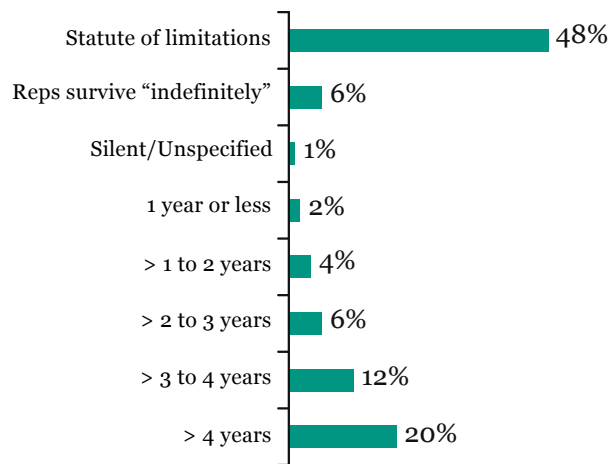
* Matters subject to carveouts survive longer than the general survival period.

† Percentages are for 2021 deals.

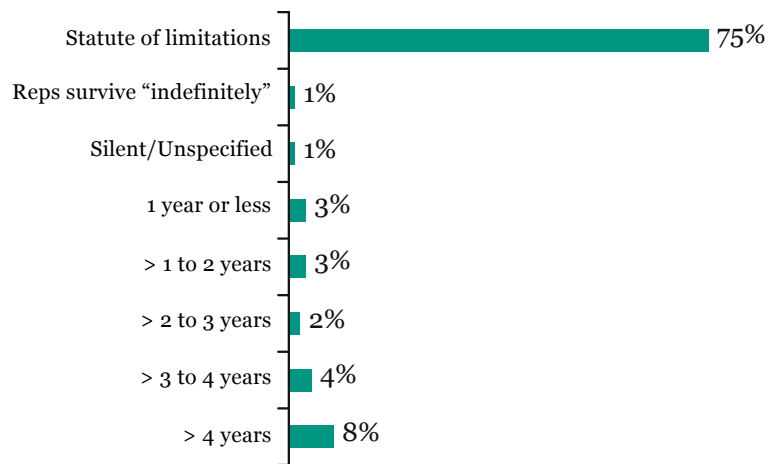
Second-Level Survival: “Fundamental” and Tax Representations

Subset: 2021 deals that include the specified carveout. Years below denote additional survival time after expiration of the general survival period.

Group of “Fundamental” Representations*



Tax representations

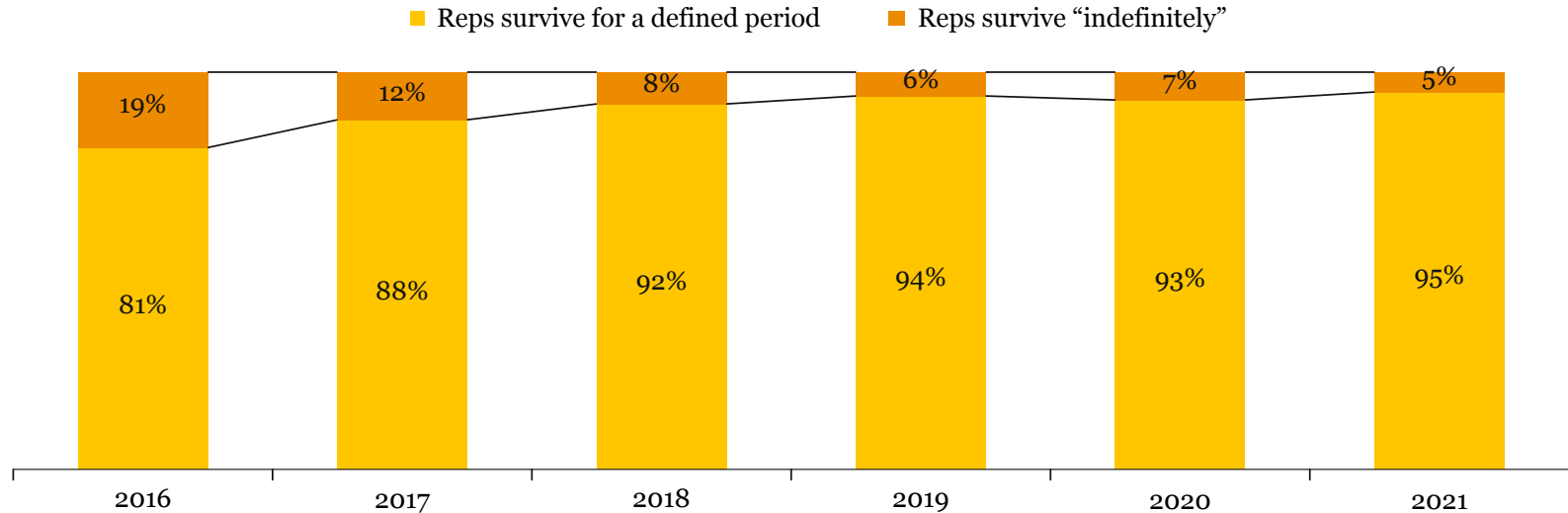


* For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property and fraud).

Survival/Time to Assert Claims:

Timing for “Fundamental” Representations Carveout to General Survival Period

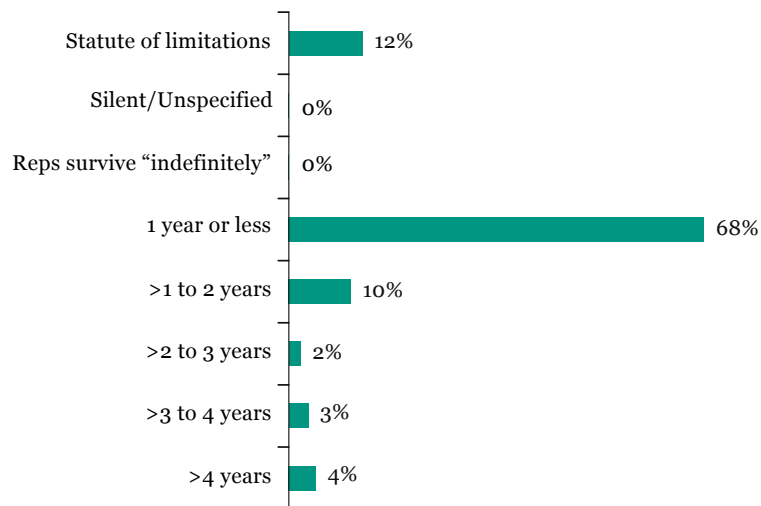
“Fundamental” representations carved out from the general survival period (mergers only)



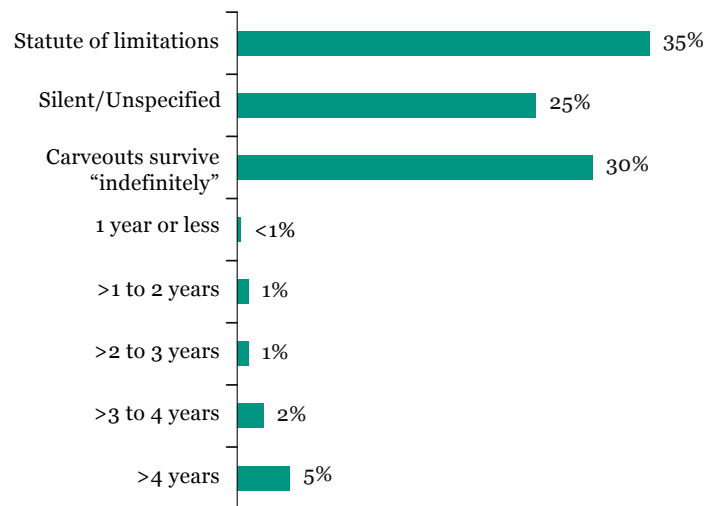
Second-Level Survival: IP Representations and Fraud

Subset: 2021 deals that include the specified carveout. Years below denote additional survival time after expiration of the general survival period.


Intellectual property representations



Fraud/intentional misrepresentation

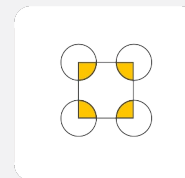
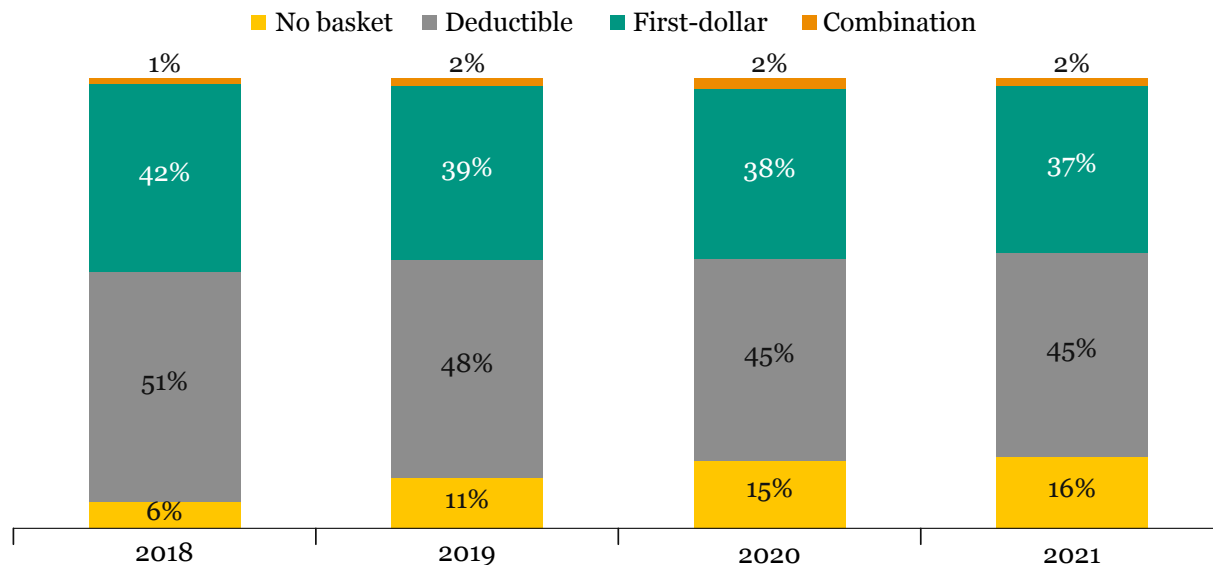


Baskets: Definitions

 See example terms
on slide 100

Subset: Deals with indemnification

Basket frequency



For more information,
see the *SRS Acquiom*
checklist:

M&A Seller Checklist:
Post-Close Drafting
Considerations

Baskets: Influence of RWI

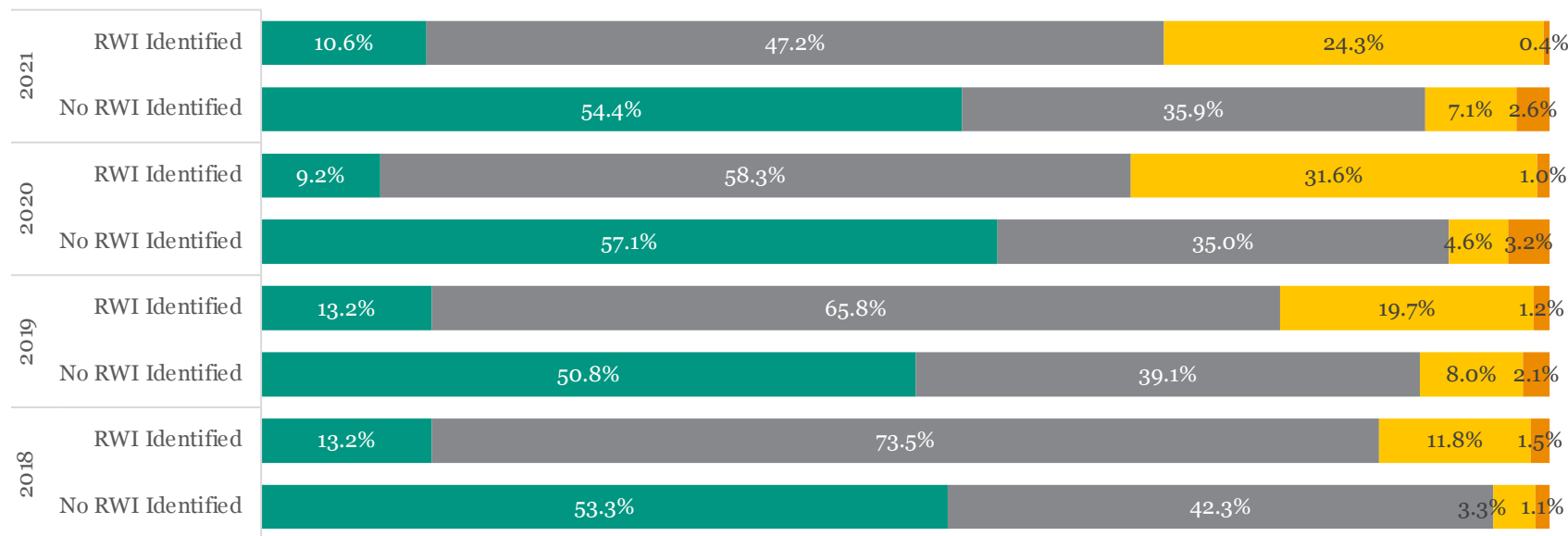
KEY FINDING

NEW DATA

When the deal includes buy-side RWI, sellers' indemnification obligations are more likely to be structured as deductible baskets than first-dollar baskets.

Basket type distribution, deals 2018–2021

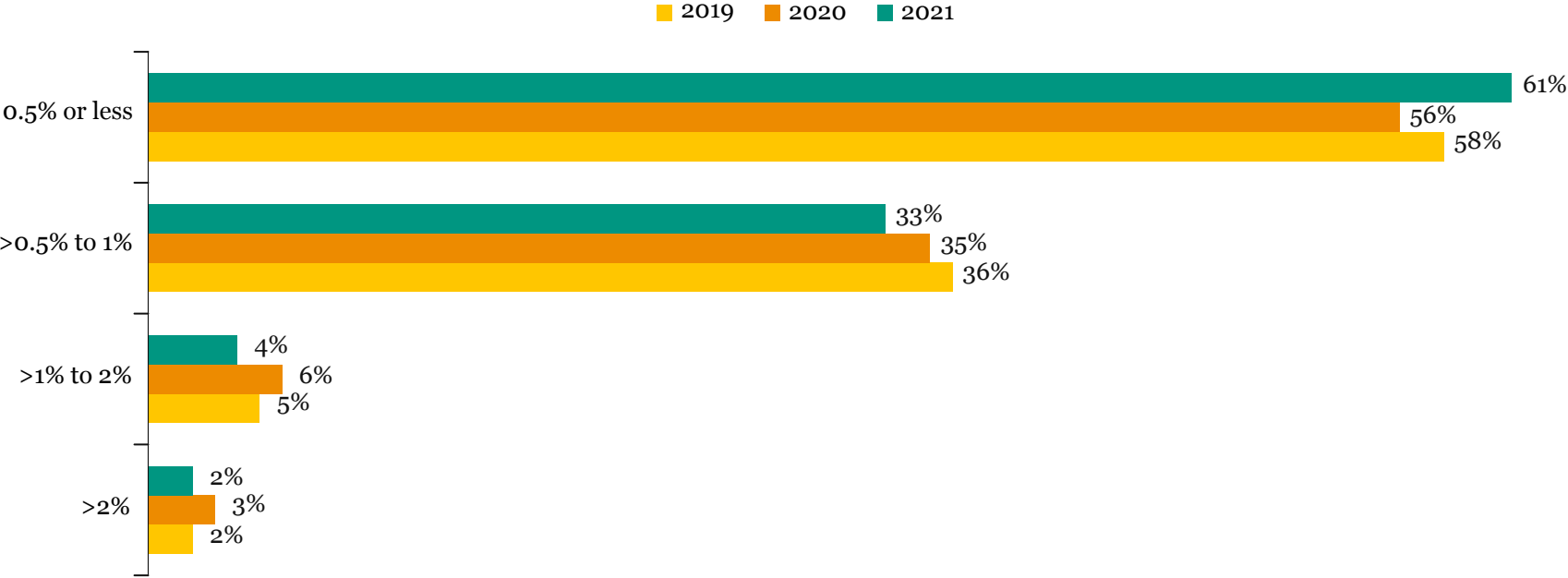
■ First-Dollar ■ Deductible ■ None ■ Combination



Baskets as a Percentage of Transaction Value

Subset: Deals with deductible and first-dollar baskets

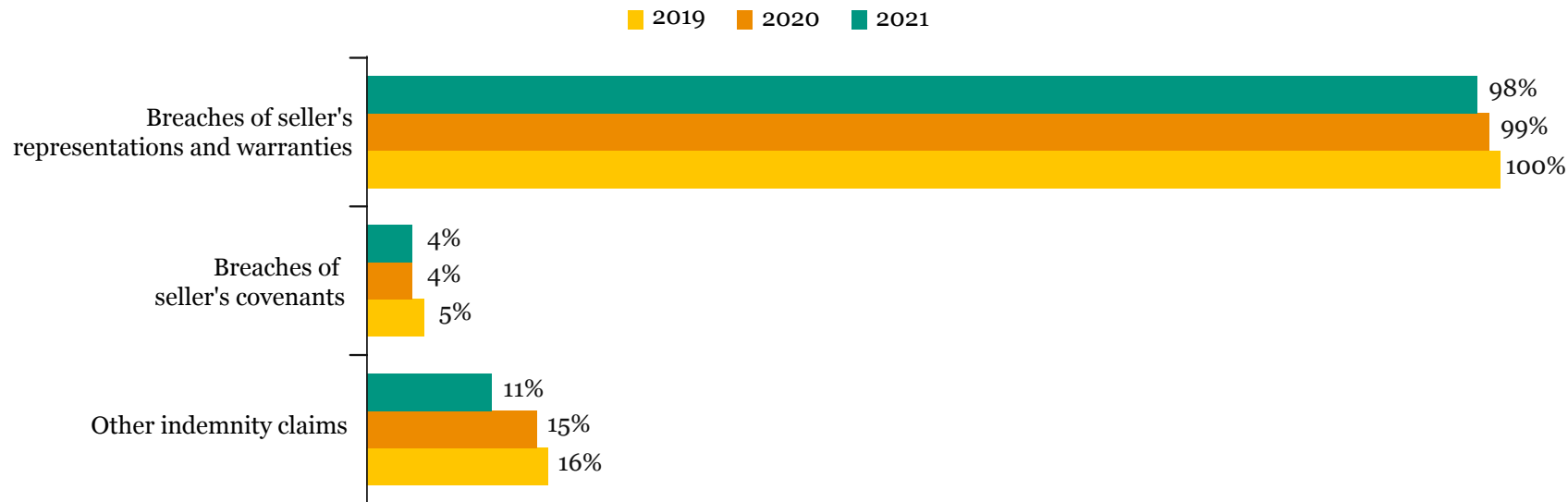
Basket sizes



Baskets: General Coverage*

Subset: Deals with baskets

Coverage details



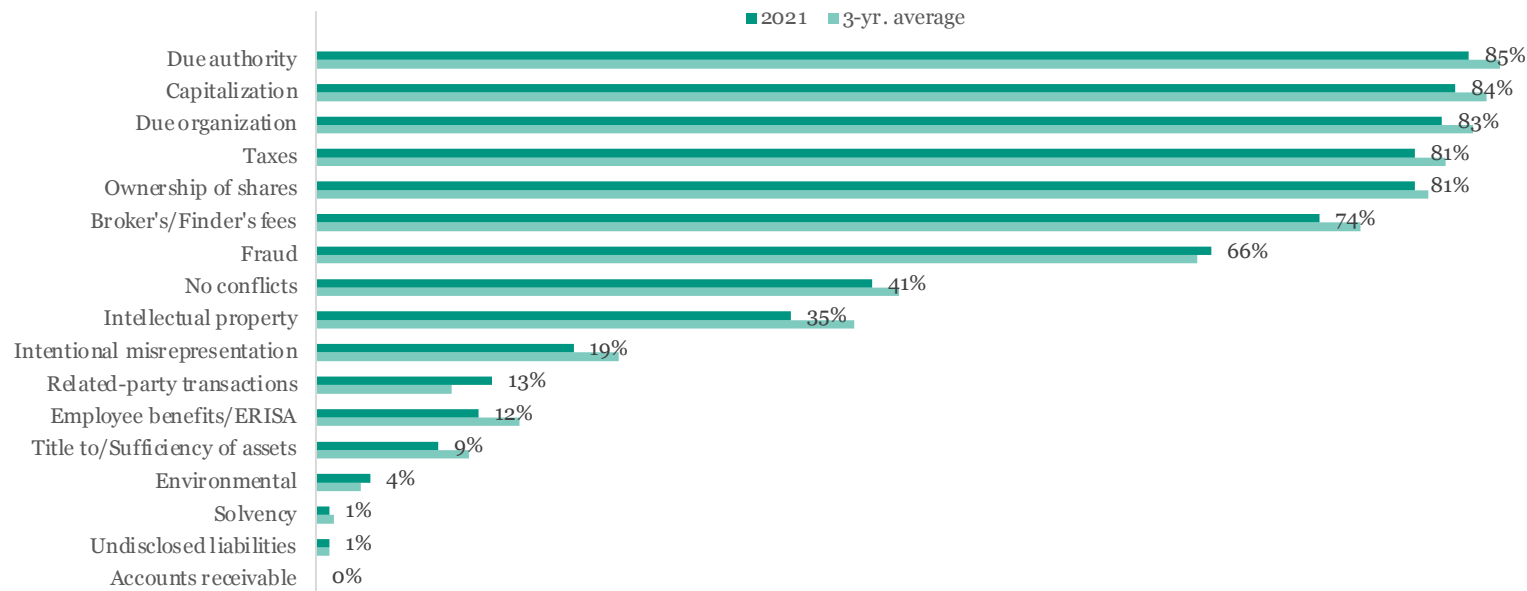
* Carveouts to general basket coverage are discussed on the next slide.

Baskets: Carveouts

NEW DATA




Carveout frequency: 2021 deals compared to 3-year average (2019–2021)[†]

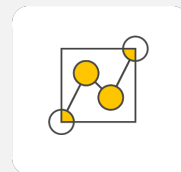
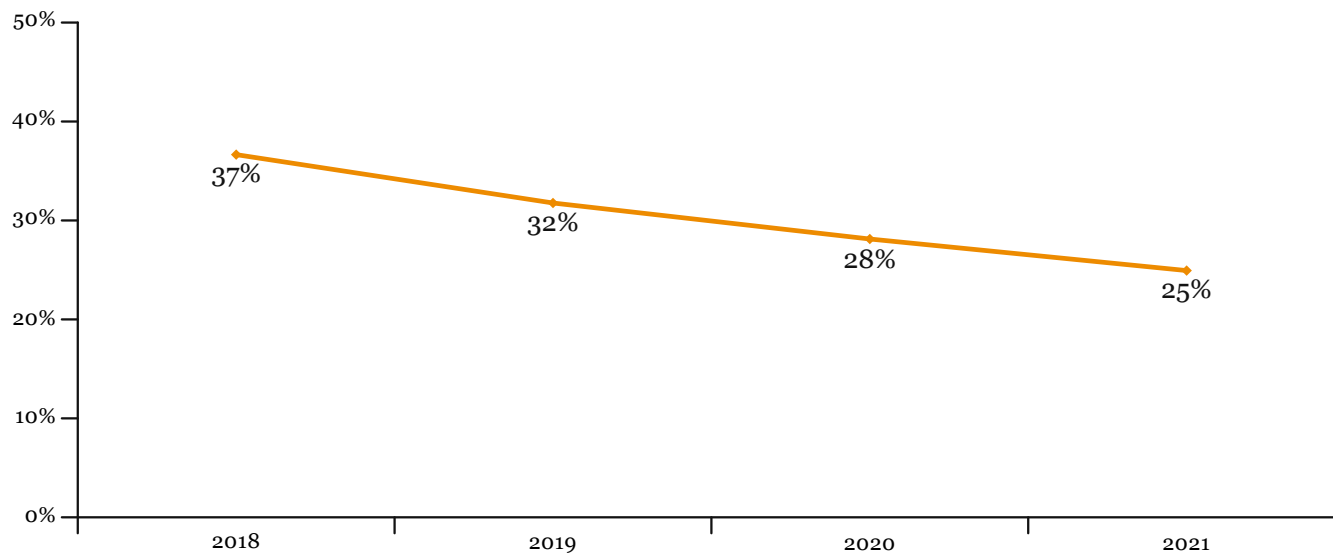


[†] Percentages are for 2021 deals.

Baskets: Eligible Claim Threshold

 See example terms
on slide 100

Threshold included, year-over-year



*This data point is
influenced by
Transaction Value
and Buyer Type.*

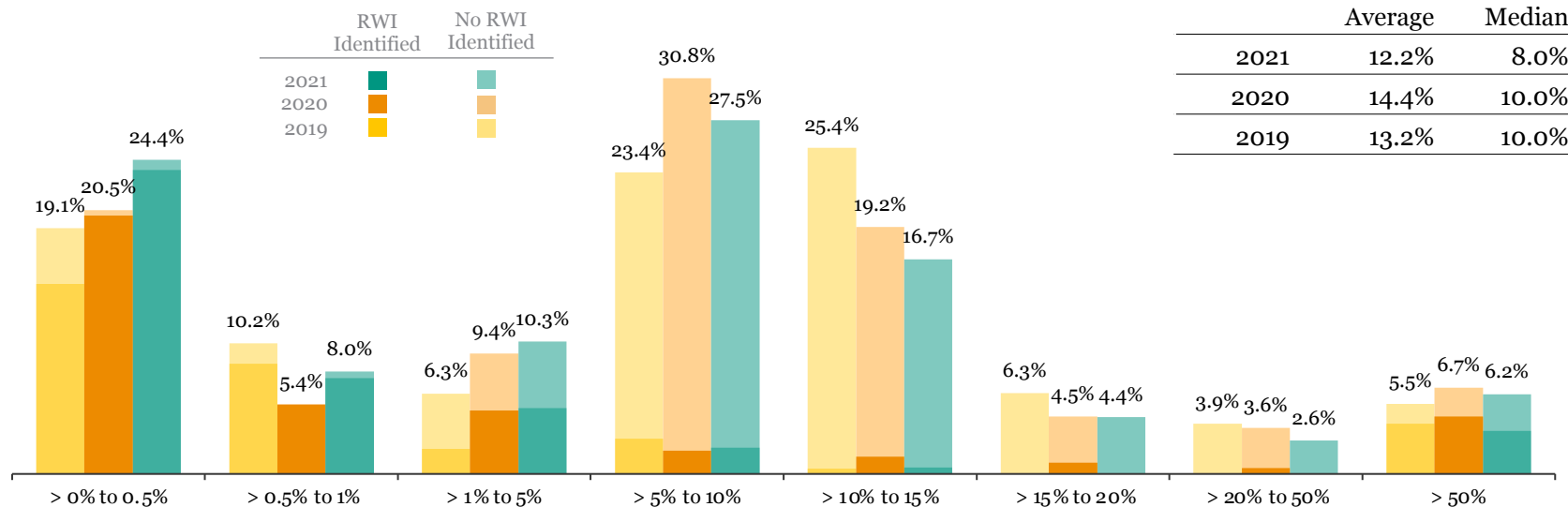
Visit [SRS Acquiom
MarketStandard®](#)
to learn more.

Caps as a Percentage of Transaction Value*: All Deals

KEY FINDING

NEW DATA

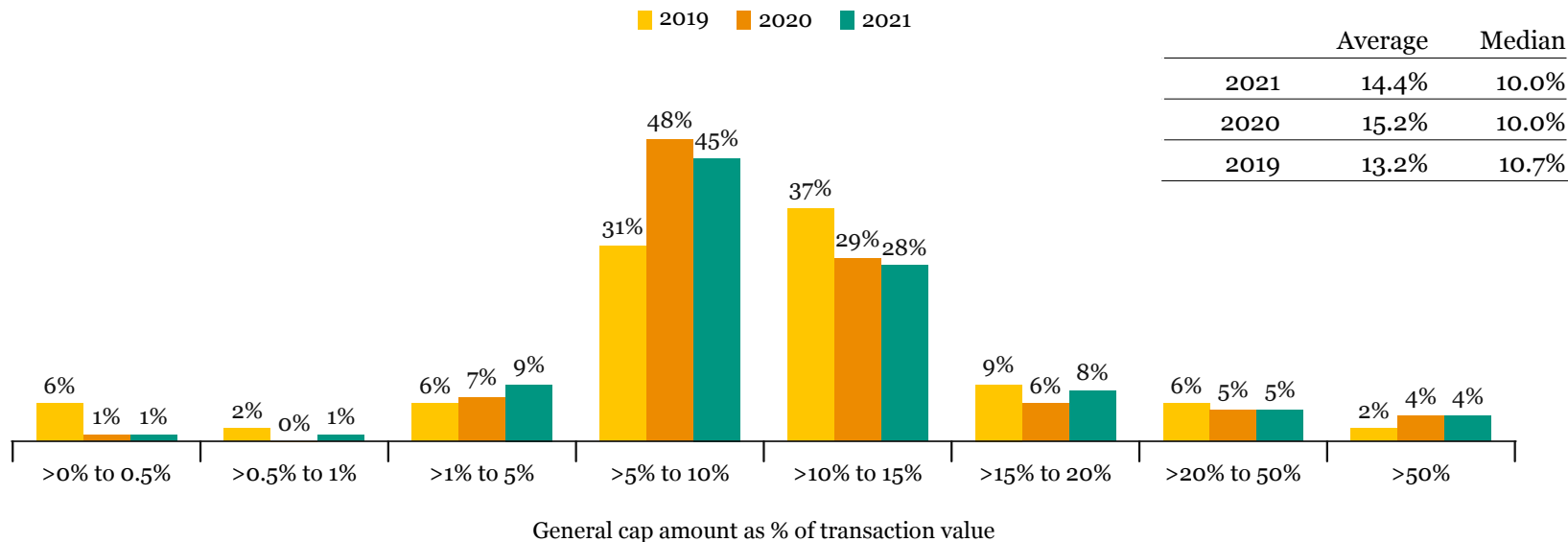
Details, 2019–2021



* In 2021 deals with escrows/holdbacks, 67% of caps equaled the escrowed amount.

Caps as a Percentage of Transaction Value: No RWI Identified

Details, 2019–2021

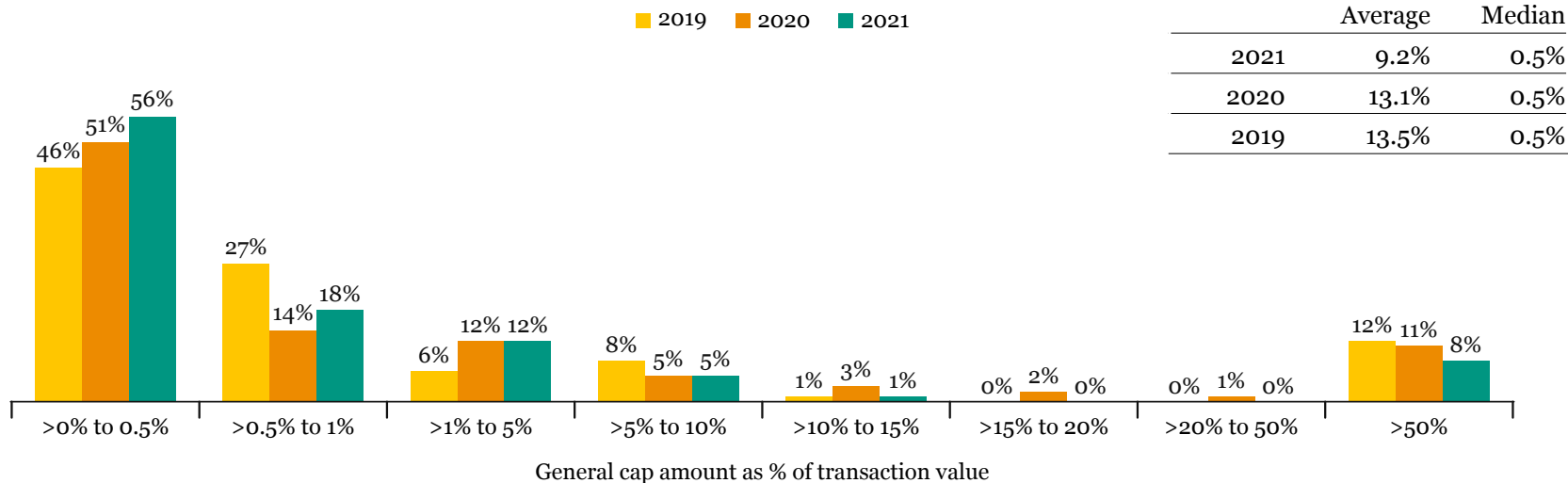


Caps as a Percentage of Transaction Value: RWI Identified

KEY FINDING



Details, 2019–2021

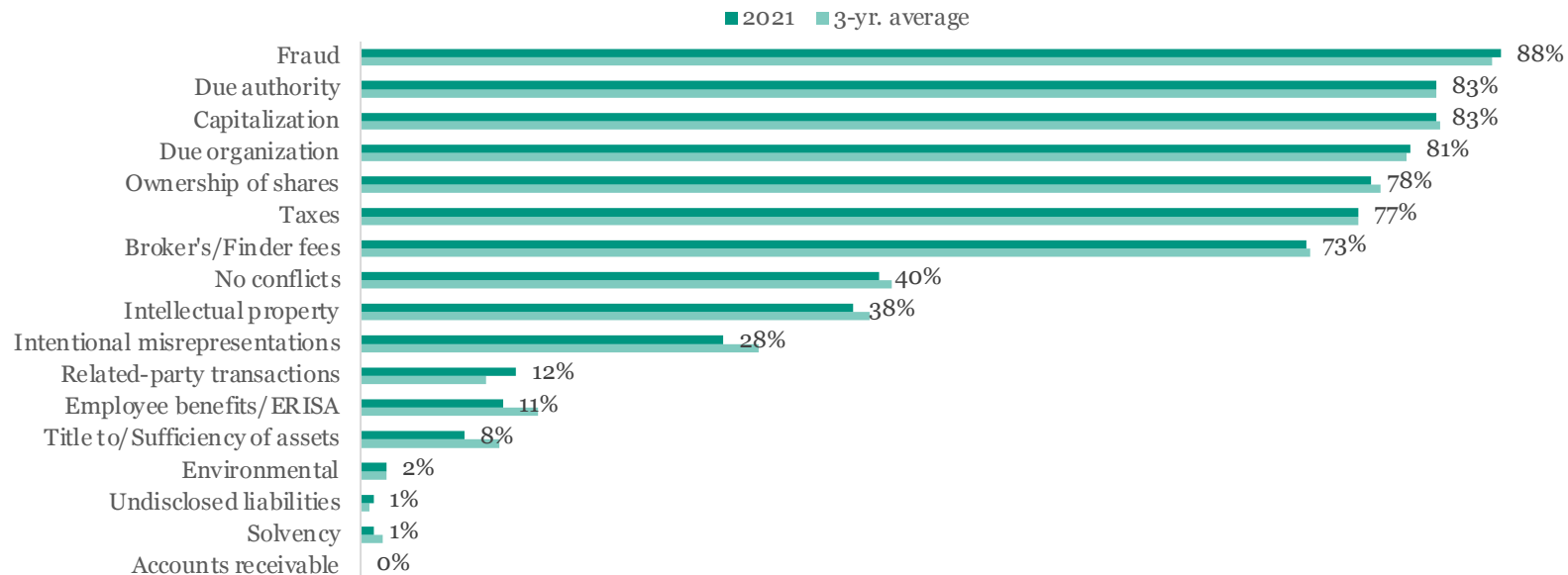


Caps: Carveouts

NEW DATA



Frequency: 2021 deals compared to 3-year average (2019–2021)[†]

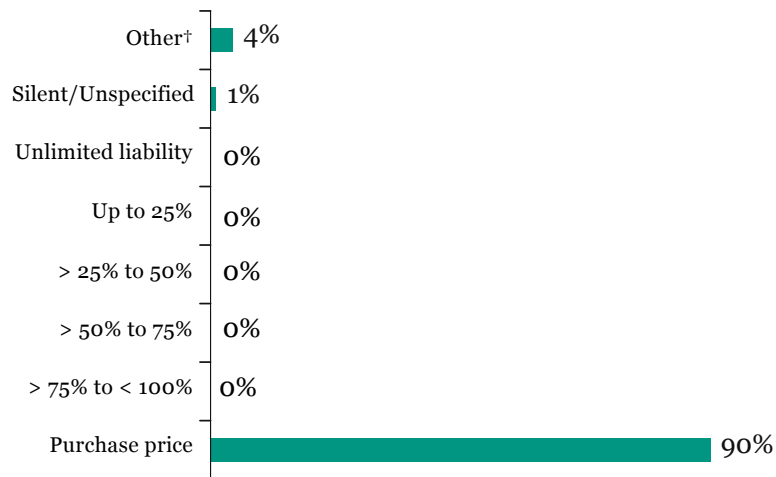


[†] Percentages are for 2021 deals.

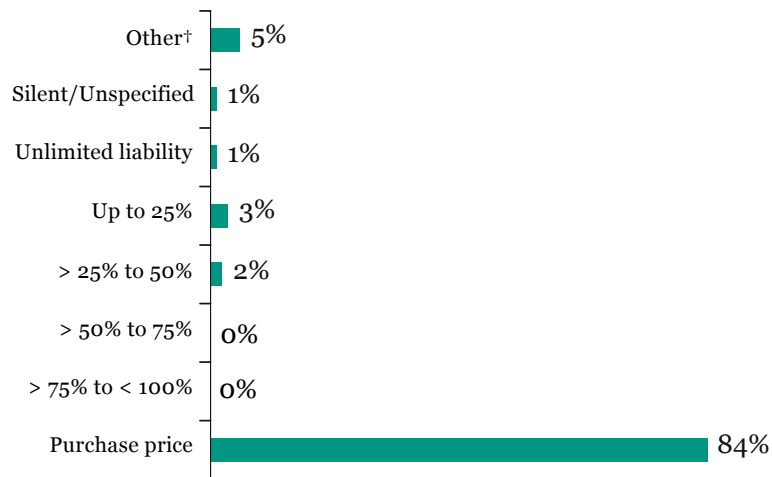
Second-Level Caps: “Fundamental” and Tax Representations

Subset: 2021 deals that include the specified carveout. Percentages below denote the second-level cap as a percentage of transaction value in absolute terms (not above the general cap).

“Fundamental” representations*



Tax representations



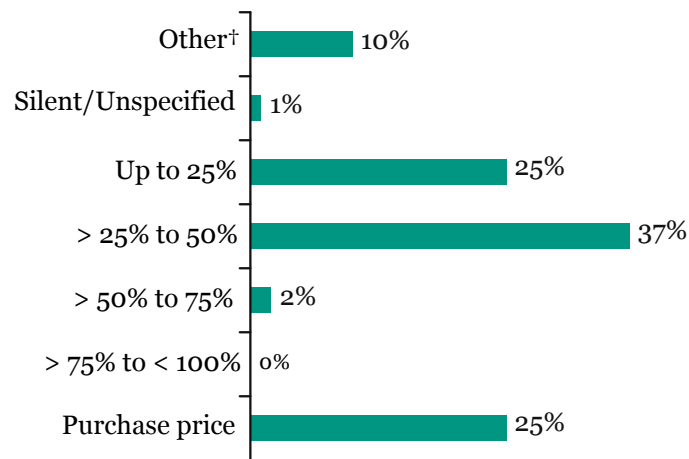
* For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property, and fraud).

† “Other” includes, for example, offsets against future earnouts above the general cap.

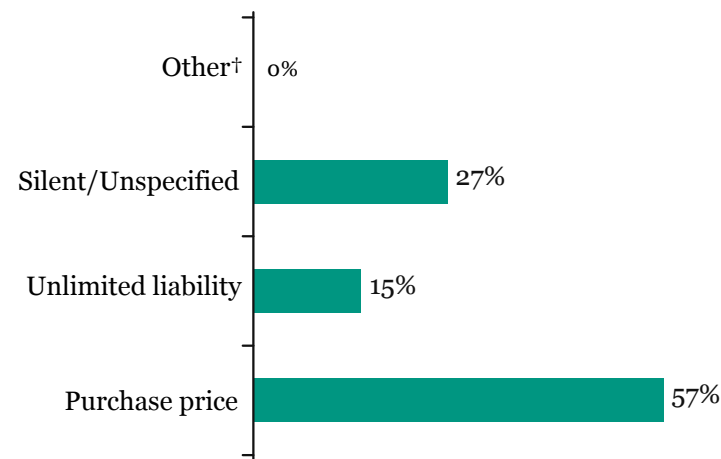
Second-Level Caps: IP Representations and Fraud

Subset: 2021 deals that include the specified carveout. Percentages below denote the second-level cap as a percentage of transaction value in absolute terms (not above the general cap).

Intellectual property representations



Fraud/intentional misrepresentation*



* Measures liability for shareholders that did not participate in the fraud (liability for participating shareholders was typically unlimited).

† "Other" includes, for example, offsets against future earnouts above the general cap.

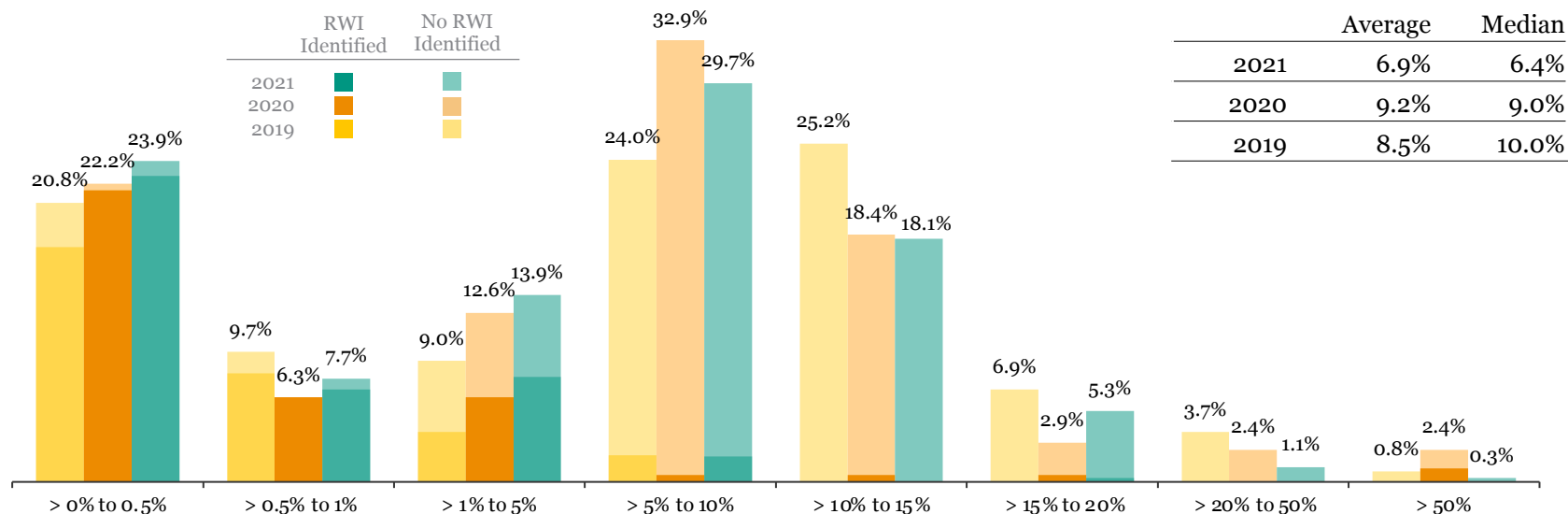
Escrows/Holdbacks as a Percentage of Transaction Value: All Deals*

KEY FINDING

NEW DATA

* Implied subset: This data (and the data on the next two slides) does not include deals without a general escrow/holdback, which constituted approximately 35% of all deals in 2021. That is slightly up from 32% in 2020 and 24% in 2019.

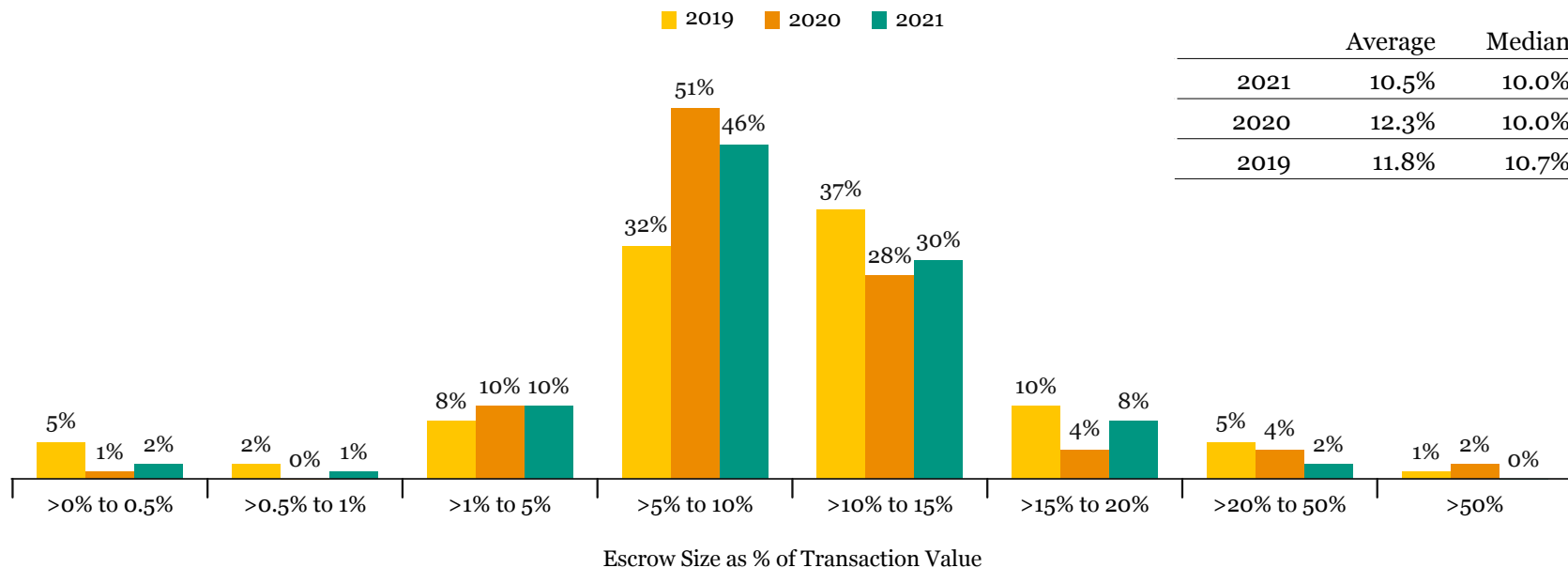
Details, 2019–2021



	Average	Median
2021	6.9%	6.4%
2020	9.2%	9.0%
2019	8.5%	10.0%

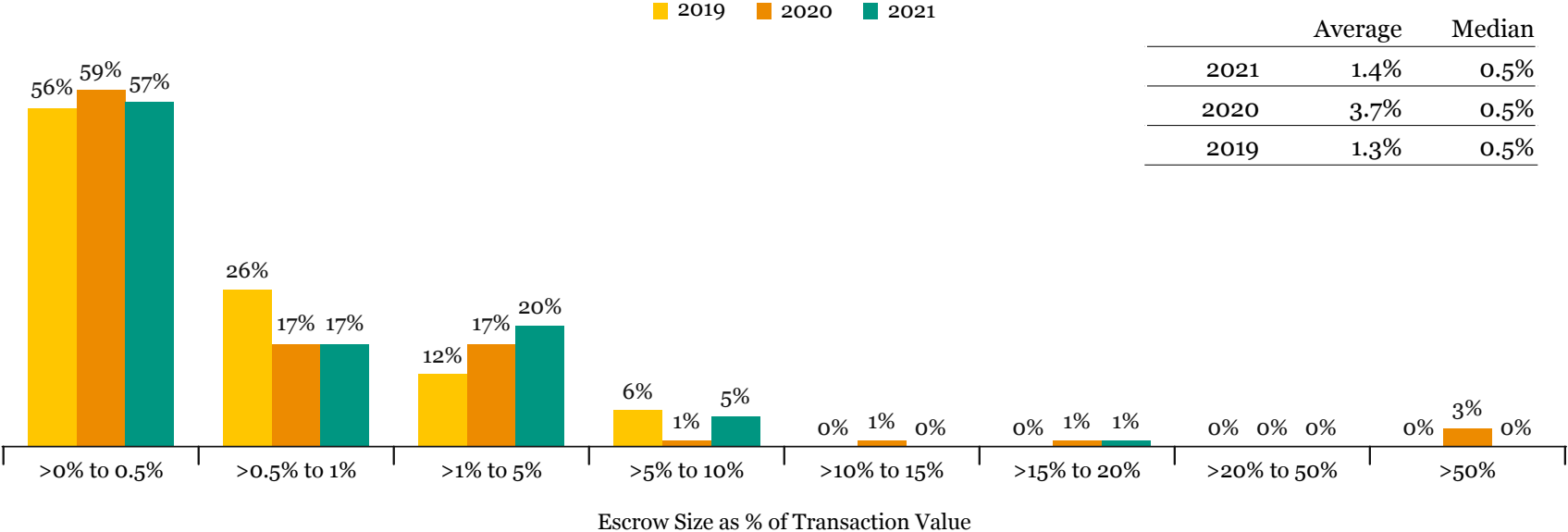
Escrows/Holdbacks as a Percentage of Transaction Value: No RWI Identified

Details, 2019–2021



Escrows/Holdbacks as a Percentage of Transaction Value: RWI Identified

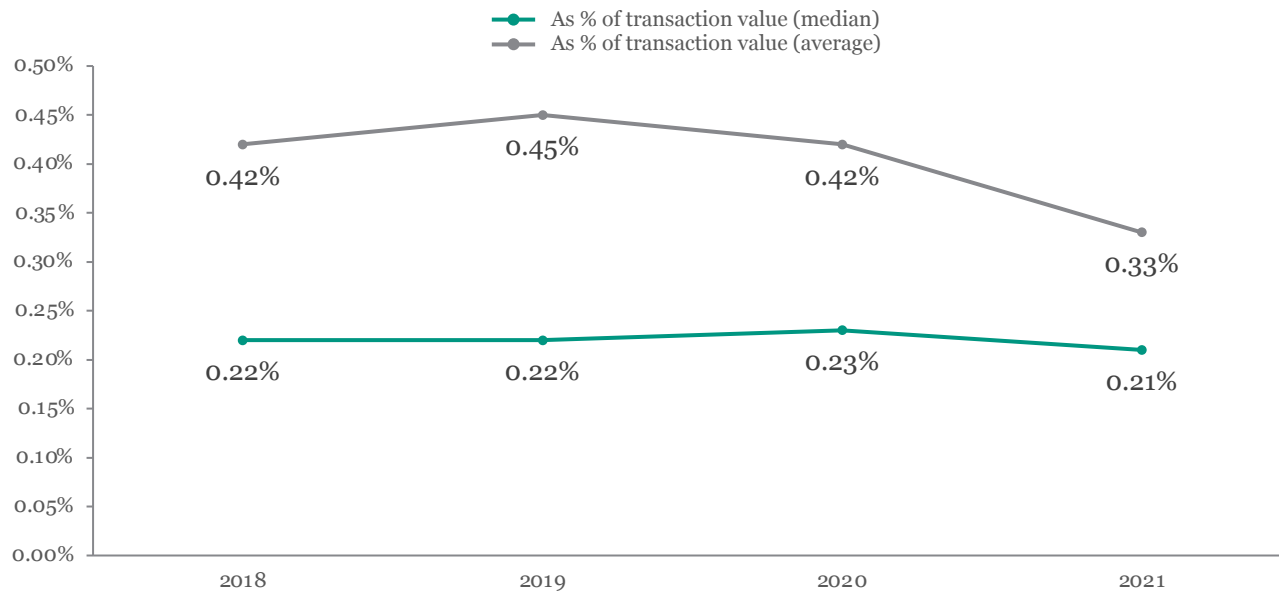
Details, 2019–2021



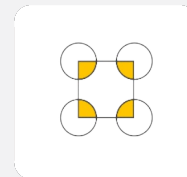
Expense Fund Sizes

Subset: Deals with expense funds

Median/Average post-closing expense fund size*



* Funds established at closing to fund post-closing expenses.




For more information,
see the SRS Acquiom
white paper:

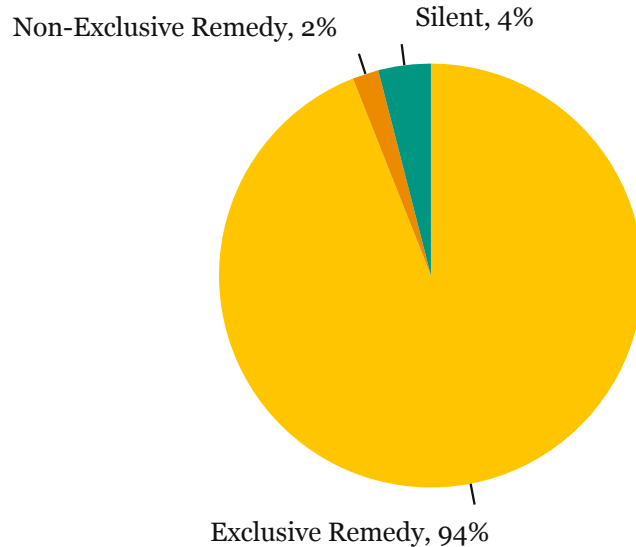
M&A Expense Funds:
Why Sellers Should
Establish One, How
Large It Should Be, and
Other Considerations

Indemnification as Exclusive Remedy for Breach

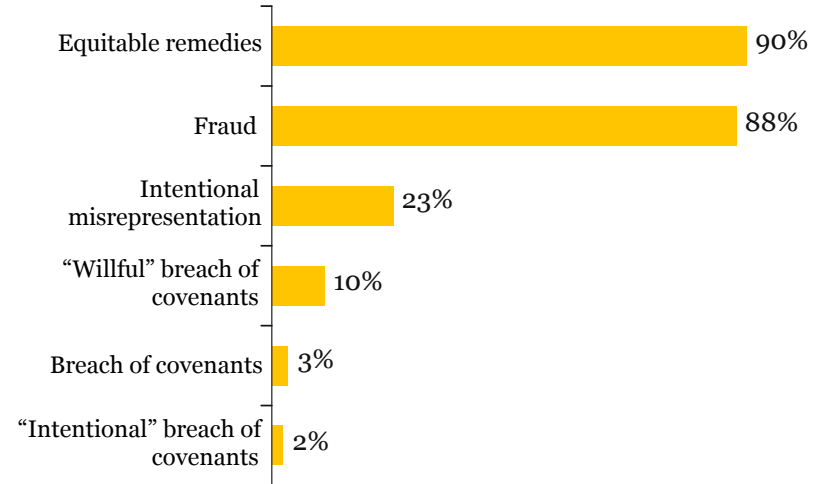
Subset: 2021 deals

 [See example terms on slide 100](#)

Indemnification as exclusive remedy



Carveouts to exclusive remedy

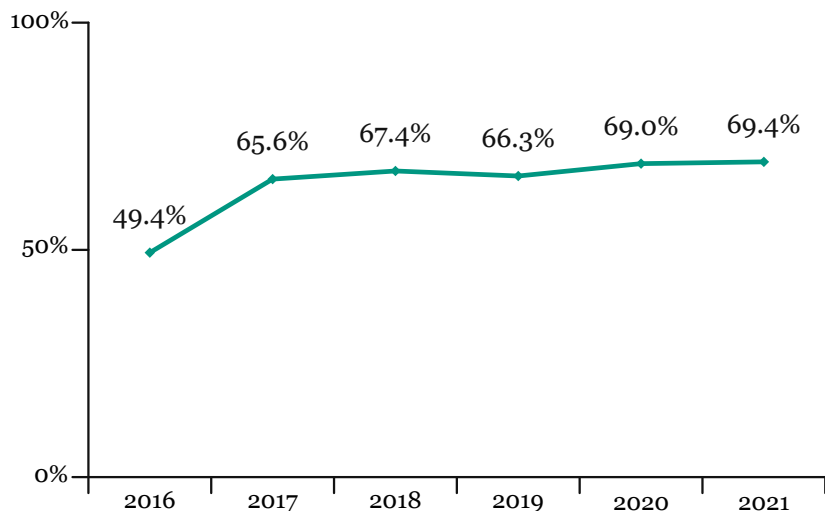




Dispute Resolution

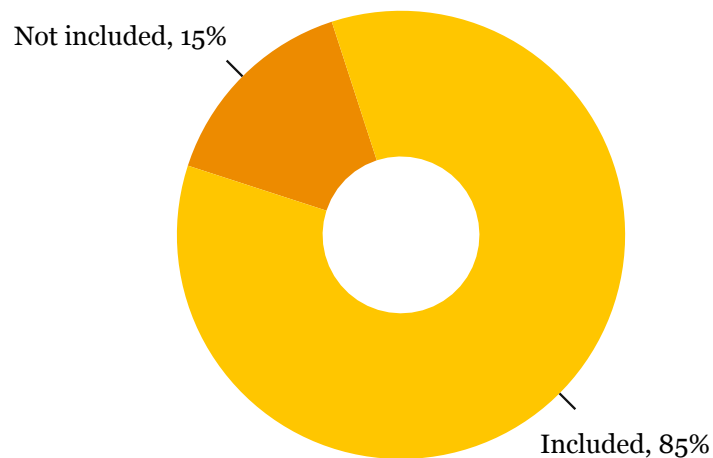
Waivers

Legal representation conflict waiver* included



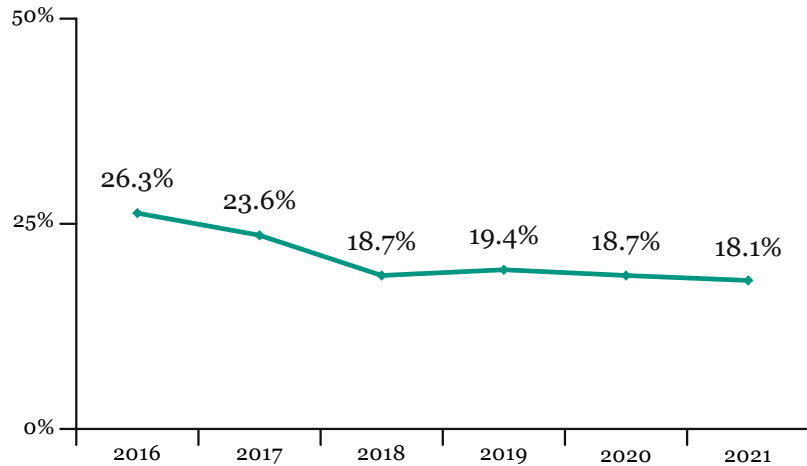
* A provision allowing seller's pre-closing counsel to represent the selling shareholders post-closing in matters relating to the acquisition.

Waiver of jury trial (2021 deals)



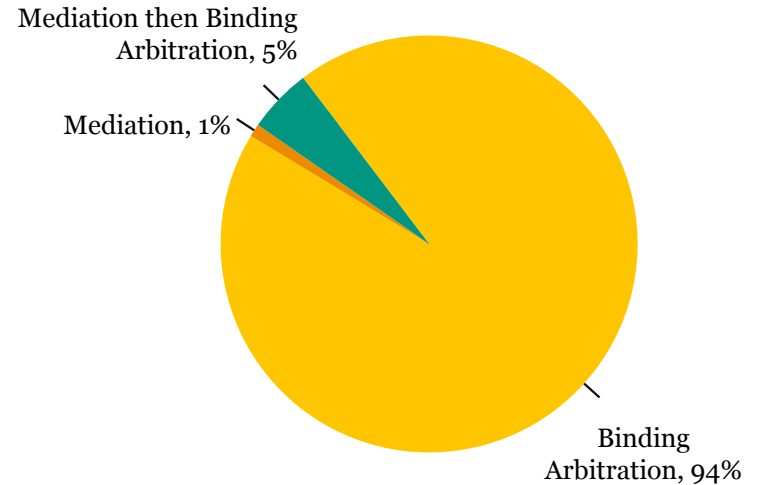
Alternative Dispute Resolution (“ADR”)*

ADR inclusion



* Sample includes ADR provisions that apply to all disputes arising out of the agreement and does not include ADR provisions limited to particular matters such as purchase price adjustments or earnouts.

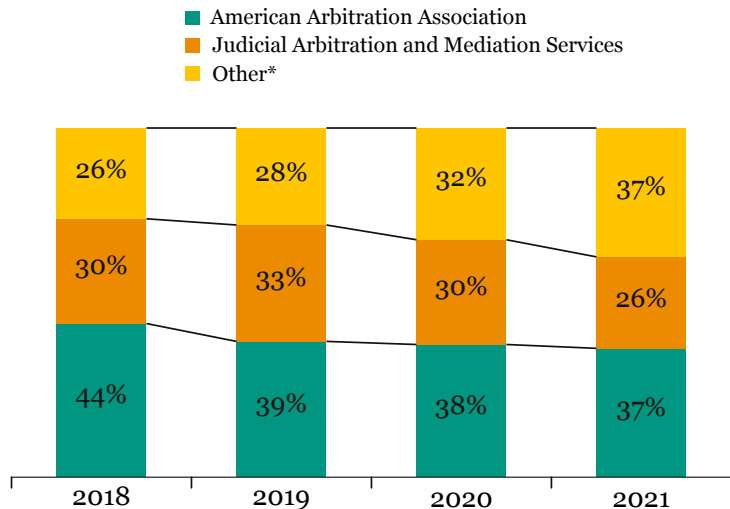
Type of ADR (subset: general ADR included, 2021)



Alternative Dispute Resolution

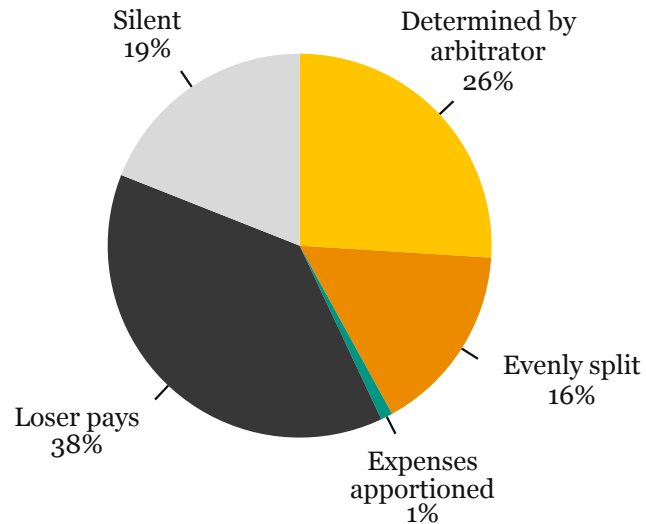
Subset: Deals with general ADR included

Institution/Rules governing arbitration



* "Other" frequently includes the International Chamber of Commerce.

Who pays arbitration expenses? (2021 deals)





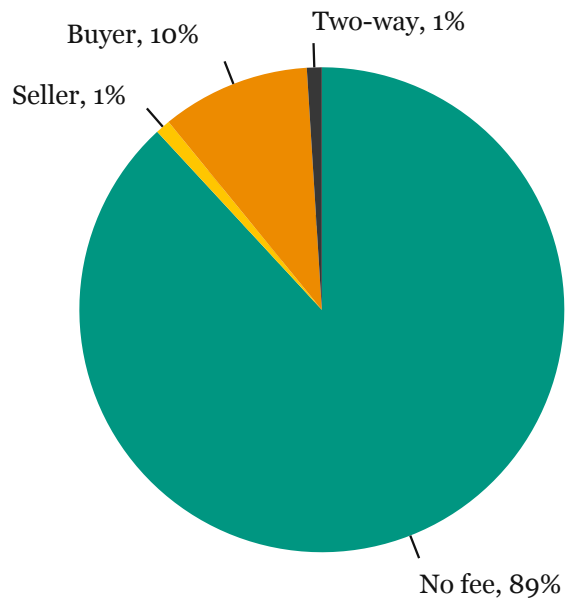
Termination Fees

Termination Fees

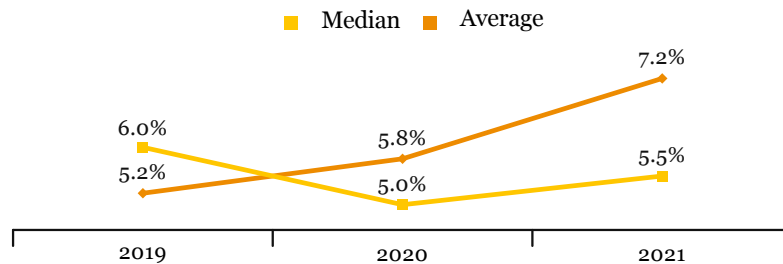
KEY FINDING

NEW DATA

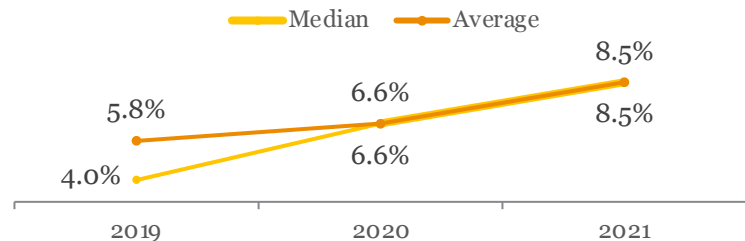
Fee paid by... (2021 deals)



Fees paid by buyer, as a percentage of transaction value



Fees paid by seller, as a percentage of transaction value

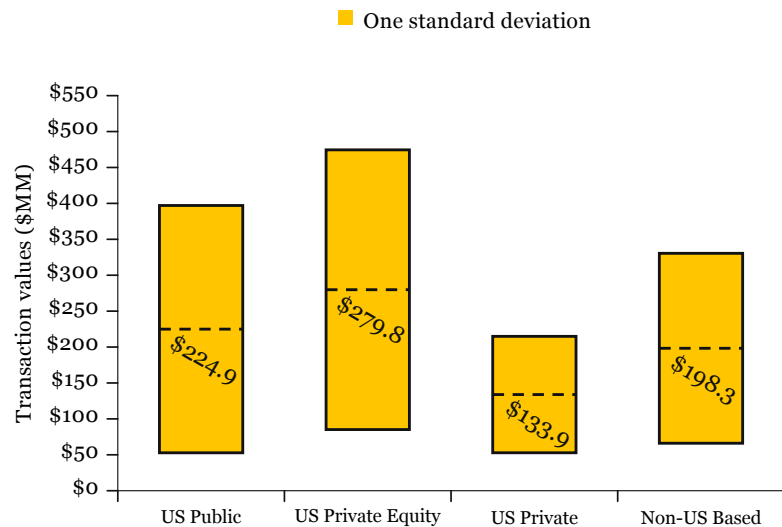




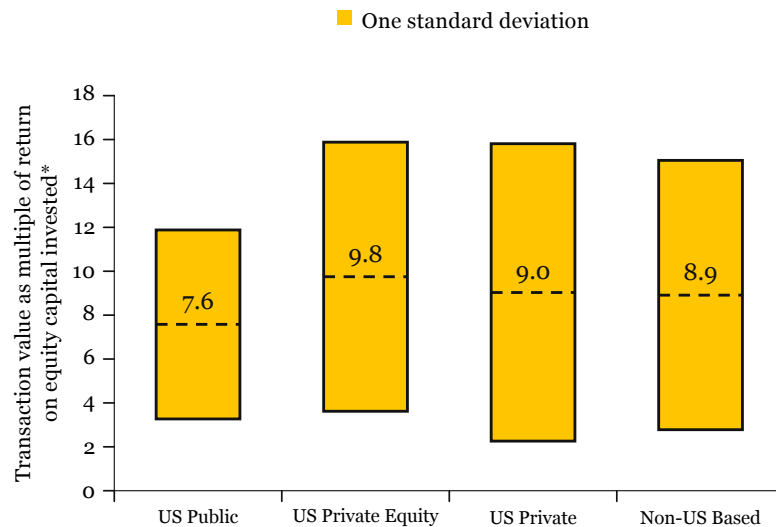
Correlations

Correlations: Transaction Value and Multiples – by Buyer Type

Transaction value vs. buyer type (2021 deals)



Multiple of return* vs. buyer type (2021 deals)

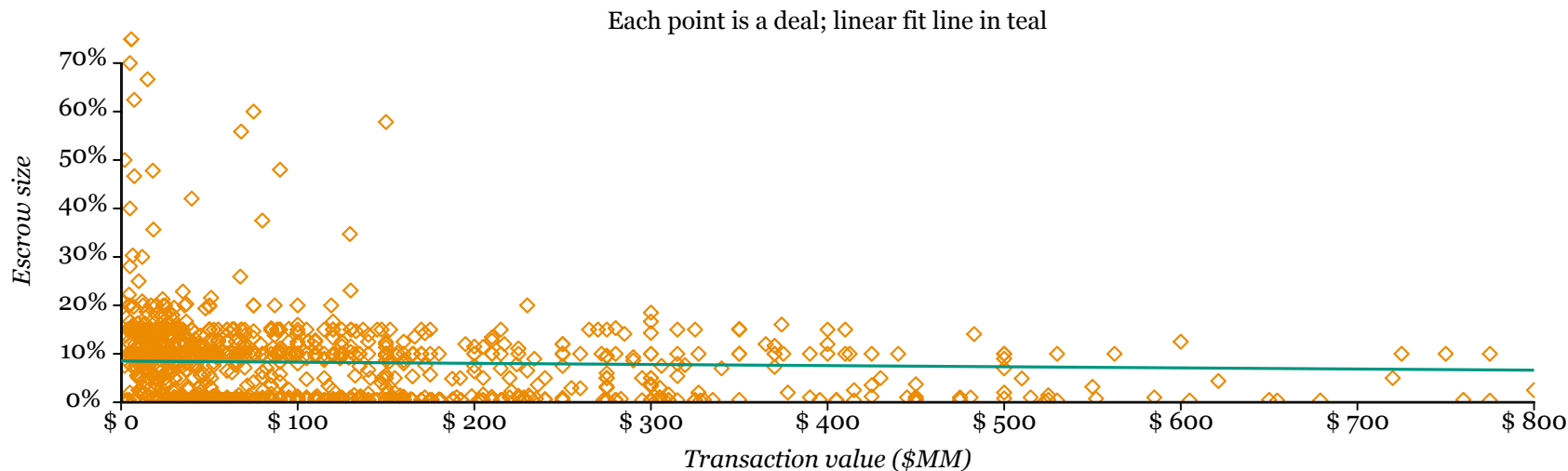


* Equity capital investment data provided by S&P Capital IQ™ and other databases.

Correlations: Transaction Value and Escrow Size

Data set: All deals closing in 2018–2021

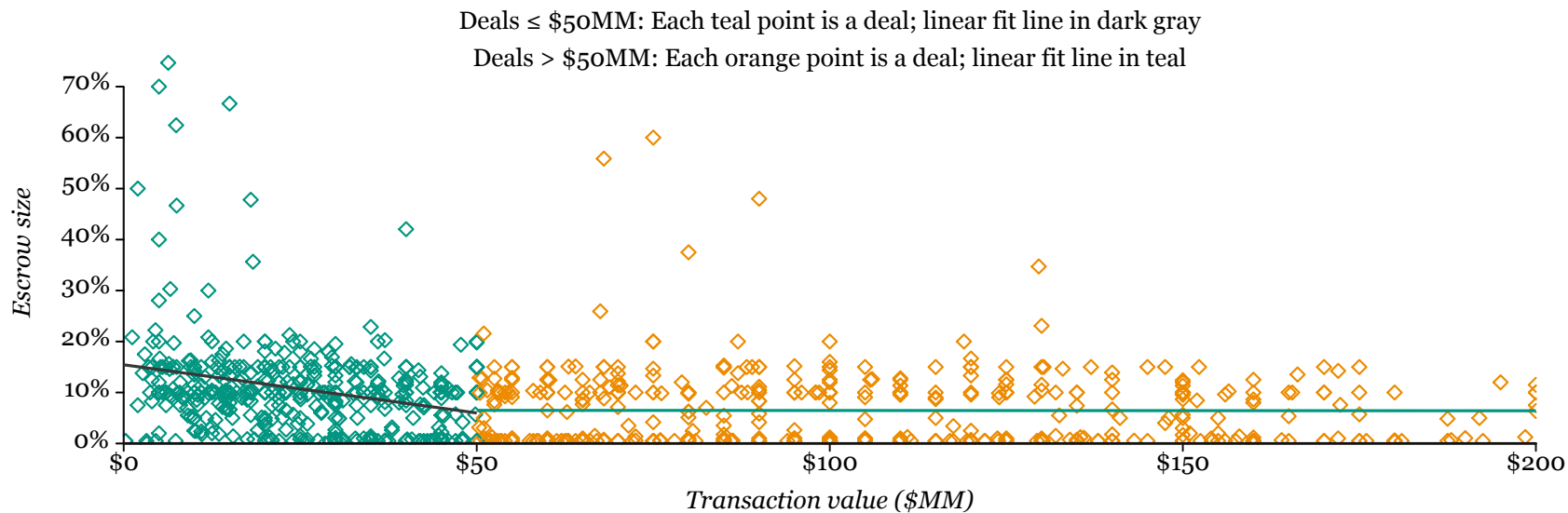
Transaction value vs. escrow size (deals over \$800MM are hidden but factor into trend line)



Correlations: Transaction Value and Escrow Size (Detail)

Data set: All deals closing in 2018–2021

Transaction value vs. escrow size (deals over \$200MM are hidden but factor into teal trend line)



Addendum for Example Terms



Example terms included in this study are provided as a reference only and may not be applicable to certain deals. Some example terms are sourced from the Private Target Deal Points Study published by the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section, available at https://www.americanbar.org/groups/business_law/committees/ma/deal_points



Example Terms (1 of 7)

Topic	Example Terms	See Data
Post-Closing Purchase Price Adjustments: Working Capital Excludes Tax-Related Items	Tax Exclusion Example “Adjusted Working Capital’ means current assets minus current liabilities provided, however, that ‘Adjusted Working Capital’ excludes from current assets all [deferred] tax assets and excludes from current liabilities all [deferred] tax liabilities.”	Slide 21 ➤
Post-Closing Purchase Price Adjustments: Accounting Methodology	Example Provision Establishing Accounting Methodology: The parties shall prepare the Closing Statement in accordance with the applicable definitions in this Agreement and with GAAP and, solely to the extent consistent with GAAP, in accordance with the Company’s past practices (including the methodologies applied in the preparation of the Financial Statements); provided that if there is any inconsistency between GAAP and the definitions in this Agreement relating to the items to be set forth on the Closing Statement, the definitions shall control.	Slide 21 ➤
Earnouts (Non-Life Sciences Deals*): Additional Provisions	Example Provision Intended to Ensure Earnout Is Not Treated as a Security: “The right of Seller to a portion of the Earnout Amount, if any, shall not be represented by a certificate or other instrument, shall not represent an ownership interest in Buyer or the Business and shall not entitle Seller to any rights common to any holder of any equity security of Buyer.” Example Disclaimer of Fiduciary Relationship: “Nothing in this Agreement creates a fiduciary duty on the part of Buyer to Seller in respect of the Earnout.”	Slide 27 ➤


Topic	Example Terms	See Data
Definition of Material Adverse Effect (“MAE”): “Prospects” Included	Example Term “Material Adverse Effect’ means any result, occurrence, fact, change, event, or effect that has a materially adverse effect on the business, assets, liabilities, prospects, capitalization, condition (financial or other), or results of operations of Seller.”	Slide 29 ➤
Definition of Material Adverse Effect (“MAE”): Forward-Looking Language	Example Term: “Material Adverse Effect’ means any result, occurrence, fact, change, event, or effect that has, or could reasonably be expected to have, a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), results of operations or prospects of Seller.”	Slide 29 ➤
Definition of Material Adverse Effect (“MAE”): Carveouts	Example Term: “Material Adverse Effect’ means any change... except to the extent resulting from (A) changes in general local, domestic, non U.S., or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions.”	Slide 30 ➤



Example Terms (2 of 7)

Topic	Example Terms	See Data
Definition of Material Adverse Effect: Carveouts Qualified by Disproportionate Effect	Example Term: “Material Adverse Effect” means any change... except to the extent resulting from (A) changes in general local, domestic, non U.S., or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions (provided that such event, change, or action does not affect Seller in a substantially disproportionate manner).”	Slide 31 
Knowledge Standards	Actual Knowledge “Knowledge” means the actual knowledge of the directors and officers of Seller.”	Slide 33 
	Constructive Knowledge “Knowledge” means the actual knowledge of the directors and officers of Seller and the knowledge that such directors and officers would have after reasonable or due inquiry.”	


Topic	Example Terms	See Data
“No Undisclosed Liabilities” Representation Examples	Buyer-favorable Formulation “Seller has no liability except for liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in Seller’s ordinary course of business since the date of the Interim Balance Sheet.”	Slide 35 
	Seller-Favorable Formulation “Seller has no liability of the nature required to be disclosed in a balance sheet prepared in accordance with GAAP [or which could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect], except for liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in Seller’s ordinary course of business since the date of the Interim Balance Sheet.”	
“Compliance with Laws” Representation	Example Representation “To the Seller’s knowledge, the Business has been and is being conducted in compliance with all applicable laws.”	Slide 36 


Example Terms (3 of 7)

Topic	Example Terms	See Data
"10b-5" and "Full Disclosure" Representations Examples	"10b-5" Representation "No representation or warranty or other statement made by Seller in this Agreement, the Disclosure Schedules, any supplement to the Disclosure Schedules, the certificates delivered pursuant to this Agreement or otherwise made in connection with the Contemplated Transaction contains any untrue statement or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading."	Slide 37 
	"Full Disclosure" Representation "Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Schedules."	



Topic	Example Terms	See Data
"No Other Representations" and "Non-Reliance" Clause Examples	No Other Representations "Buyer acknowledges that Seller has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in this Article III."	Slide 40 
	Non-Reliance "Buyer is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties provided in this Article III."	
Accuracy of Seller's Representations (Timing): When Must They Be Accurate?	At Signing Only "Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the date made."	Slide 47 
	At Closing Only "Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the Closing Date as if made on the Closing Date."	
	At Signing and Closing "Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the date made and as of the Closing Date as if made on the Closing Date."	


Example Terms (4 of 7)

Topic	Example Terms	See Data
Accuracy of Seller's Representations (Timing): How Accurate Must They Be?	Accurate "in all respects" "Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the Closing Date as if made on the Closing Date."	Slide 47 
	Accurate "in all material respects" "Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all material respects as of the Closing Date as if made on the Closing Date."	
	MAE qualification "Each of the representations and warranties made by Seller in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not have and could not reasonably be expected to have a Material Adverse Effect."	


Topic	Example Terms	See Data
Accuracy of Seller's Representations (Materiality): MAE Qualifier with Capitalization Representation Carveout	Example Capitalization Carveout "The representations and warranties set forth in Section 3.3 (Capitalization) shall be accurate in all respects as of the Closing Date as if made on the Closing Date. Each of the other representations and warranties made by Seller in this Agreement shall be accurate as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not have and could not reasonably be expected to have a Material Adverse Effect."	Slide 48 
	Example Materiality Scrape "Each of the representations and warranties made by Seller in this Agreement shall be accurate in all material respects as of the Closing Date as if made on the Closing Date; provided that, for purposes of determining the accuracy of such representations and warranties, all materiality, 'Material Adverse Effect' and similar qualifications contained in such representations and warranties shall be disregarded."	


Example Terms (5 of 7)

Topic	Example Terms	See Data
“Material Adverse Change” Condition (“MAC”)	“Stand-alone” MAC “Since the date of this Agreement, there has not been any Seller Material Adverse Change.”	Slide 49 
	“Back-door” MAC The Agreement includes an “Absence of Changes” representation: <i>“Section 3.6 Absence of Changes. (i) Since the Balance Sheet Date, there has not been any Seller Material Adverse Change.”</i> and includes a condition “bringing down” the accuracy of Seller’s representations and warranties: <i>“The representations and warranties made by Seller in this Agreement shall be true and correct in all respects when made and at the Closing Date as if made on the Closing Date.”</i>	
“No Legal Proceedings” Condition	Example Formulation “There will not be pending [or threatened] any action, suit, or similar legal proceeding brought by any Governmental Entity [or any Person] challenging or seeking to restrain or prohibit the consummation of the transactions contemplated herein.”	Slide 50 



Topic	Example Terms	See Data
“Sandbagging”	Pro-sandbagging “The right to indemnification, reimbursement, or other remedies based upon any such representation or warranty will not be affected by any Knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of such representation warranty...”	Slide 57 
	Anti-sandbagging “No party shall be liable under this Article for any Losses resulting from or relating to any inaccuracy in or breach of any representation or warranty in this Agreement if the party seeking indemnification for such Losses had Knowledge of such breach before Closing.”	

Example Terms (6 of 7)




Topic	Example Terms	See Data
“Materiality Scrape” Example Definitions	<p>Materiality qualifications in representations and warranties disregarded for all indemnification purposes (determining breaches and calculating losses)</p> <p>“For purposes of this Article X (Indemnification), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect.”</p> <p>Materiality qualifications in representations and warranties disregarded for calculation of losses only</p> <p>“For the sole purpose of determining Losses (and not for determining whether any breach of any representation or warranty has occurred), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect.”</p> <p>Materiality qualifications in representations and warranties disregarded for determining breaches only</p> <p>“For purposes of this Article VII (Indemnification), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect in determining whether such representation or warranty has been breached.”</p>	Slide 58 

Topic	Example Terms	See Data
Reductions Against Buyer's Indemnification Claims	<p>Reduction for insurance proceeds Payments by an Indemnifying Party pursuant hereto shall be limited to the amount of any liability or damage that remains after deducting therefrom any insurance proceeds and any indemnity, contribution or other similar payment received or reasonably expected to be received by the Indemnified Party in respect of any such claim.</p> <p>Reduction for tax benefits Payments by an Indemnifying Party pursuant hereto for any Loss shall be reduced by an amount equal to any Tax benefit realized or reasonably expected to be realized as a result of such Loss by the Indemnified Party.</p> <p>Buyer required to mitigate losses Each Indemnified Party shall take, and cause its Affiliates to take, all reasonable steps to mitigate any Loss upon becoming aware of any event or circumstance that would be reasonably expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach that gives rise to such Loss and using commercially reasonable efforts to recover under insurance policies or indemnity, contribution, or other similar agreements for any Losses.</p>	Slide 60 

Example Terms (7 of 7)

Topic	Example Terms	See Data
General Survival Period/Time to Assert Claims	<p>Survival "All representations, warranties, and covenants in this Agreement and the Disclosure Schedules and any other certificate or document delivered pursuant to this Agreement will survive the Closing for a period of 12 months."</p> <p>Time Limitations "If the Closing occurs, Seller will have no liability (for indemnification or otherwise) with respect to any representation or warranty unless on or before the 12-month anniversary of the Closing, Buyer notifies Sellers of a Claim specifying the factual basis of such Claim in reasonable detail to the extent then known by Buyer."</p>	Slide 61 
Baskets: Definitions	<p>Deductible "Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$300,000 (the 'Deductible') in which event Securityholders shall be responsible only for Losses exceeding the Deductible."</p> <p>First-Dollar "Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$500,000 (the 'Threshold') in which event the Securityholders shall be responsible for the amount of all Losses, regardless of the Threshold."</p>	Slide 66 

(Continued in next column)

Topic	Example Terms	See Data
Baskets: Definitions (continued)	<p>Combination "Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$500,000 (the 'Threshold') in which event the Securityholders shall be responsible only for Losses in excess of \$300,000 (the 'Deductible')."</p>	Slide 66 
Baskets: Eligible Claim Threshold	<p>Claim Threshold Formulation "Securityholders shall not be required to indemnify Buyer for any individual item where the Loss relating to such claim (or series of claims arising from the same or substantially similar facts or circumstances) is less than \$25,000."</p>	Slide 71 
Indemnification as Exclusive Remedy for Breach	<p>Example provision for Exclusive Remedy The parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from fraud) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be pursuant to the indemnification provisions set forth herein.</p>	Slide 82 



Glossary

Glossary (#–C)

10b-5	Rule 10b-5 is an SEC rule that prohibits any act or omission resulting in fraud or intentional deceit (scienter) and relied upon by the injured party in connection with the purchase or sale of a security. A "10b-5 Representation" is a catch-all representation in the merger agreement modeled from the SEC rule but without the scienter or reliance requirement, expanding buyer's ability to claim breach of the agreement.
Adjusted Working Capital	A method of calculating working capital where certain items are expressly included or excluded from current assets or current liabilities such as deferred tax assets (e.g., loss carry forward) or contingent liabilities (e.g., pending litigation).
Appraisal Rights	Shareholders' statutory right under state law to seek judicial determination of the value of their shares when the target company is party to a merger.
Arbitration	A method of alternative dispute resolution whereby a dispute, with the consent of the parties, is submitted to a neutral person or group for a decision. Usually includes a full evidentiary hearing and presentations by attorneys for the parties. The merger agreement may provide that the arbitrator's decision be binding or non-binding.
Baskets (Indemnification)	A limitation on the Seller's indemnification of the Buyer by setting a deductible (i.e., the Seller is only responsible for losses above the deductible), threshold (i.e., the Seller is responsible for all losses only after such losses hit the threshold amount, also known as a "tipping basket" or a "first-dollar basket") or both with respect to aggregated claims. Baskets may also be set for individual claims.

Buy-side Representations And Warranties Insurance (RWI)	An insurance policy issued to the Buyer in an M&A transaction to indemnify the Buyer for covered losses it suffers resulting from a breach of the representations and warranties made by the Seller (and/or selling shareholders) in the acquisition agreement.
Cap (Indemnification)	A limitation on the Seller's indemnification of the Buyer by setting a maximum amount of liability of the Seller. Caps may also be set for individual or specific claims.
Capitalization	The equity ownership of the target company (e.g., number and types of securities issued and outstanding).
Change In Control	A merger, consolidation, or acquisition involving all or substantially all the assets of an entity. Changes in control often trigger acceleration provisions (e.g., vesting of equity compensation paid to officers or other employees or with respect to earnouts).
Closing Date	The date on which the transaction is consummated, i.e., the date on which the purchase price is paid, and the merger occurs.
Covenant	Covenants are actions that must be taken or not taken by the parties. In a merger agreement, covenants may require the parties to take actions both before and after the closing.

Glossary (E–L)

Earnout	Contingent consideration earned and payable after a set period of time and/or based on the level of achievement of certain milestones such as financial metrics (e.g., revenue, EBITDA, etc.) or operational metrics (e.g., regulatory approval).
Escrow	In the M&A context, a portion of the transaction consideration that is held to secure the selling shareholders' indemnification obligations to the Buyer such as a Purchase Price Adjustment, indemnification claim, pending litigation or PPP Loan forgiveness. After a pre-determined period of time has passed (the "escrow period"), any amount in the escrow account not claimed by the Buyer is released to the selling shareholders.
Expense Fund	A voluntary fund set aside by the shareholders from the acquisition consideration at closing for potential third-party expenses that might be incurred during the post-closing period such as costs incurred in negotiating the purchase price adjustment or defending an indemnification claim.
Fiduciary Duty	An obligation or duty to act in the best interests of another party.
GAAP	Generally Accepted Accounting Principles; guidance promulgated by certain policy authorities and commonly accepted accounting practices used for consistency in reporting financial information.
Indemnification	Where one party secures another against suffered losses. In the M&A context, the selling shareholders often agree to indemnify the Buyer against certain types of losses that could be suffered in connection with the transaction such as in the event of losses resulting from a breach of a representation, warranty, or covenant set forth in the acquisition agreement.

Knowledge	Acquisition agreements generally include two concepts when defining knowledge: who and actual versus constructive knowledge. Definitions of knowledge for a particular entity typically encompass the knowledge of officers and directors and may include additional groups related to the entity (e.g., key employees). Actual knowledge is information actually known to the person. Constructive knowledge is information that the person should know given their position or would know after investigation or due inquiry.
Knowledge Qualifier	A representation and warranty (e.g., a statement about the operations or conditions of an entity's business) can either be stated as a fact (i.e., with no knowledge qualifier) or stated as true "to the Knowledge of the Company" (i.e., with a knowledge qualifier), which would mean that the Seller is not in breach of making such representation and warranty even if such statement is not true if the Seller did not have Knowledge that such statement was not true.
Legal Opinion	A legal opinion provided by Seller's counsel to Buyer that addresses the legal status of the assets being sold, legal and contractual restrictions, compliance with law and enforceability. Specialized opinions may be provided for certain patent, tax, litigation, or other specific legal matters.
Legal Representation Conflict Waiver	A provision allowing the Seller's pre-closing counsel to represent the selling shareholders post-closing in matters relating to the acquisition.

Glossary (M–O)

Management Carveout

A portion of deal proceeds guaranteed to the Seller's management when management would otherwise receive little or nothing for their equity ownership due to liquidation preferences. Transaction bonuses, which often differ materially from management carveouts in size and timing of adoption, are not included in our data.

Material Adverse Change (MAC)

Typically expressly defined in an acquisition agreement, material adverse changes are substantial changes to the business, prospects, operations, results of operations, assets, liabilities or condition (financial or otherwise) of the target company or, more simply, may be tied to the definition of Material Adverse Effect (e.g., any event, development or circumstance that has had or could reasonably be expected to have a Material Adverse Effect).

Material Adverse Effect (MAE)

Typically expressly defined in an acquisition agreement, material adverse effect means any result, occurrence, fact, change, event, or effect that has a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of Seller. The definition may also include "prospects" of the Seller, which expands the definition to include planned, potential, contingent or even yet-unknown business activities. The definition may also be expanded by including forward-looking language (...any effect that has, or could reasonably be expected to have, a materially adverse effect...). The definition may be pared back with certain carveouts (e.g., changes in laws, actions required by the acquisition agreement, etc.), which carveouts may be cancelled out if such carved out occurrence had a disproportionate effect on the Seller (i.e., the adverse effect of such occurrence was substantially more significant to the Seller than to other comparable entities, such as a competitor or similar company in the same industry).

Materiality Scrape

Notwithstanding any materiality qualifiers included in a representation or warranty, for purposes of (1) determining whether a breach of such representation or warranty occurred or (2) calculating the amount of an indemnifiable loss as a result of such breach, materiality will be disregarded. A "double materiality scrape" includes both (1) and (2).

Mediation

A form of alternative dispute resolution where the parties attempt to negotiate a settlement with the assistance of a neutral third party. Unlike arbitration or litigation, the resulting agreement, or lack thereof, is wholly controlled by the parties.

Non-U.S. Based Buyer

Includes foreign companies headquartered outside of the U.S. Both public and private foreign companies are included.

No-Shop/No-Talk

Seller is not permitted to initiate or engage in discussions with a competing acquirer, which gives the present acquirer exclusivity (and incentive to pursue the transaction). Certain jurisdictions have affirmed that the board of a target company may still owe a fiduciary duty to the shareholders of such target company to consider all acquisition proposals regardless of a contractual no-shop/no-talk provision to ensure maximum value to the shareholders.

Option

A type of security where the holder may elect to purchase equity (e.g., shares of capital stock) at a certain price often used as a form of compensation for officers or employees of an entity and subject to a vesting schedule. Holders of options that are in-the-money (where the current value of the underlying equity is more than the price payable pursuant to the option) may receive consideration in an acquisition transaction in exchange for their options, sometimes even participating in the PPA and escrow provisions alongside the holders of capital stock (e.g., "contribution"). An acquisition may trigger change in control provisions, accelerating the vesting schedule of the options. A Buyer may also elect to assume options, whereby the option would permit the holder to purchase equity in the Buyer after closing.

Glossary (P–U)

Private Buyer (U.S.)	Non-public companies headquartered in the U.S. Also includes companies whose stock is traded on the OTCBB or Pink Sheets and potentially the portfolio companies of private equity firms.
Public Buyer (U.S.)	Acquiring companies listed on U.S. public stock exchanges (e.g., NYSE or NASDAQ).
Purchase Price Adjustment (PPA)	A common deal feature where the transaction consideration is adjusted shortly after closing in accordance with a specified financial metric given such metrics are generally estimated at the time of closing and more accurately calculable after a certain amount of time after closing. While there are a number of metrics used to determine the adjustment, the most common is some variation of a net working capital formula. The adjustment can be in favor of either the Buyer or selling shareholders.
Representations and Warranties Insurance (RWI)	A commercial insurance policy purchased from a third-party insurance provider that provides coverage for breaches of representations and warranties, often subject to a deductible (i.e., retention amount) and express coverage carveouts. RWI is most often purchased by the Buyer with the premium considered a transaction expense. The retention amount of the RWI policy often correlates to the size of the indemnification escrow/holdback.
Sandbagging	Having knowledge of a breach of a representation, warranty, or covenant of the other party under the acquisition agreement and continuing with the consummation of the transaction nonetheless and potentially seeking indemnification for any losses that may result from such breach post-closing.

Signing date	The date on which the merger agreement is signed by the principal parties. Closing typically, but not always, occurs on a later date.
Survival	The time period after closing during which the Buyer may make a claim against the Seller or selling shareholders for breach of their representations, warranties, and covenants. The time period is usually shorter than the applicable statute of limitations.
Termination Fee	A fee payable in the event the acquisition transaction is not consummated, generally included to cover transaction expenses.
Transaction Bonus	Compensation payments to officers and/or key employees in connection with the acquisition transaction often for purposes of retention.
Transaction Expenses	Typically expressly defined in the acquisition agreement, transaction expenses generally include expenses incurred by the Seller and Buyer to consummate the transaction and may include (or exclude) the fees of brokers, advisors, counsel and third-party vendors (e.g., escrow agent), costs associated with regulatory approvals or obtaining certain consents, transaction bonuses, change in control payments and severance, and/or other expenses incurred in connection with the negotiation, preparation, review, execution, delivery or performance of the acquisition agreement or consummation of the transaction.
Transaction Value	The enterprise value to be paid by the Buyer according to the acquisition agreement. For purposes of this study, transaction value does not include contingent consideration (e.g., earnouts) or adjustments to the purchase price.
U.S. Private Equity Buyer	Buyer that acquires a target as an investment rather than for the purpose of expanding its own business or for other strategic purposes.

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Additional Resources

- 2020 SRS Acquiom Claims Insight Report:
<https://www.srsacquiom.com/resources/ma-claims-report/>
- 2021 SRS Acquiom Life Sciences M&A Study:
<https://www.srsacquiom.com/resources/life-sciences-deal-terms/>
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