



May 2021

# 2021 M&A Deal Terms Study

Discussing



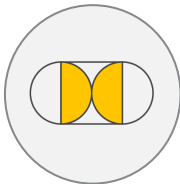
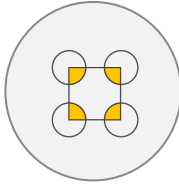
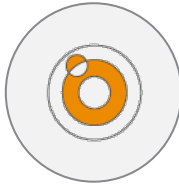
An analysis of deal terms in private-target  
M&A transactions that closed between 2016-2020

Please direct inquiries to: [dts@srsacquiom.com](mailto:dts@srsacquiom.com)



# Comprehensive Platform

SRS Acquiom offers a robust platform of solutions designed to work together or independently to reduce unnecessary steps, risks, and complications in mergers & acquisitions and loan agency services.

Mergers & Acquisitions				Loan Agency
				
<b>Enhanced Stockholder Solicitation</b>	<b>Payments</b>	<b>Escrows</b>	<b>Shareholder Representation</b>	<b>Loan Agency</b>
Secure, flexible, online document distribution to securityholders for review or action, plus tabulation and reporting back to deal parties.	Our online payments process enables fast and efficient payment of parties to an M&A transaction, including integrated foreign exchange. Most shareholders are paid in one day.	A better M&A escrow experience, period. Simple, fast engagement, online Deal Dashboard, and a dedicated team.	Protect shareholder interests with professional representation.	Unbiased, independent, third-party loan agency services for syndicated and bilateral loans.

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## An Experienced Partner to Reduce Deal Complexity

More deal parties trust us to manage escrows, payments, risk, documents, and claims. We pair tailored, expert service with game-changing data and technology, making complex deals as efficient as possible.

**4,300+**

deals engaged  
on to date

**\$525**

**BILLION+**  
aggregate deal value

**310K+**

shareholders represented  
in more than 125 countries

**\$330**

**BILLION+**  
in payments

**99%**

of shareholders are  
paid within 24 hours\*

**330K+**

total shareholders  
paid to date

*\* Consideration given to those who have completed a LoT.*

## About this Study and the Data

The 2021 M&A Deal Terms Study is powered by SRS Acquiom MarketStandard®, a tool to analyze our proprietary database of more than 2,800 private-target M&A deals with customizable searches best suited to your specific transaction.

- This study analyzes more than 1,400 private-target acquisitions (\$285.8 billion) that closed from 2016 through 2020
- SRS Acquiom provided professional and financial services on these deals; the vast majority of these are not publicly reported
- Data is presented on a calendar-year basis and is tied to the deal closing date
- Medians are presented in addition to averages to counterbalance the effect of outliers
- Sample sizes are larger in more recent years as a result of our growth

*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. Some charts do not sum to 100% due to rounding.*

Designed to help deal parties determine “what’s market,” MarketStandard allows you to filter data and access market terms for the specific deal you’re negotiating by drawing information from more than 2,800 deals—with more added every day.



## Go Online for an Interactive Version of this Study

### 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

### 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, including Buyer Power Ratio<sup>™</sup>

### Utilize Buyer Power Ratio

- ✓ An interactive filter developed by SRS Acquiom and the American Bar Association Mergers & Acquisitions Committee
- ✓ Buyer Power Ratio generally correlates with the merger parties’ relative negotiating strengths and their ability to obtain favorable deal terms\*
- ✓ This filter may be the most accurate predictor of expected results for a particular transaction

► Visit [srsacquiom.com/marketstandard/](https://srsacquiom.com/marketstandard/)

\* To learn more, read [Impact of “Buyer Power Ratio” on M&A Deal Terms](#)

## Representative Deals

**APTUS™**

acquired by



**EllieMae**

acquired by



**ENCORE VISION™**  
Restoring Near Focus

acquired by



**flatiron**

acquired by



**iZettle**

acquired by



**KaNDy™**  
THERAPEUTICS

acquired by



**LORD**

acquired by



**MIRROR**

acquired by



**m\*Modal™**

acquired by



**OpenLending**

acquired by



**PROMACH™**

acquired by



**PROTECTWISE™**

acquired by



**Simplecast**

acquired by



**verse**

acquired by



**wave**

acquired by



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# Key Findings (1 of 3)

## Overall:

- The COVID-19 pandemic had a dramatic impact on the M&A market, from how deals are done to the terms that the parties negotiated. Throughout this study, we make special note of deal terms that we identified as being particularly influenced by the pandemic. We will also be tracking these data points into next year as we look to see which pandemic-influenced terms are here to stay and which revert to pre-pandemic norms.

## Financial terms:

- The average return as a multiple of equity capital invested\* for 2020 was 6.3x, with a median return of 3.5x (slide 13). Median figures for years to exit after the first investment (6 years), equity financing rounds (3 years), and equity capital invested (\$26MM) were largely unchanged since last year (slide 14).
- There was a significant increase in the percentage of deals with buyer equity as a component of deal consideration. 21% of 2020 deals featured buyer equity as part of deal consideration, up from 13% in 2018 and 15% in 2019 (slide 15).
- The percentage of deals with a management carveout remained relatively low in 2020, at 6.7%; although, we did note an increase in deals with 1-3x returns that did have a carveout (slides 16–18).
- The rise of separate purchase price adjustment (PPA) escrows continued, with 68% of deals having this feature in 2020, up from 59% in 2019. The median size of those escrows was 0.7% of transaction value (slide 25).
- Earnouts saw significant developments that we believe were influenced by the pandemic. First, the percentage of deals with an earnout increased from 15% in 2019 to 19% in 2020 (slide 27). Meanwhile, for deals with earnouts, the median earnout potential as a percentage of the closing payment increased significantly, to 39% (slide 28). This could be because parties were relying more on earnouts to bridge valuation gaps that arose from pandemic uncertainties.

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



## Key Findings (2 of 3)

### Financial terms: (continued)

- The pandemic also influenced the way earnouts are structured. Earnout periods for 2020 deals trended longer, with fewer deals having an earnout period that is one year or less, and more that are set to last two or three years (slide 28). We also saw more deals using an “Earnings/EBITDA” test, while “Revenue” tests became less predominant (slide 27).

### Pervasive qualifiers:

- A new carveout to the definition of Material Adverse Effect became common almost overnight. While included infrequently prior to 2020, a “Pandemic” was added as an exception to the definition of a Material Adverse Effect in more than three quarters of deals by the third quarter of 2020 (slide 36). This was frequently accompanied by an exception for a disproportionate impact of the pandemic on the seller company.

### Seller’s representations, warranties, and covenants:

- “10b-5” and “full disclosure” type representations are continuing to become less popular; 84% of deals do not contain either provision (slide 42).
- More deals contained both a “no other representations” and “non-reliance” provision (slide 45). These provisions are influenced by Representations and Warranties Insurance (RWI) and in many cases include a fraud carveout (slide 46).

### Closing conditions:

- Parties are continuing to be more likely to agree that the seller’s representations and warranties should be accurate at both signing and closing (slide 51).
- A “No Legal Proceedings” closing condition appears in 96% of deals. Moreover, continuing the trend, 80% of agreements now provide that the definition of legal proceeding in this condition includes “any legal proceedings”, and 20% include “only governmental proceedings” (slide 56).

## Key Findings (3 of 3)

### Indemnification terms:

- The median general survival period for indemnity escrows remains 15 months, but there were more deals with short (<12 months) survival periods or no survival (slide 68).
- The average and median escrow sizes converged in 2020, which is a slight increase for the average but a decrease for the median (slide 85). The difference in escrow sizes between deals with RWI and without is stark. A majority of deals with RWI have an escrow that is 0.5% or less of deal value, while for deals without RWI, the escrow size hovered in the traditional 10-15% range (slides 86–87).
- Deals without a basket increased to 15% in 2020, from a low of 4% in 2017 (slide 73). Basket sizes, however, remained relatively stable year over year (slide 75).
- The percentage of deals with an eligible claim threshold to indemnification continued to decline, with only 28% of deals having such a provision, down from 40% in 2017 (slide 78).
- Indemnification remains an exclusive remedy in 94% of deals, with equitable remedies and fraud remaining by far the most common carveouts (slide 89).

### Dispute resolution:

- The number of deals that included alternative dispute resolution provisions stayed relatively flat at 18.5%, with binding arbitration now the nearly unanimous favorite for the type of ADR used (slide 92). A “loser pays” structure for payment of arbitration expenses also remained predominant (slide 93).

### Termination fees:

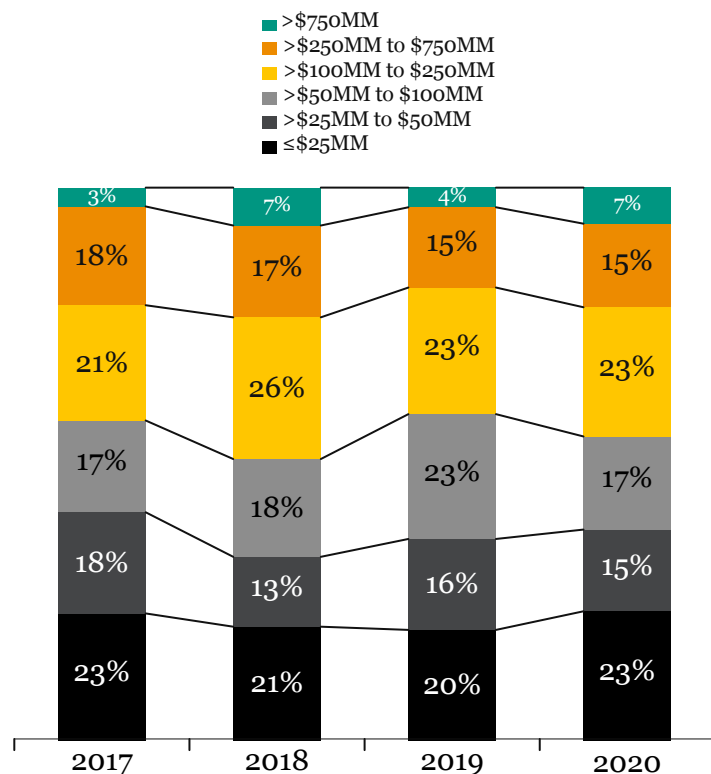
- We observed a rebound in the number of deals that included a termination fee, up to 19% in 2020, perhaps reflecting anxiety about the deal environment. At the same time, the size of the fee to be paid by the seller in particular increased when compared to 2019 (slide 95).

# Financial Terms and Provisions

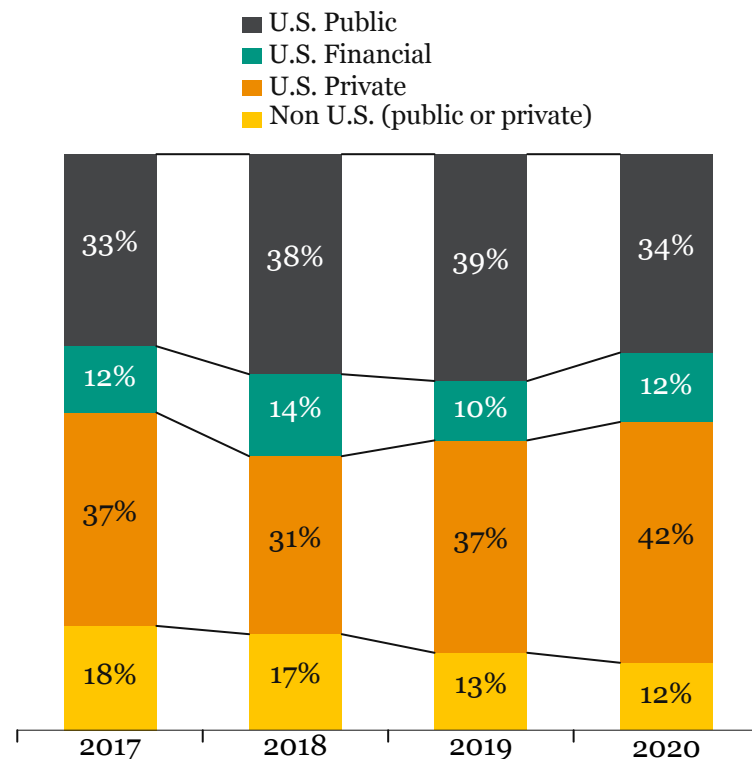
# Transaction Values\* and Buyer Types

Subset: 2017–2020 deals

## Transaction values



## Buyer types

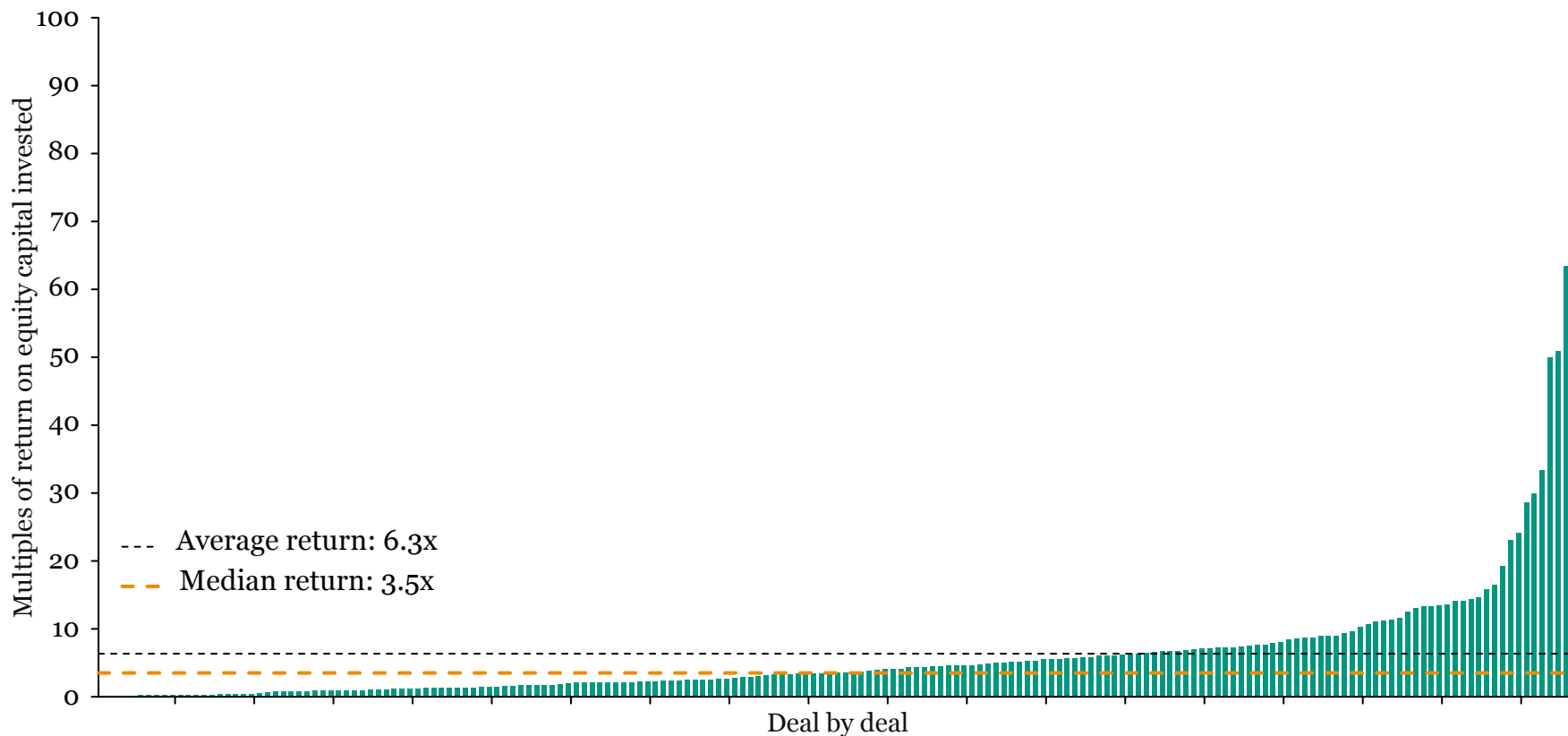


\* The term “transaction values” includes escrowed amounts but does not include potential earnout consideration.



# Transaction Values\* as Multiples of Equity Capital Invested†

## 2020 Deals

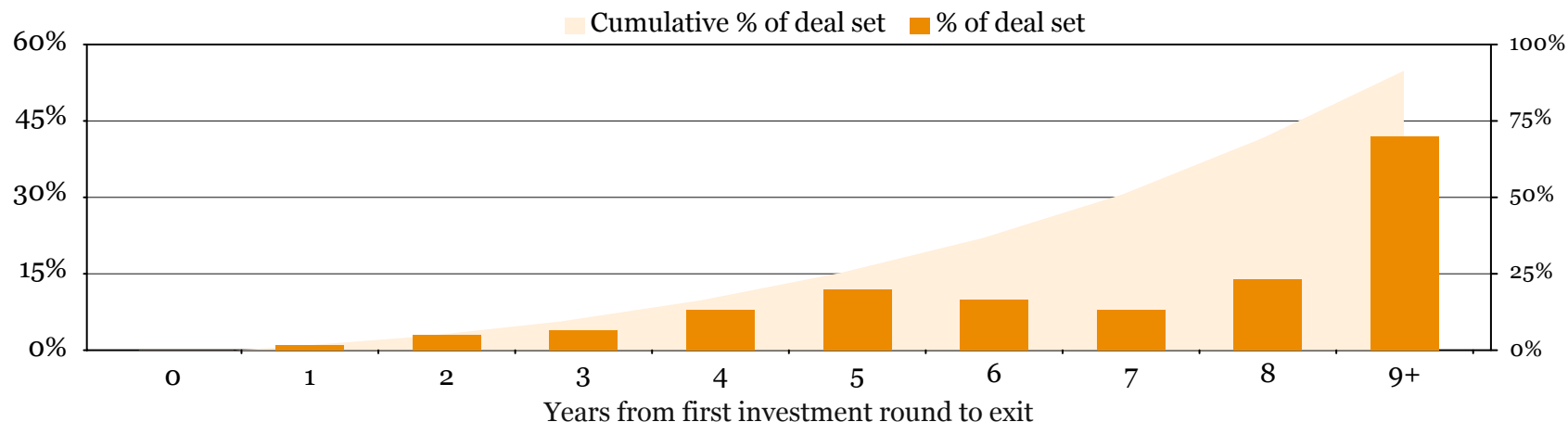


\* The term “transaction values” includes escrowed amounts but does not include potential earnout consideration.

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

# Investment Exit Timing

## 2020 Deals

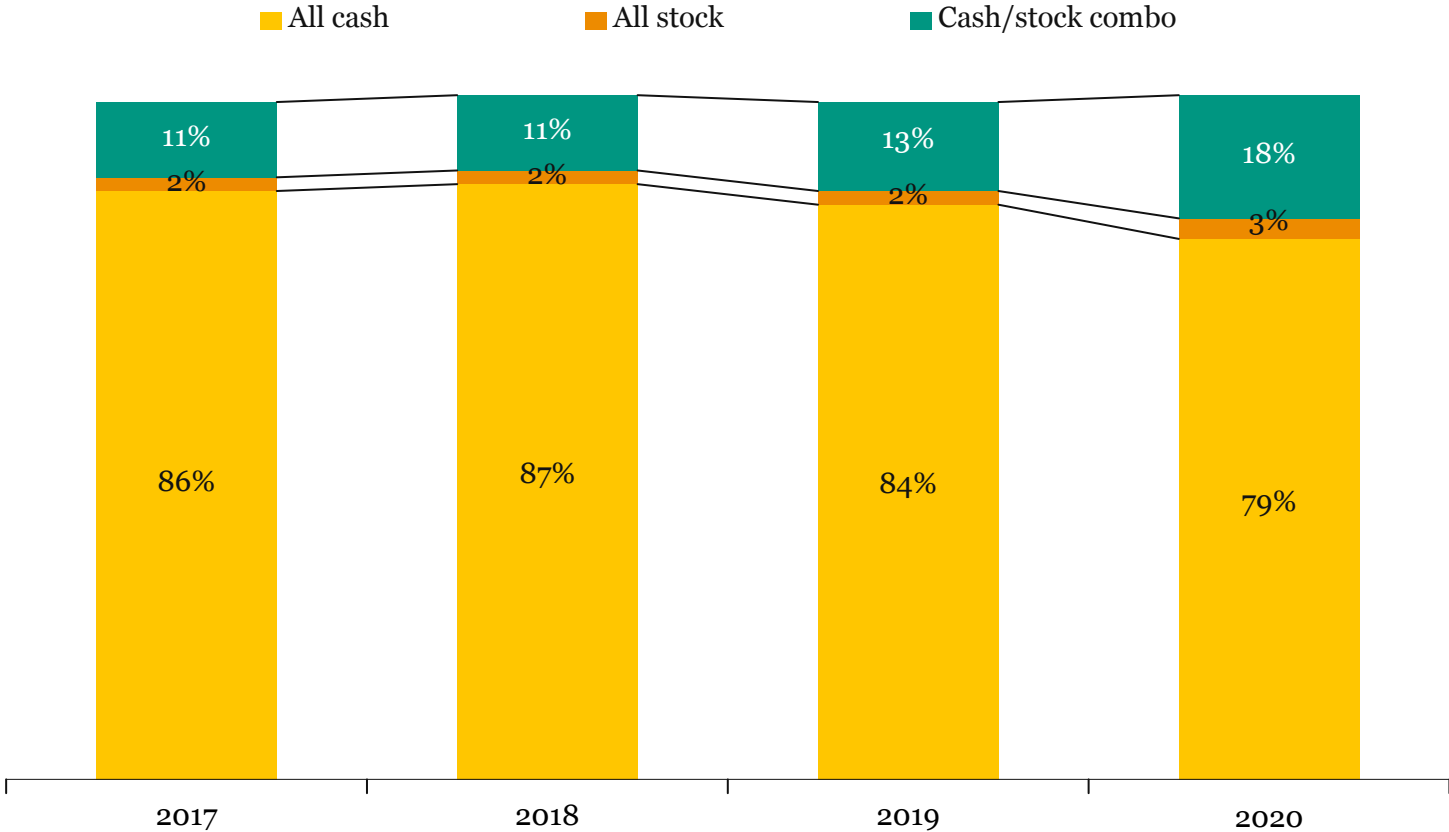


Years to exit (from date of first investment*)	Equity financing rounds at exit	Equity capital invested*
Median: 6.1	Median: 3.0	Median: \$26MM
Average: 6.9	Average: 3.7	Average: \$54MM

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

# Closing Consideration Trends

Consideration type

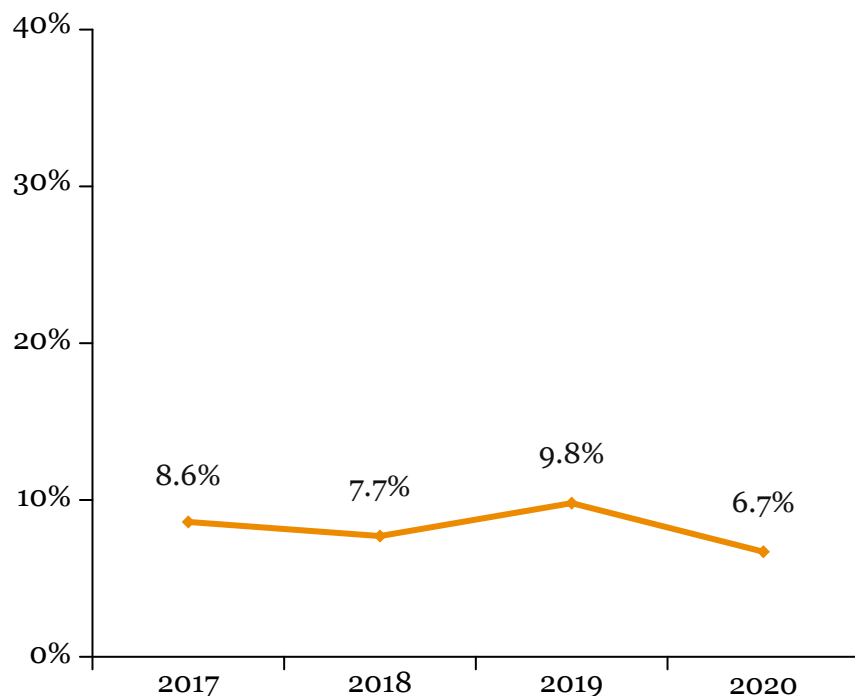


► COVID-19 pandemic, target industry, and other factors may have influenced this deal point. Visit [srsacquiom.com/marketstandard/](https://srsacquiom.com/marketstandard/) to explore.

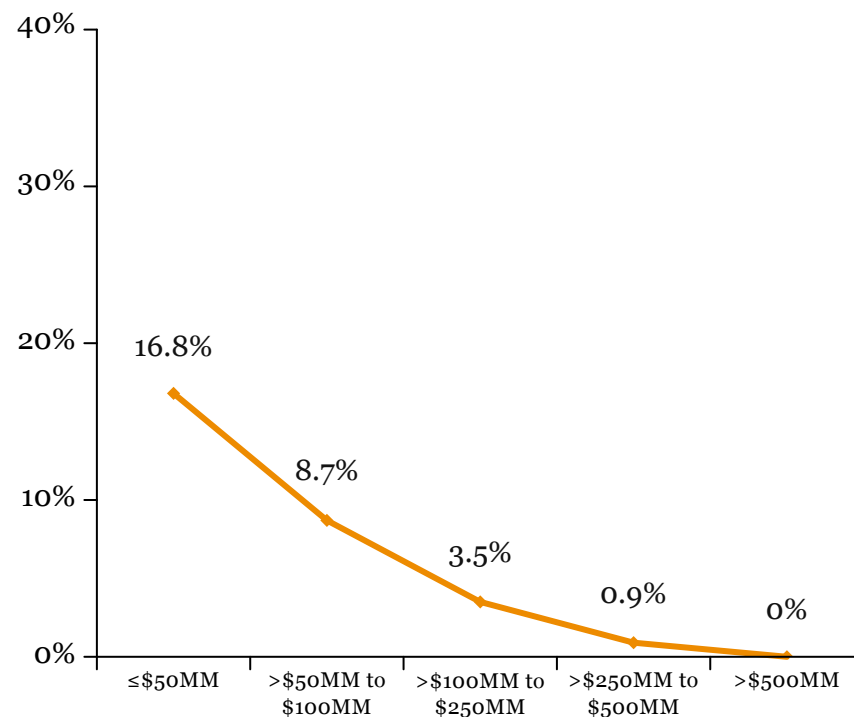
## Management Carveouts: Frequency

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 below.

Deals including a management carveout



Management carveout frequency by transaction value\*



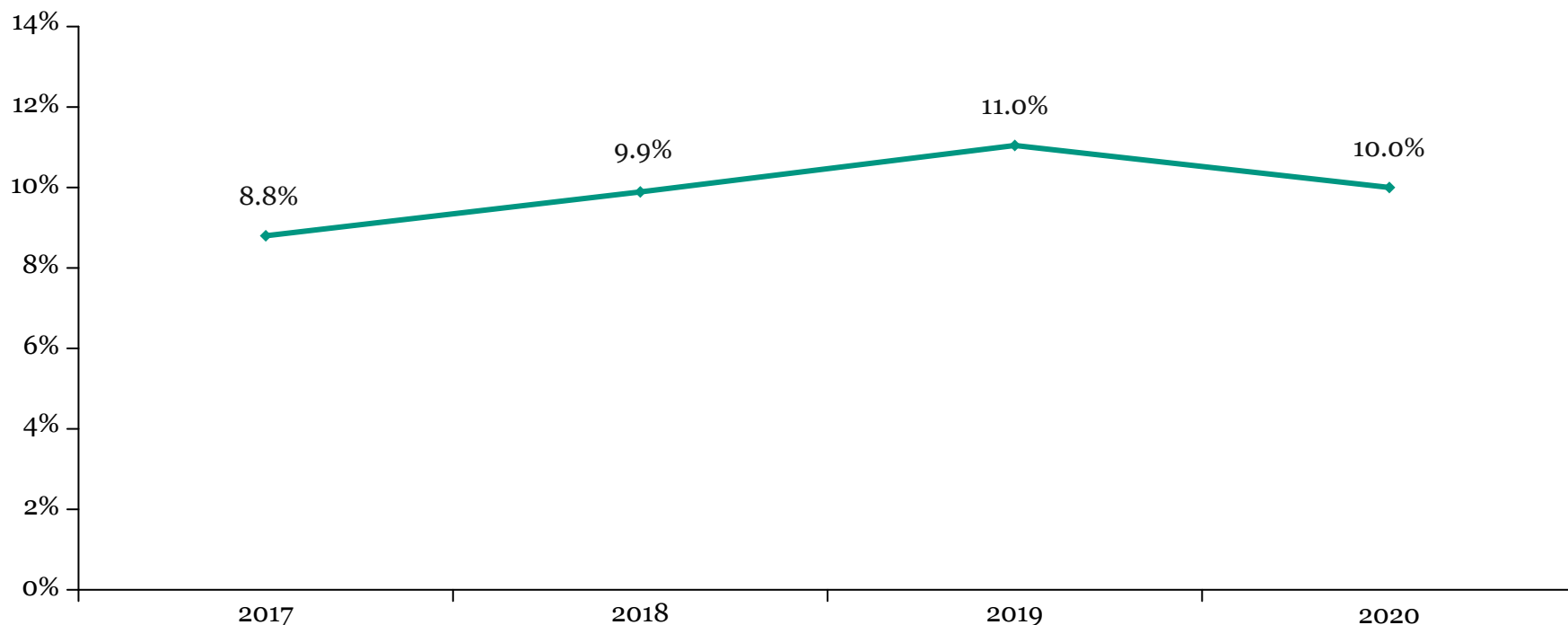
\* “Transaction value” includes escrowed amounts but does not include potential earnout consideration.



## Management Carveouts: Size

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 below.

### Median size as a percentage of transaction value\*

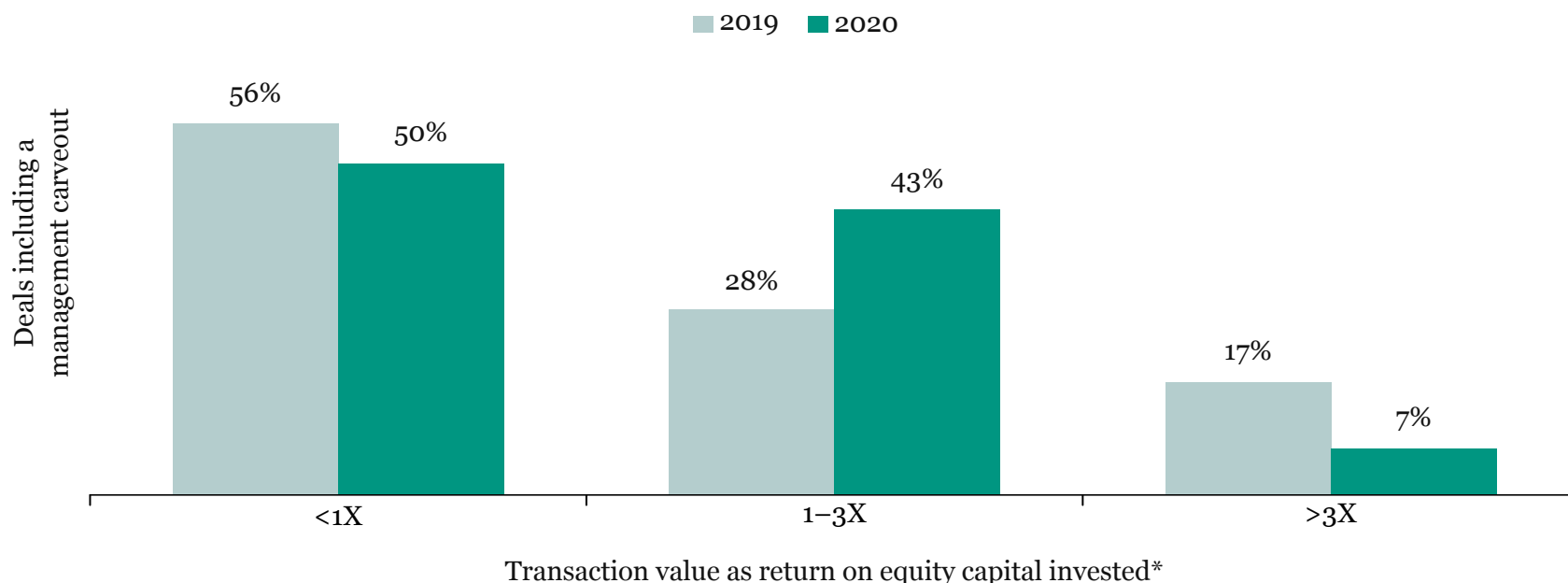


\* Measures size of carveout only, disregarding consideration received by seller management in respect of equity ownership (if any).

## Management Carveouts: Frequency by Return on Equity Capital Invested

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 below.

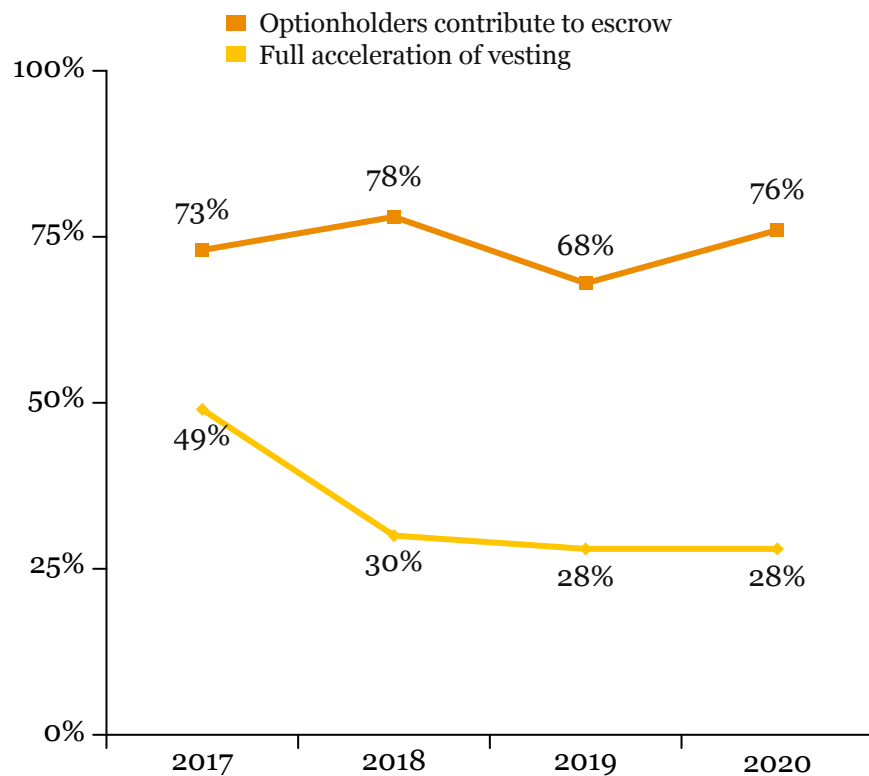
### Deals including a management carveout



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

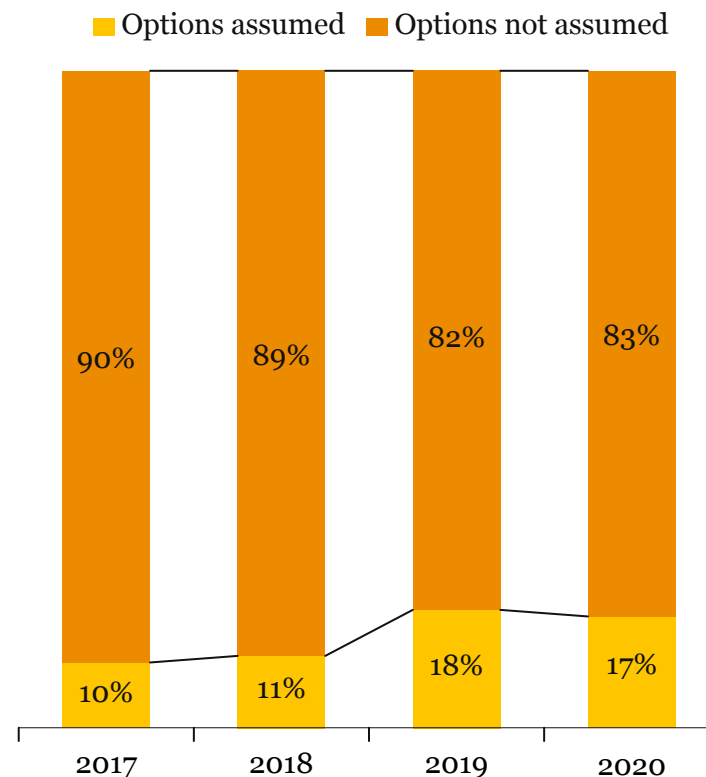
# Treatment of Options: Contribution, Acceleration, and Assumption

## Contribution and acceleration\*



\* Excludes deals where optionholders received no consideration.

## Assumption of options by buyer



# Post-Closing Purchase Price Adjustments (“PPA”)

## Example adjustment provision

### Adjustment Mechanism

“The ‘Adjustment Amount’ (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account specified by Buyer. If the Adjustment Amount is negative, the Adjustment Amount shall be paid by wire transfer by Buyer to an account specified by Seller.”

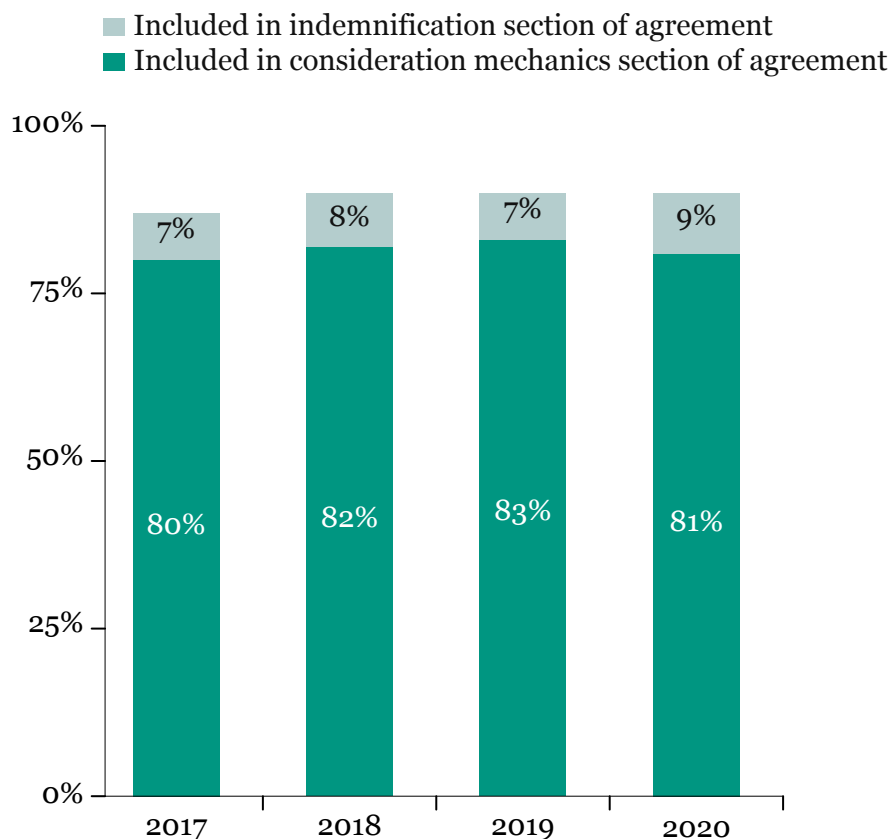
### Definition of Working Capital

“‘Working Capital’ as of a given date shall mean the amount calculated by subtracting the current liabilities of Seller as of that date from the current assets of Seller as of that date. The Working Capital of Seller as of the date of the Balance Sheet (the ‘Initial Working Capital’) shall be deemed to be \$\_\_\_\_\_.”

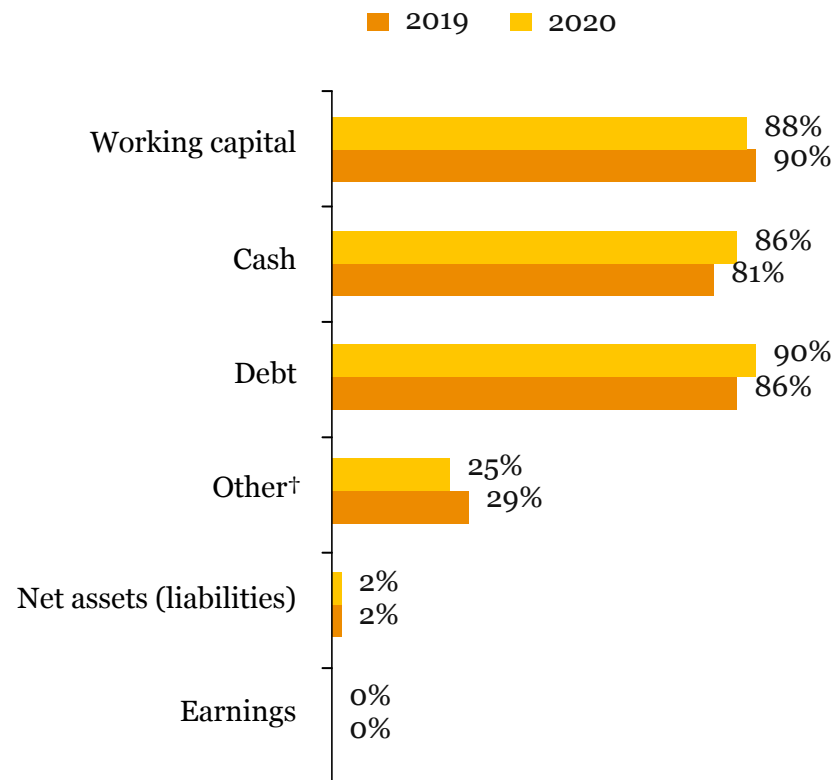


# Post-Closing Purchase Price Adjustments

## Adjustment provision included



## Adjustment metrics\*



\* 94% of post-closing purchase price adjustments in 2020 deals were based on more than one metric.

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

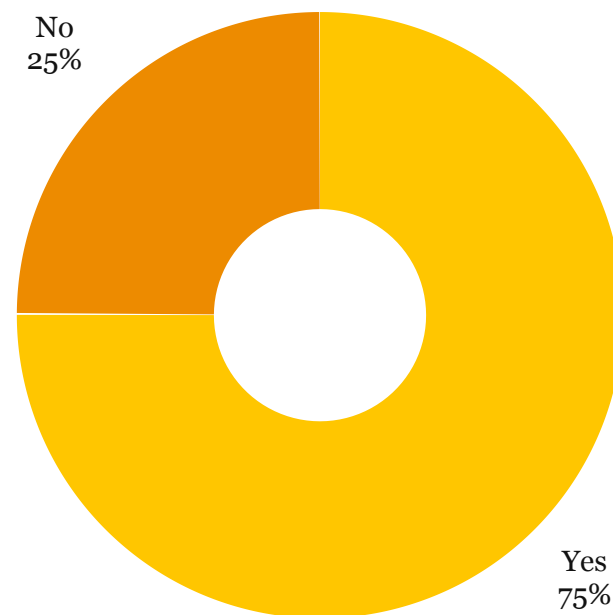
# Post-Closing Purchase Price Adjustments: Working Capital Excludes Tax-Related Items

Subset: 2020 deals with a Working Capital adjustment

## Tax exclusion example

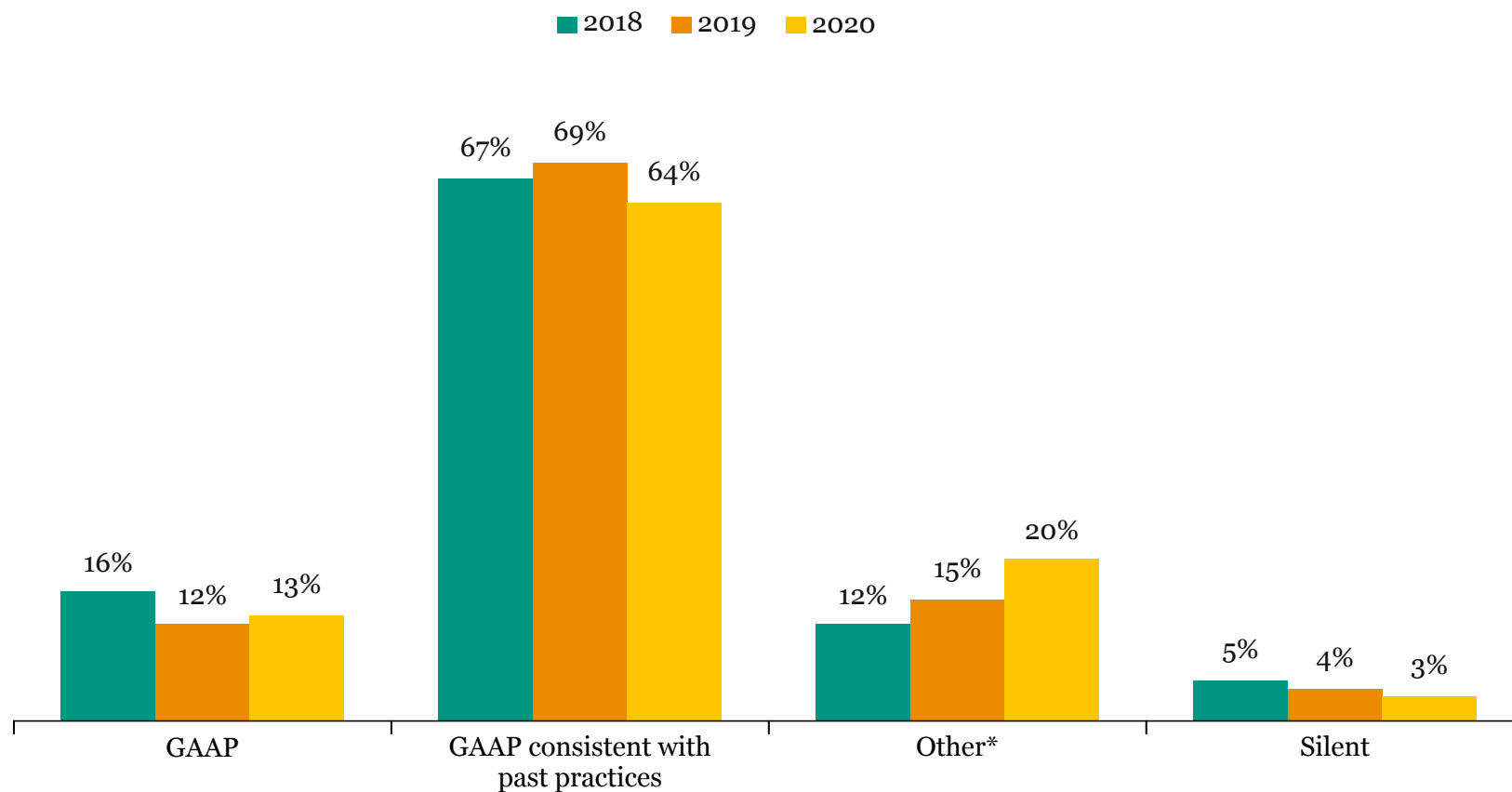
“Adjusted Working Capital’ means current assets minus current liabilities provided, however, that ‘Adjusted Working Capital’ excludes from current assets all [deferred] tax assets and excludes from current liabilities all [deferred] tax liabilities.”

## Adjustment excludes tax-related items



# Post-Closing Purchase Price Adjustments: Methodology for Preparation of Closing Balance Sheet

Subset: Deals with post-closing purchase price adjustments

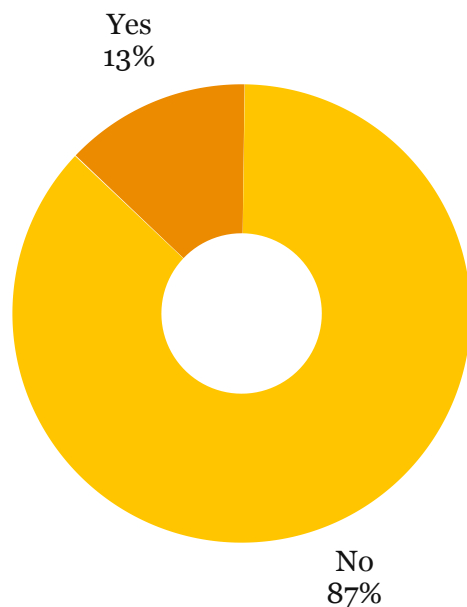


\* "Other" methodology most commonly used was GAAP as modified by the principles and changes set forth on a schedule.

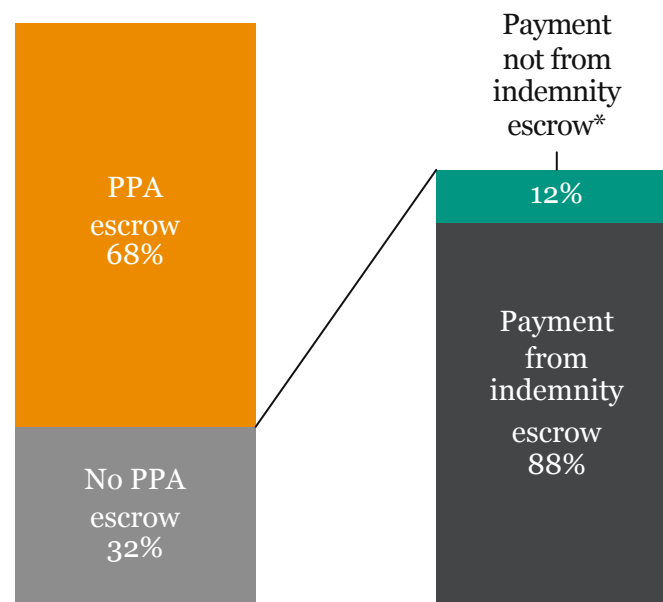
## Post-Closing Purchase Price Adjustments: Thresholds and Separate Escrows

Subset: 2020 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

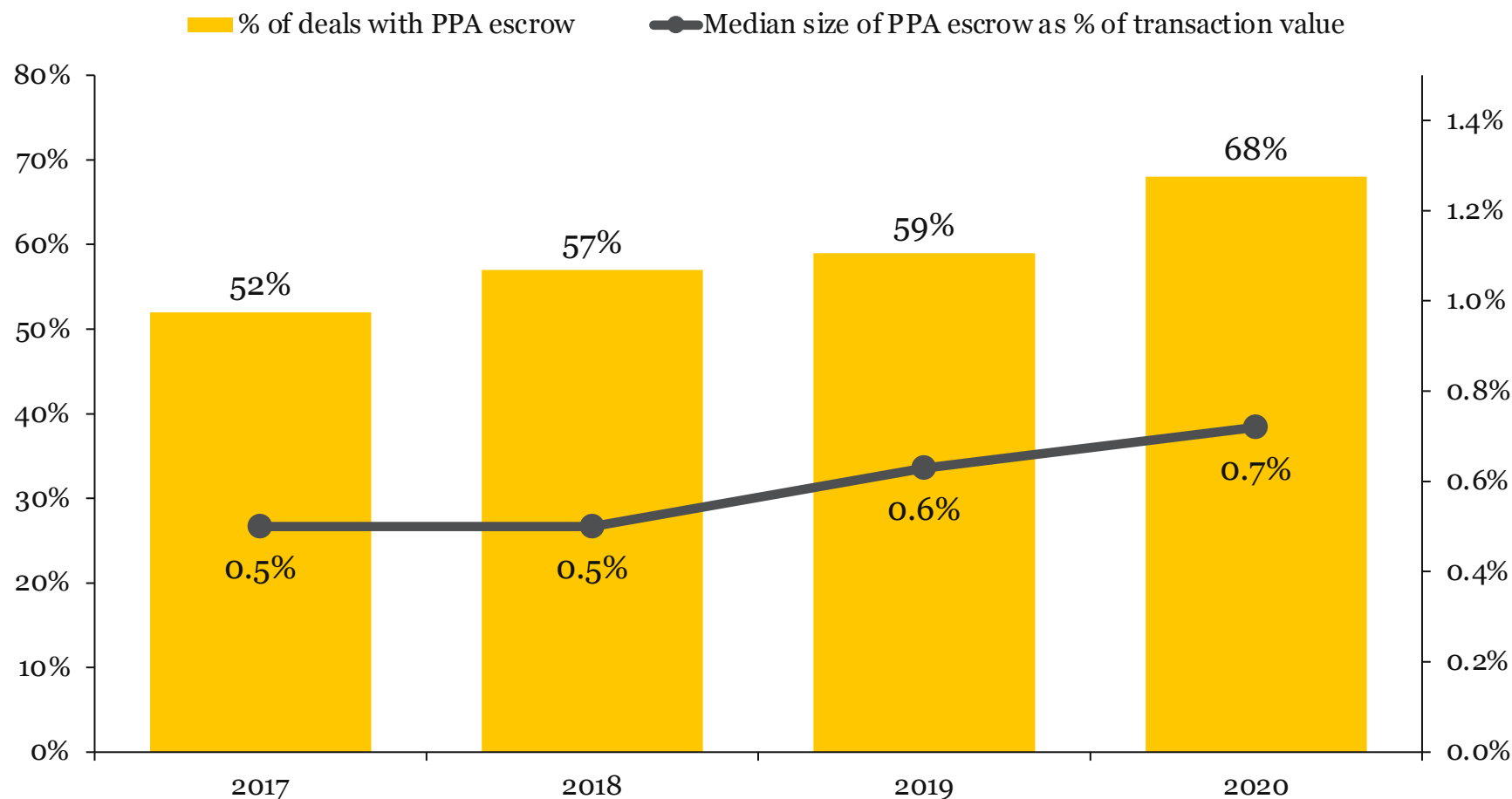


\* Generally, payment out-of-pocket from securityholders.



## Post-Closing Purchase Price Adjustments: Separate Escrows

### Percentage of deals with PPA escrow and median sizes



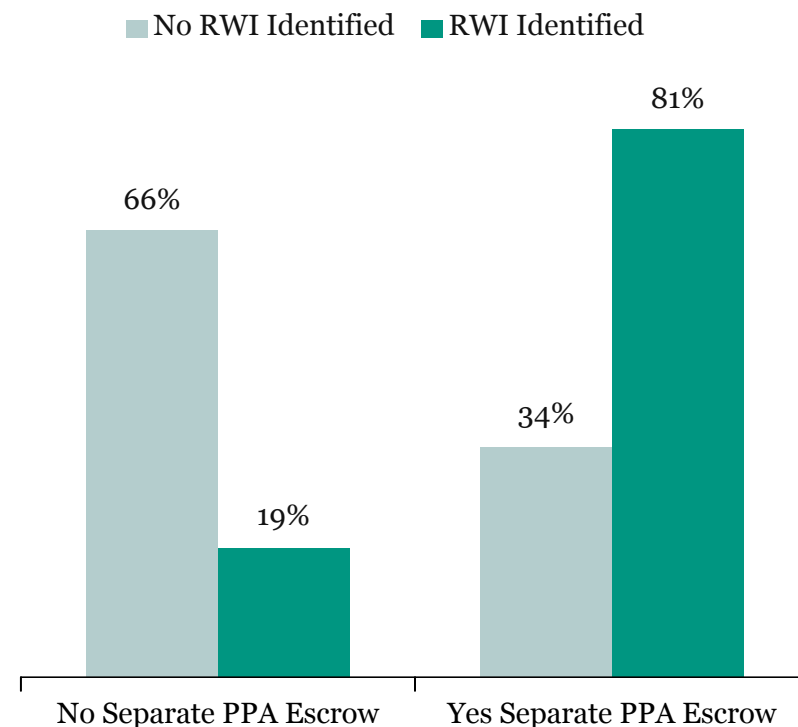
# Purchase Price Adjustments: Influence of RWI on Separate Escrows

## Overview

For deals that use buy-side RWI and incorporate a PPA, the vast majority specify a separate PPA escrow in the purchase agreement to affect that adjustment.

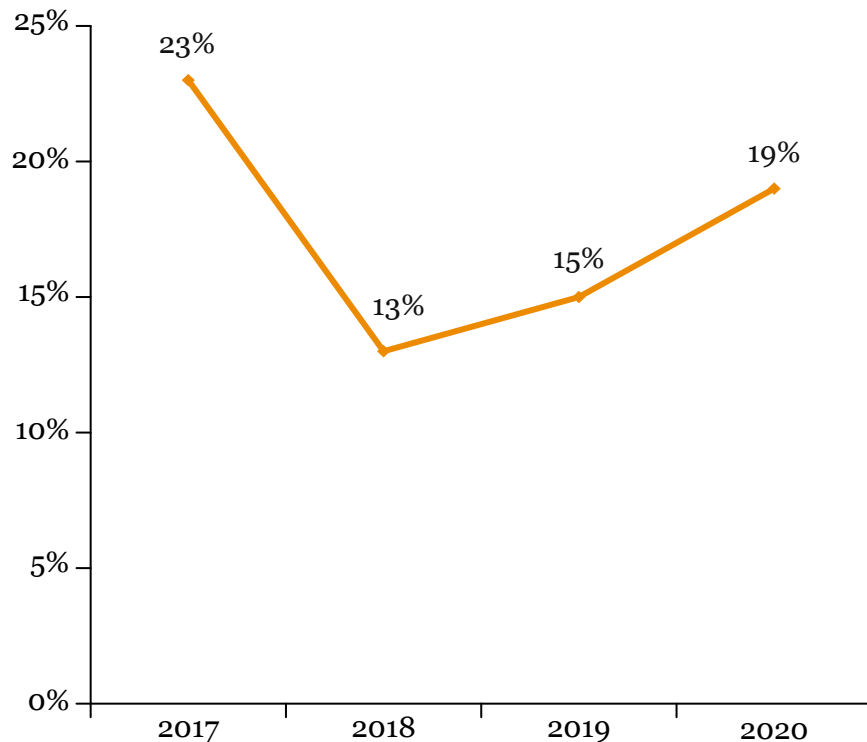
A separate PPA escrow is a highly correlated categorical attribute associated with buy-side RWI.

## Separate PPA escrows, deals 2017–2020

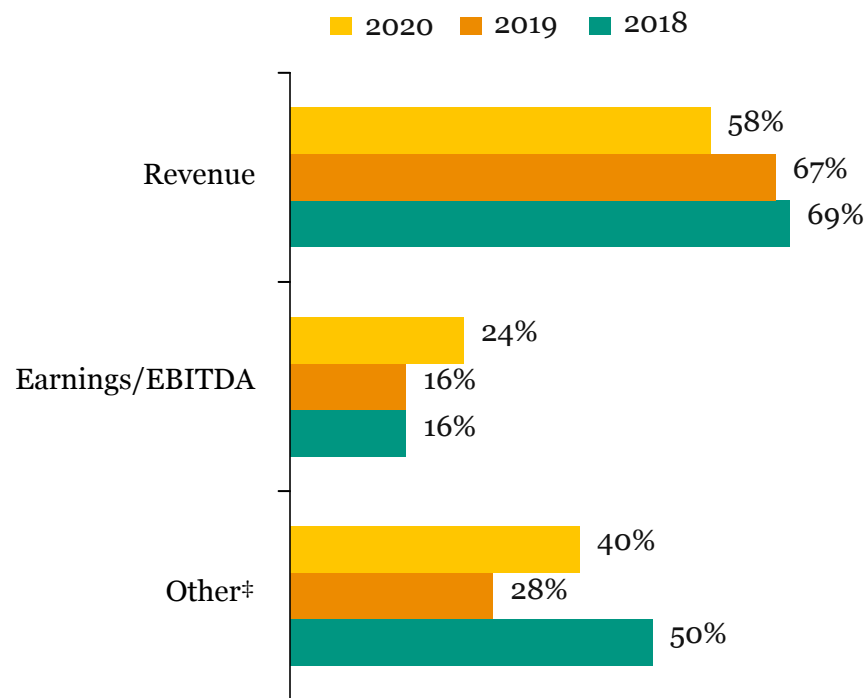


## Earnouts (Non-Life Sciences Deals\*)

### Earnout included



### Earnout metrics†



► **COVID-19 pandemic, target industry, and other factors may have influenced this deal point. Visit [srsacquiom.com/marketstandard/](https://srsacquiom.com/marketstandard/) to explore.**

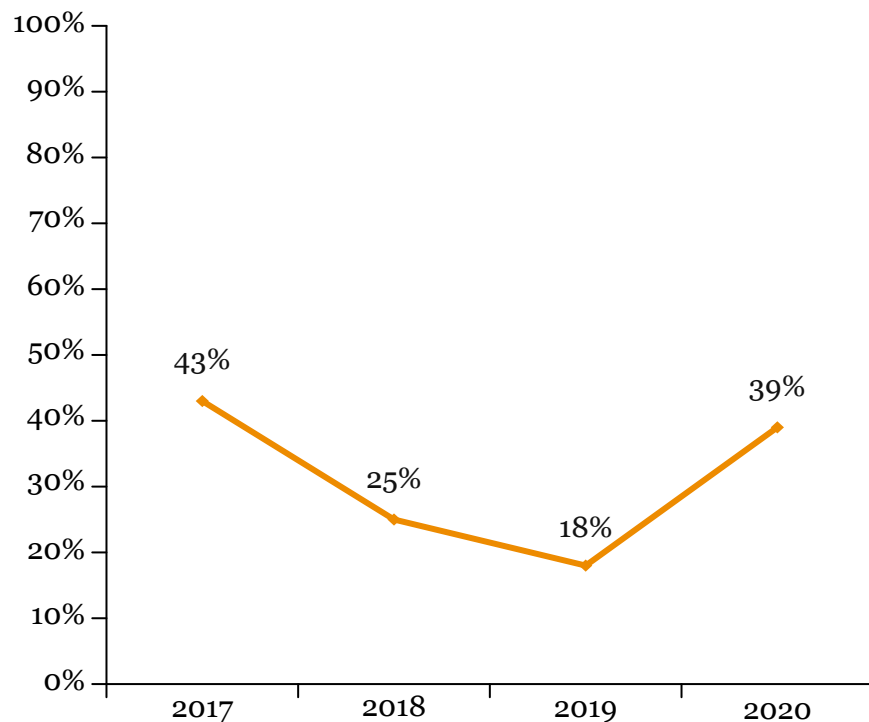
\* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

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

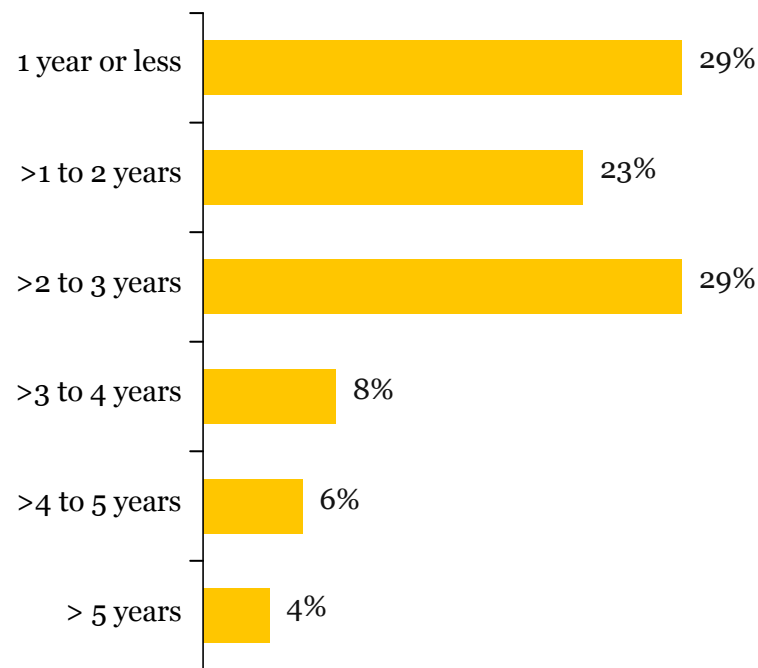
‡ Examples: unit sales, product launches, divestiture of assets.

## Earnouts (Non-Life Sciences Deals\*)

Median earnout potential as % of closing payment†



Earnout length‡ (2020 median: 24 months)



► **COVID-19 pandemic, target industry, and other factors may have influenced this deal point. Visit [srsacquiom.com/marketstandard/](https://srsacquiom.com/marketstandard/) to explore.**

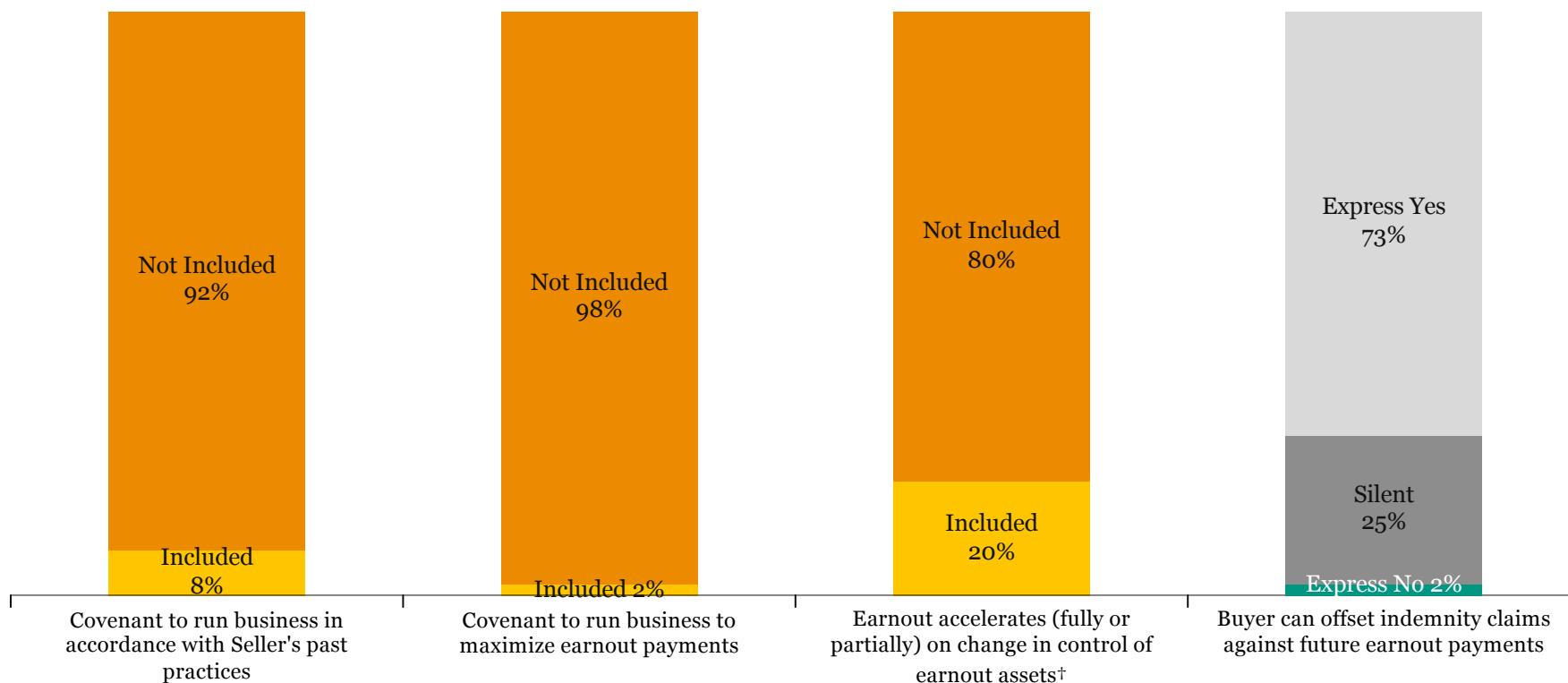
\* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

† 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.

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

Subset: 2020 deals with earnouts, excluding life sciences deals

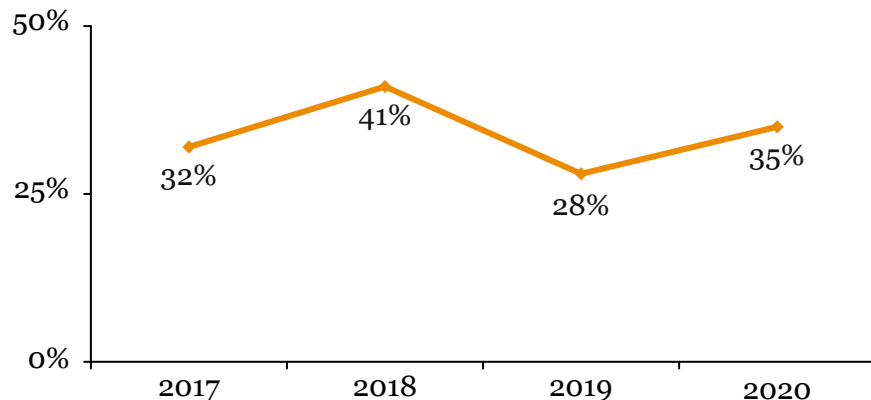


\* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

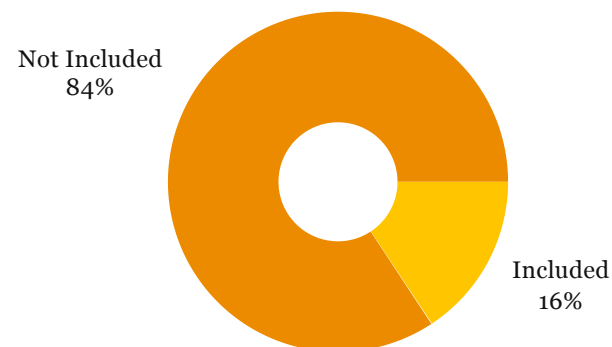
† Generally subject to exceptions, such as if the subsequent buyer assumes the earnout obligations.

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

### “Earnout is not a security” provision included



### Disclaimer of fiduciary relationship (2020 deals)



#### 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.”

*\* For a more detailed analysis of SRS Acquiom life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.*



# Pervasive Qualifiers



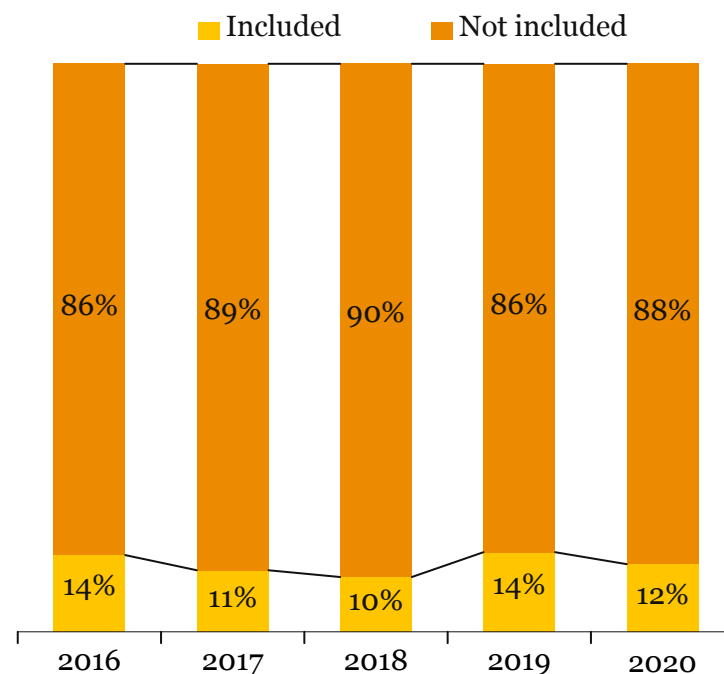
# Definition of Material Adverse Effect ("MAE"): "Prospects" Included

Subset: Deals with MAE defined\*

## 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.”

## Use of “prospects”



\* Material Adverse Effect or Material Adverse Change was defined in 98% of deals for 2020.

## Definition of Material Adverse Effect: Forward-Looking Language

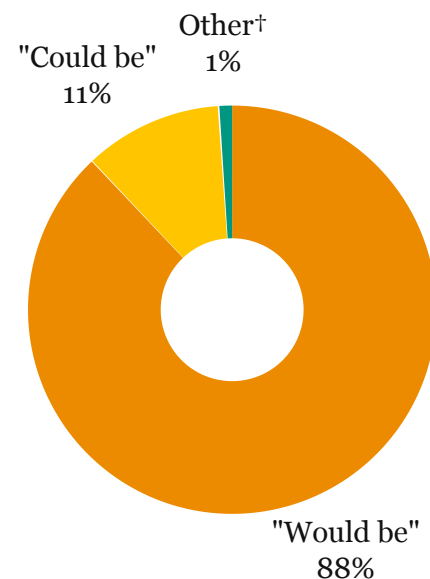
97% of 2020 deals with an MAE definition had forward-looking language.\*

Subset: 2020 deals with an MAE definition that included 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.”

### Forward-looking MAE details



\* 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

Subset: 2020 deals with MAE defined

## 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.”

## Deals with carveouts

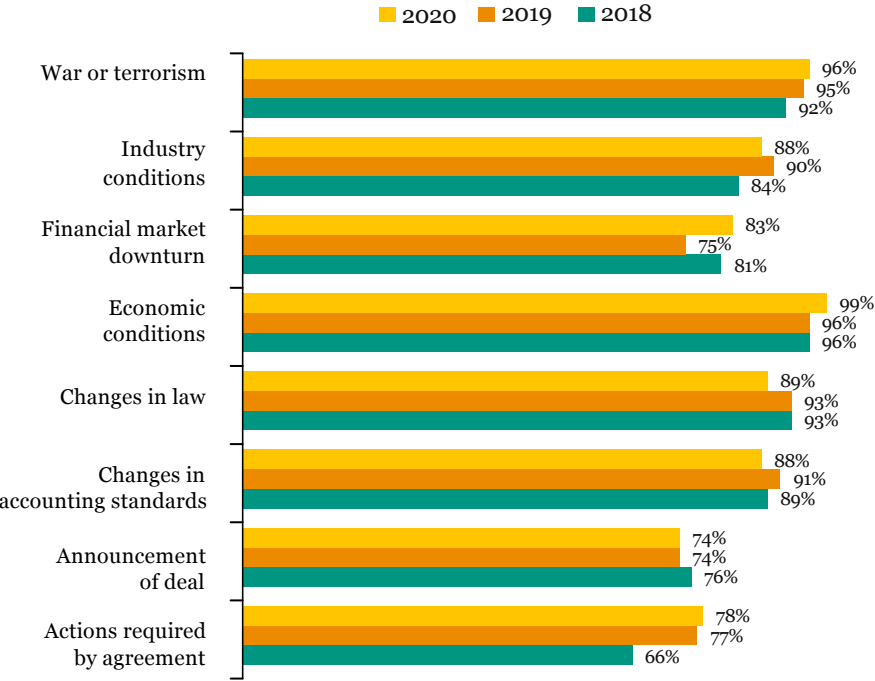


# Definition of Material Adverse Effect: Carveouts

Subset: MAE definition has carveouts

## Carveout frequency

## Comments

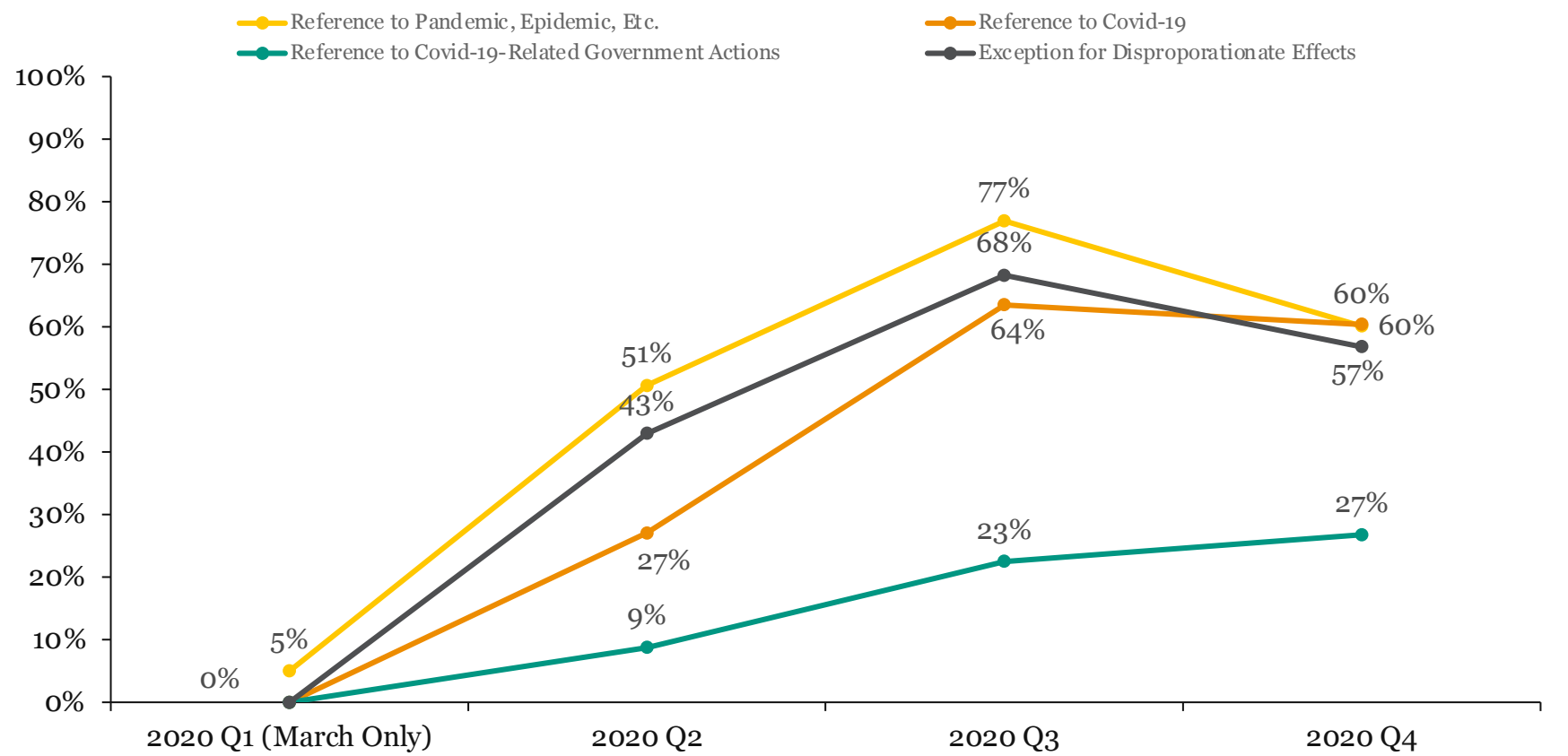


The outcome of these carveout terms can change materially based on deal dynamics.

► To manipulate those variables and see the full effect, visit [srsacquiom.com/marketstandard](https://srsacquiom.com/marketstandard).

# Material Adverse Effect: 2020 COVID-19 Variables

## COVID-19 variables



# Definition of Material Adverse Effect: Carveouts Qualified by Disproportionate Effect

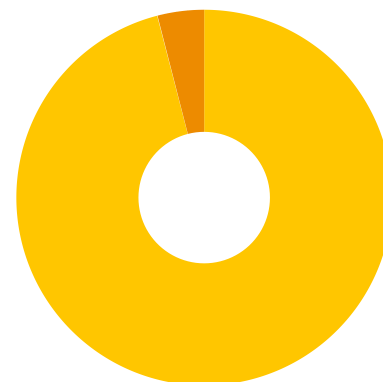
Subset: 2020 deals with an MAE definition with carveouts

## 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 (provided that such event, change, or action does not affect Seller in a substantially disproportionate manner).”

## Disproportionate effect details

No carveouts qualified by disproportionate effect  
4%



At least one carveout qualified by disproportionate effect  
96%

# Knowledge Standards

## Formulations

### Actual knowledge

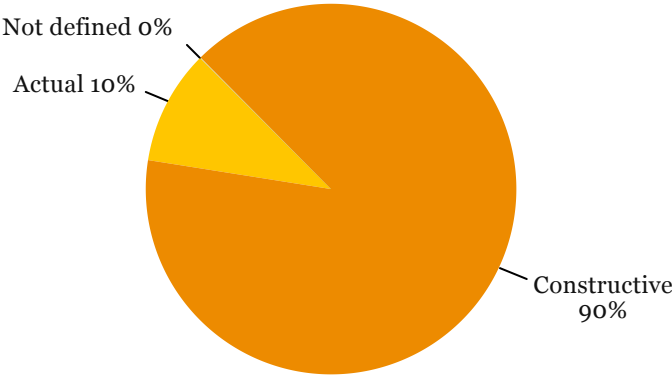
“Knowledge’ means the actual knowledge of the directors and officers of Seller.”

### Constructive knowledge

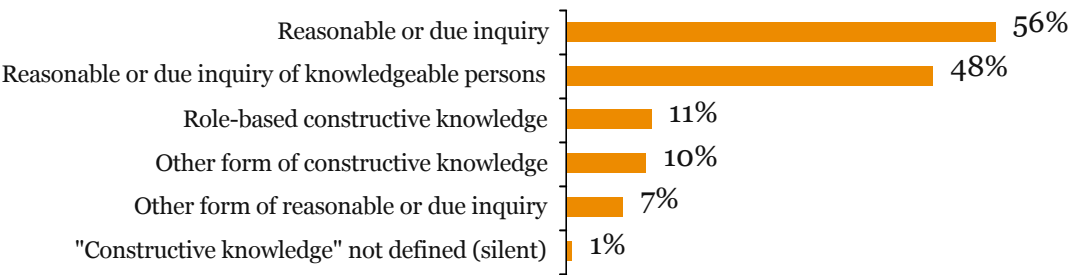
“Knowledge’ means the actual knowledge of the directors and officers of Seller and the knowledge that such directors and officers would have after reasonable or due inquiry.”

*\* 26% of 2020 deals include more than one constructive knowledge element, e.g., a due inquiry requirement as well as role-based deemed knowledge.*

## Knowledge definition details (2020 deals)



## Subset: Constructive\*





# Seller's Representations, Warranties, and Covenants

# “No Undisclosed Liabilities” Representation

98% of 2020 deals contain "No Undisclosed Liabilities" representation.

## Examples

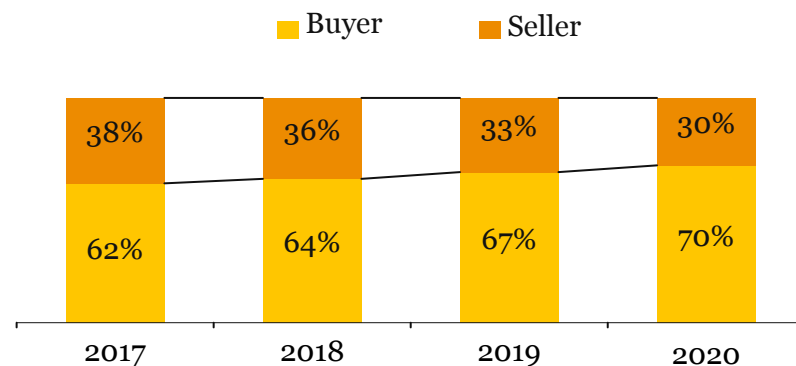
### Buyer-favorable formulation

“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.”

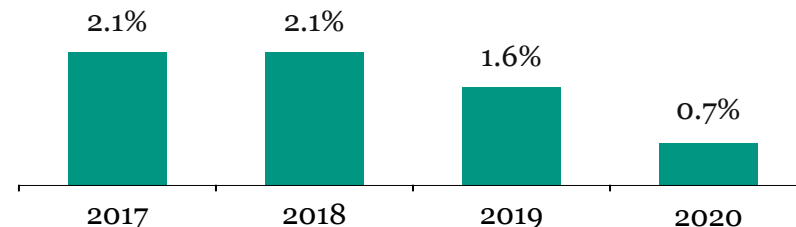
### Seller-favorable formulation

“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.”

## Party favored by definition

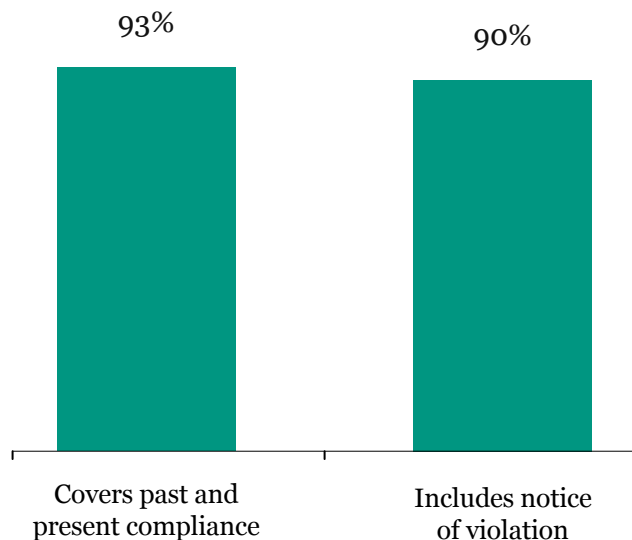


## Representation is knowledge-qualified



# “Compliance with Laws” Representation

## “Compliance with Laws” representation details, 2020



## Comments

100% of 2020 deals included this representation.

Buyer Power Ratio, industry, and transaction value may affect whether notice of investigation is required.

► To view these differences, visit [srsacquiom.com/marketstandard](https://srsacquiom.com/marketstandard).

## Example representation

“To the Seller’s knowledge, the Business has been and is being conducted in compliance with all applicable laws.”

# “10b–5” and “Full Disclosure” Representations

## Examples

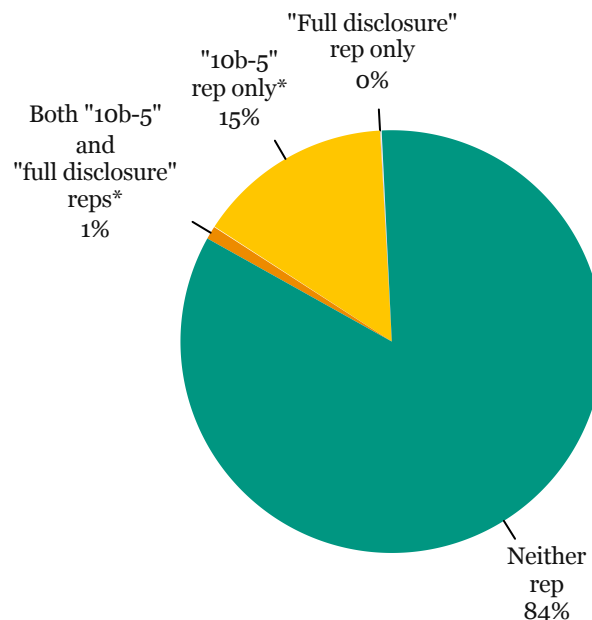
### “10b–5” representation

“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.”

### “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.”

## Inclusion of representations (2020 deals)

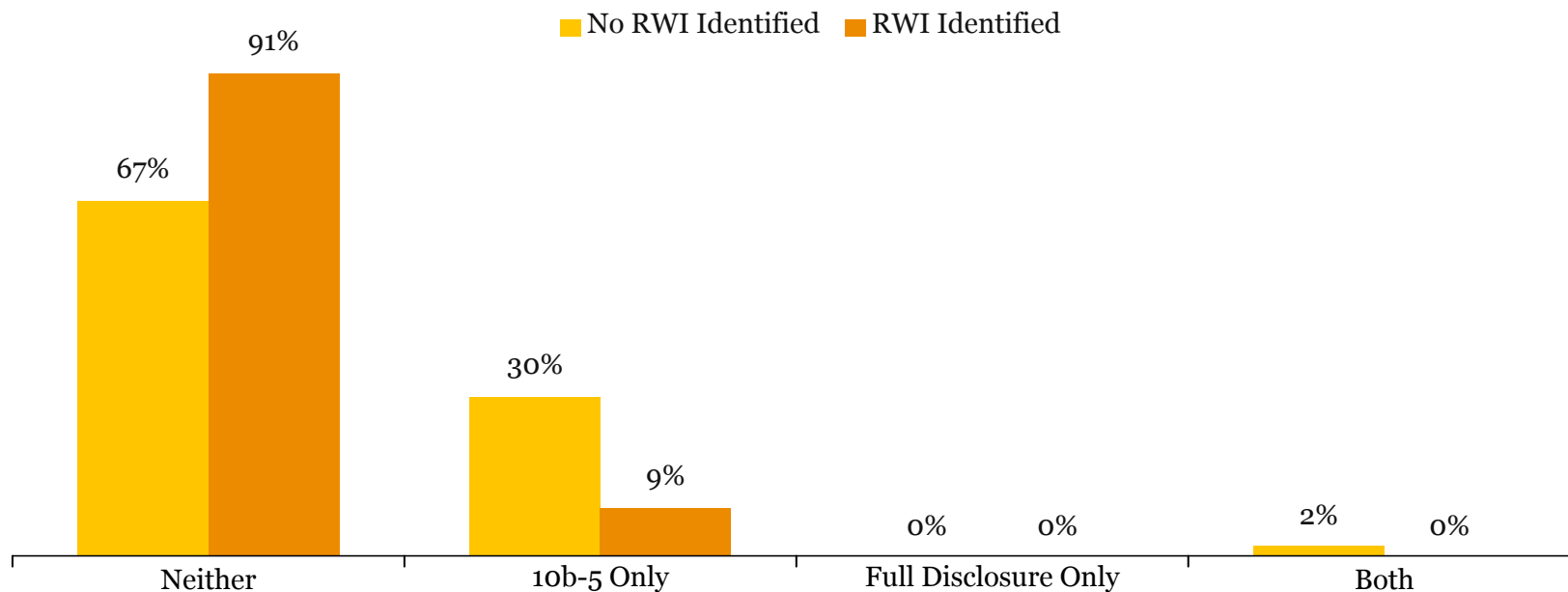


*\* Does not include representations that apply only to the shareholder information statement (and not the acquisition agreement).*

## “10b–5” and “Full Disclosure” Representations: Influence of RWI

A purchase agreement is more likely to contain neither a "10b-5" nor a "Full Disclosure" representation when there is a buy-side RWI policy.

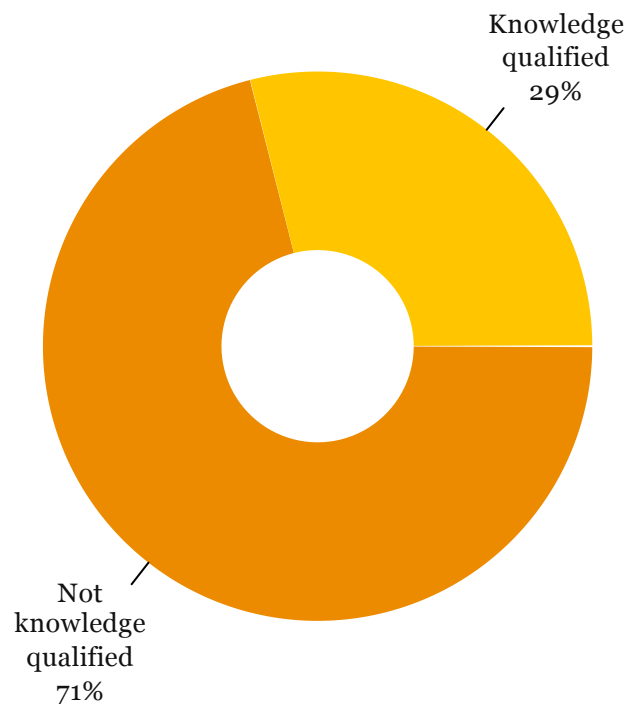
Deal years 2017–2020



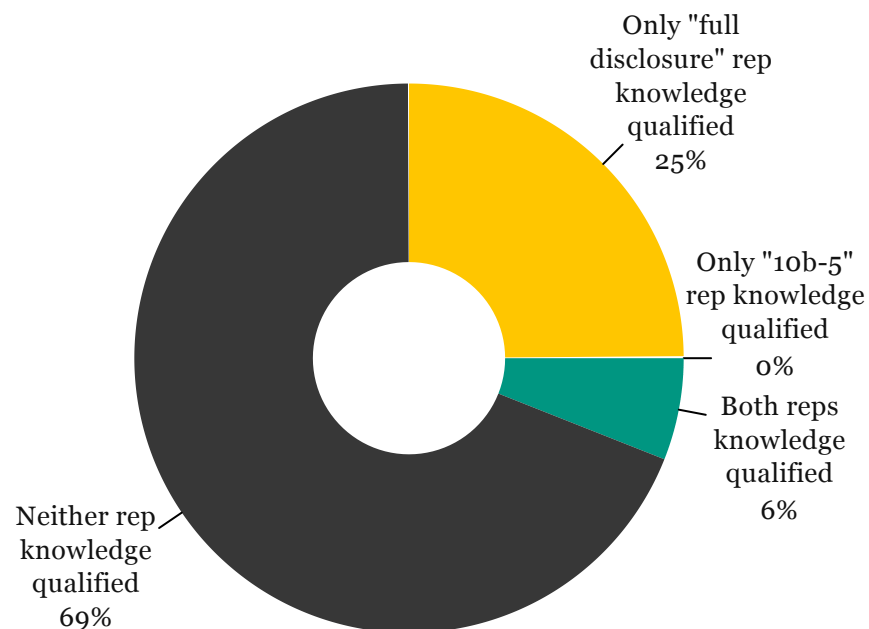
# “10b-5” and “Full Disclosure” Representations: Knowledge Qualifiers

Subset: 2017–2020 deals

Subset: “10b-5” rep only



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



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

## Examples

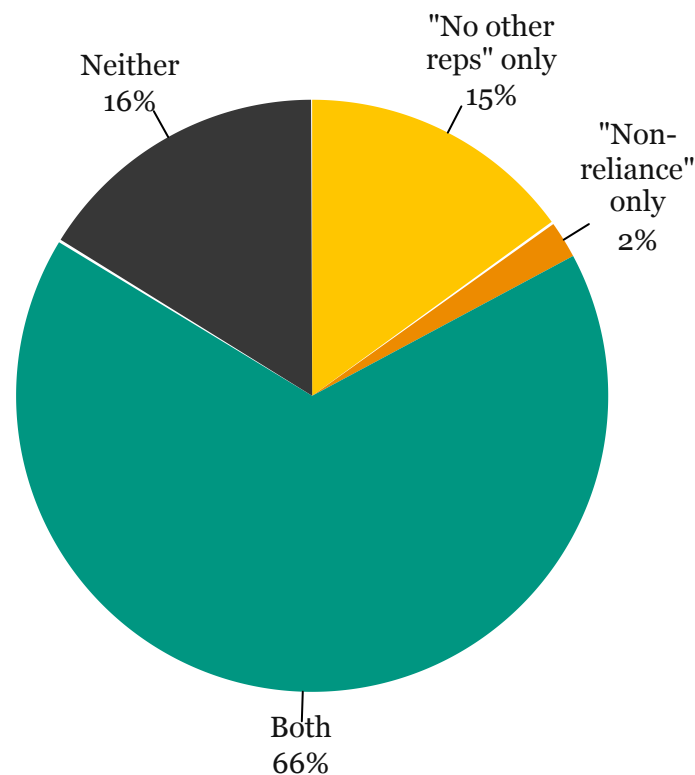
### No other representations

“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.”

### 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.”

## Inclusion of representations (2020 deals)



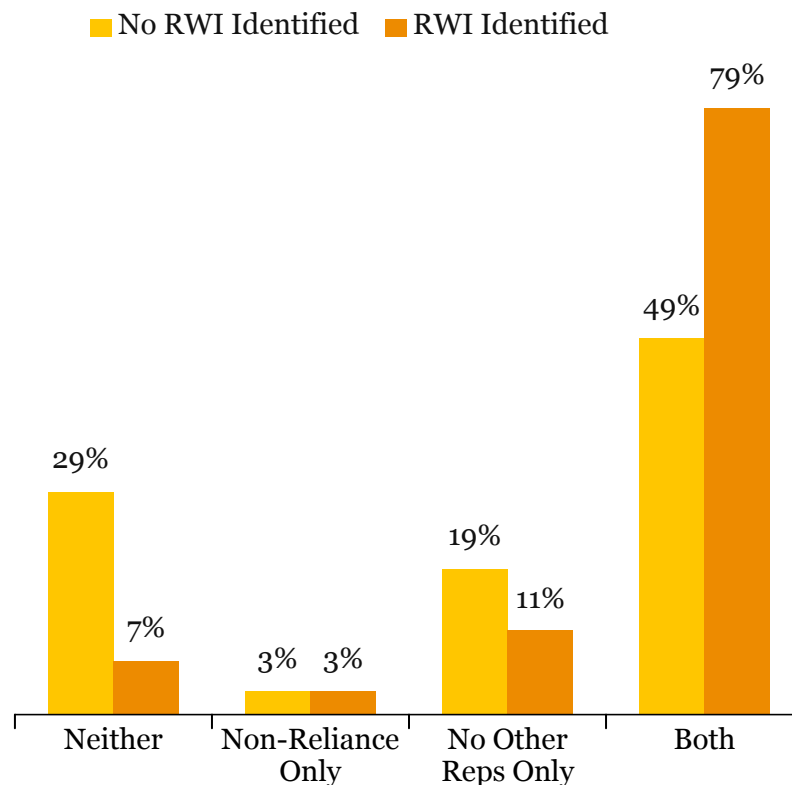


# “No Other Representations” and “Non-Reliance” Clauses: Influence of RWI

## Correlation to buy-side RWI

In transactions that utilize buy-side RWI, the buyer is more likely to agree to statements regarding "Non-Reliance" and "No Other Representations."

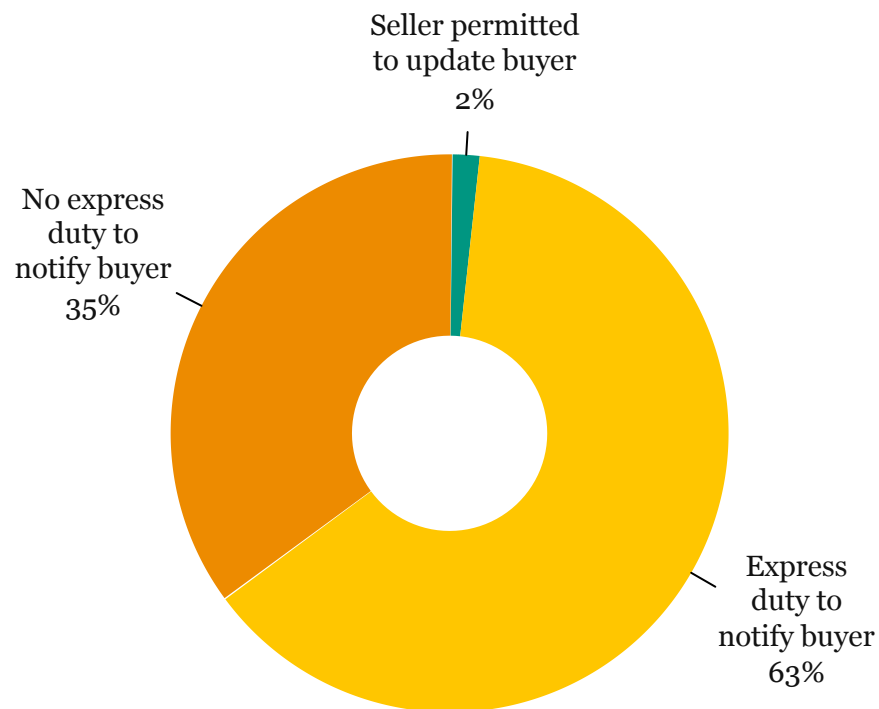
## Non-reliance / No other reps (2017–2020)



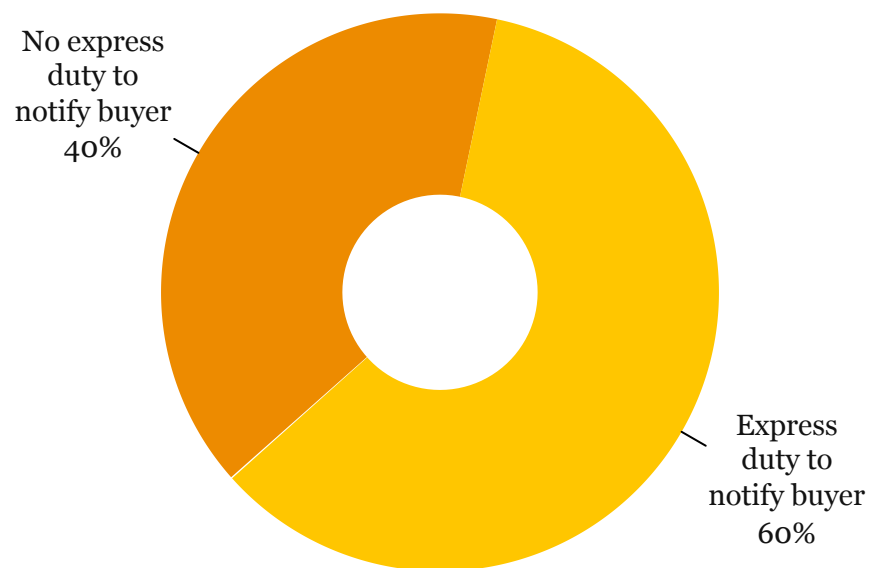
## Covenants: Seller's Duty to Notify Buyer of Pre-Closing Breaches\*

Subset: 2020 deals

### Breaches of representations and warranties



### Breaches of covenants



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

## Covenants: No-Shop/No-Talk

### Example No-Shop/No-Talk covenant

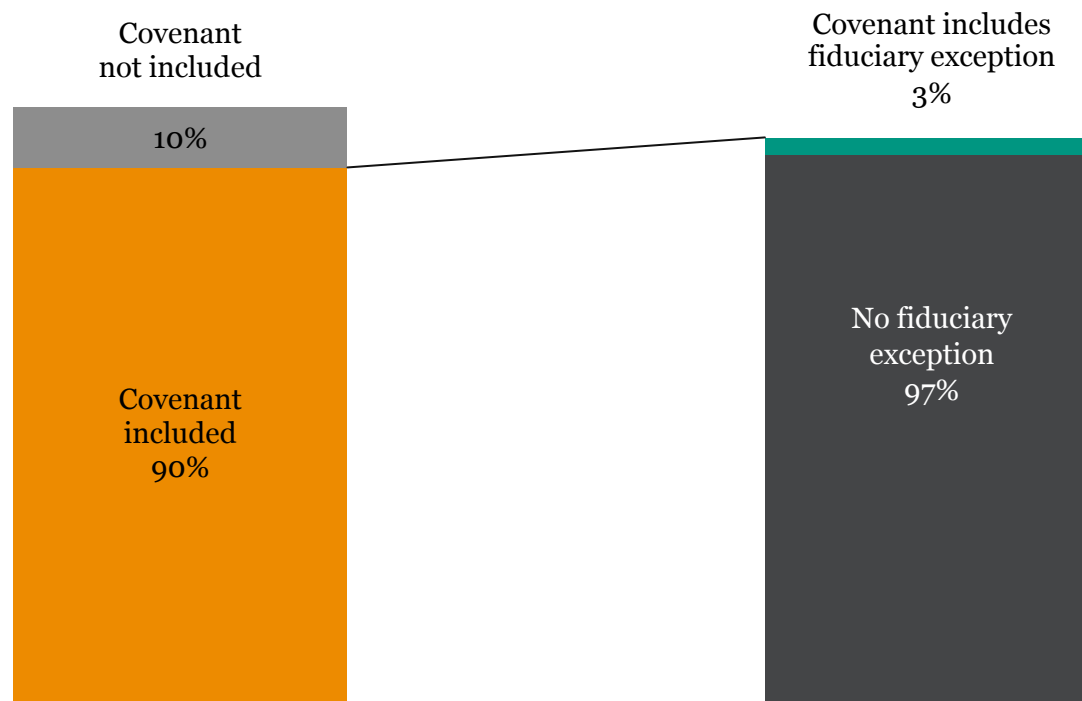
“Between the date of this Agreement and the Closing Date, Seller shall not... (i) solicit, initiate, consider, encourage, or accept any proposal or offer that constitutes an Acquisition Proposal or (ii) participate in any discussion, conversation, negotiation, or other communication regarding, or furnish to any other Person any information with respect to, or otherwise cooperate in any way, assist or participate in, facilitate or encourage the submission of, any proposal that constitutes, or could reasonably be expected to lead to, an Acquisition Proposal.”

### Example fiduciary exception to the No-Shop/No-Talk covenant

“Notwithstanding the foregoing... the Seller Board may withhold, withdraw, amend, or modify its recommendation to the Selling Shareholders if it determines in good faith by resolution duly adopted, after consultation with outside legal counsel, that it is required to do so in order to comply with its fiduciary duties to the Selling Shareholders under applicable law.”

## Covenants: No-Shop/No-Talk\*

### No-shop/No-talk covenant inclusion† (2020 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 (Timing): When Must They Be Accurate?

## Timing formulations

### 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.”

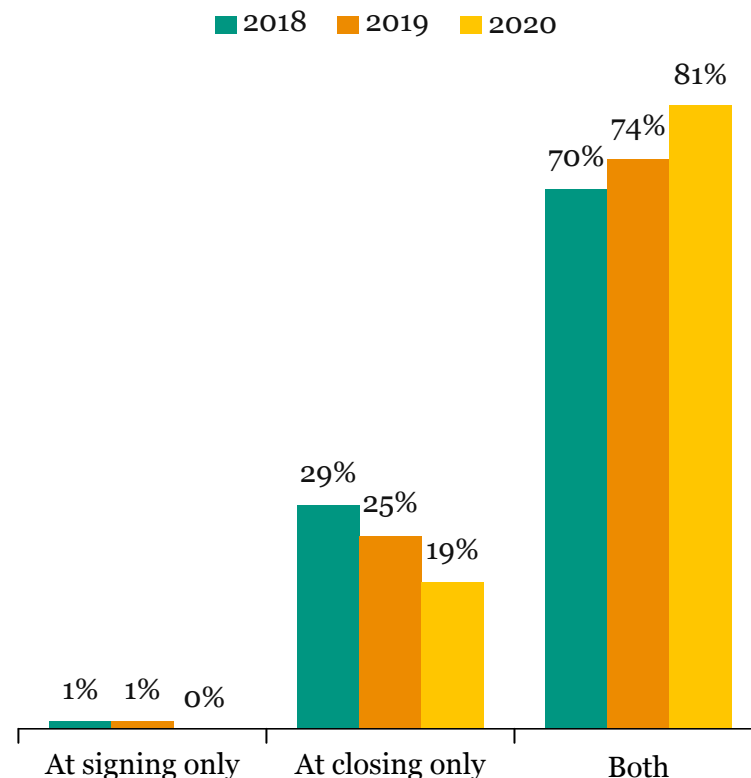
### At closing only

“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.”

## Accuracy: Timing



# Accuracy of Seller's Representations (Materiality): How Accurate Must They Be?

## Accuracy formulations

### 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.”

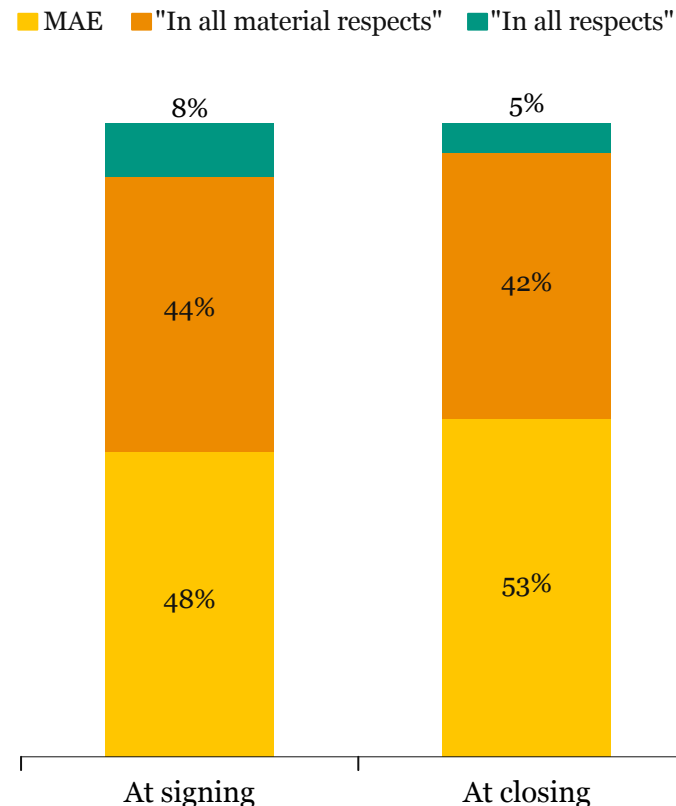
### Accurate “in all material respects”

“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.”

## Accuracy: Materiality (2020 deals)



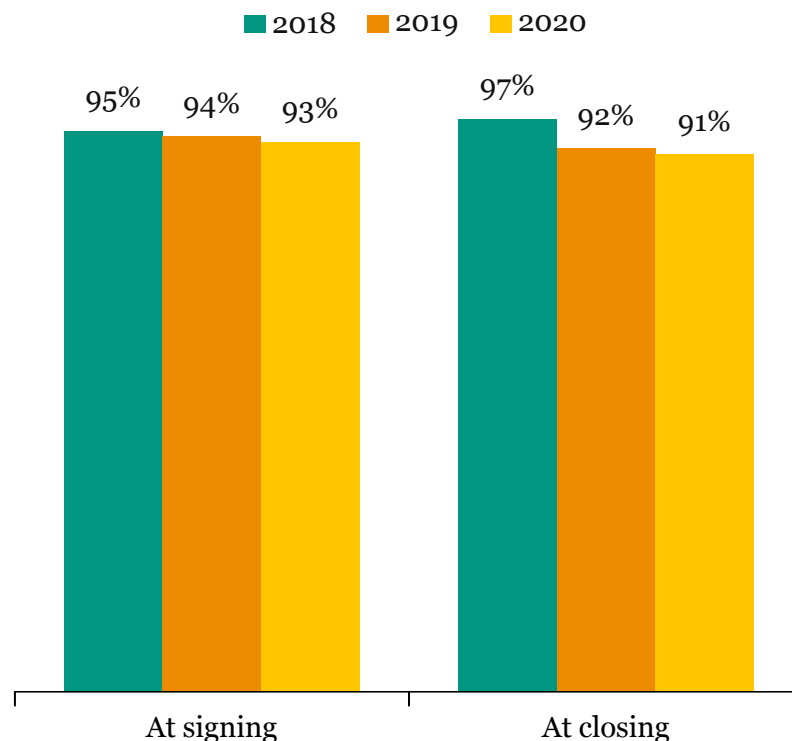
# Accuracy of Seller's Representations (Materiality): MAE Qualifier with Capitalization Representation Carveout

Subset: Deals with MAE qualifiers in the “accuracy of representations” condition

## 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.”

## Carveout applies





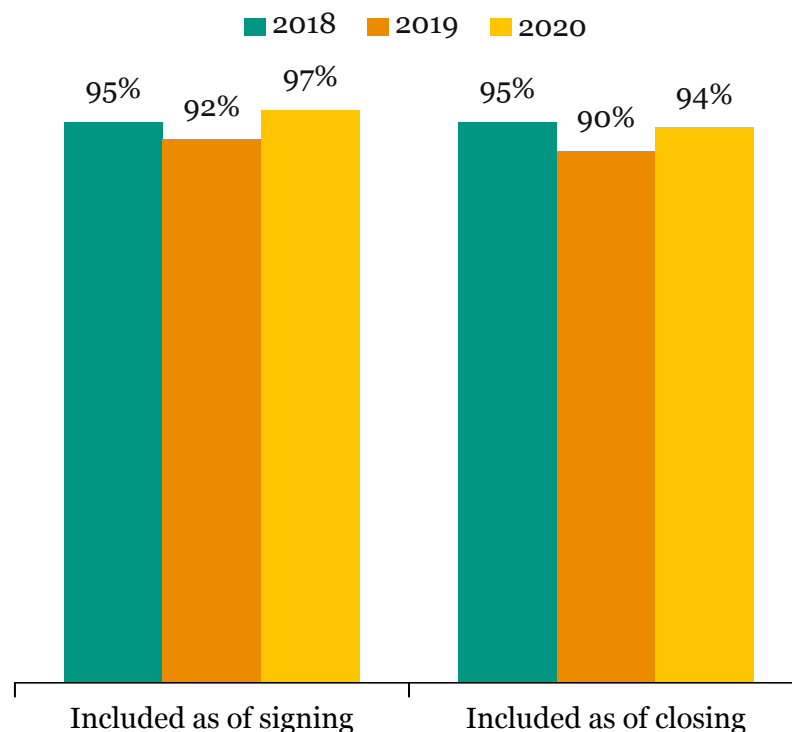
## Accuracy of Seller's Representations (Materiality): Materiality Scrape

Subset: Deals with materiality or MAE qualifiers in the “accuracy of representations” condition

### 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.”

### Frequency



## “Material Adverse Change” Condition (“MAC”)

### Condition

#### “Stand-alone” MAC

“Since the date of this Agreement, there has not been any Seller Material Adverse Change.”

#### “Back-door” MAC

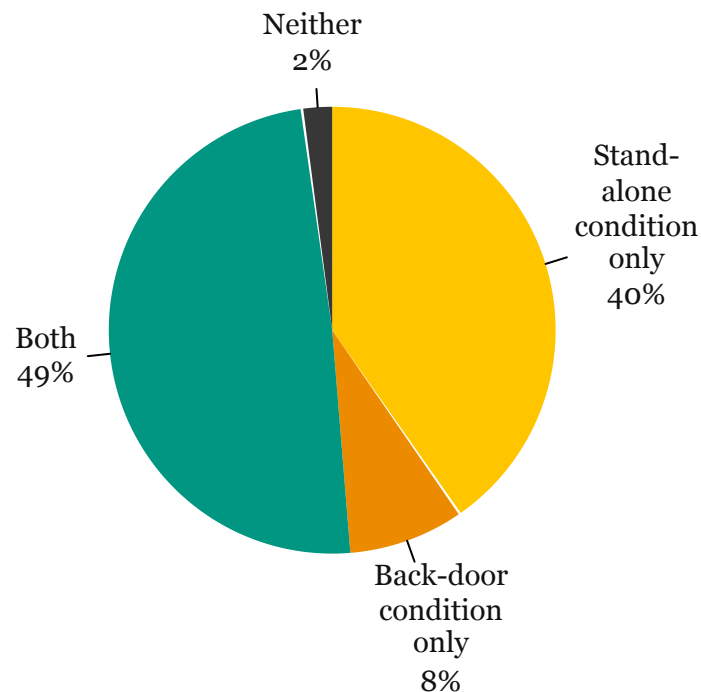
The Agreement includes an “Absence of Changes” representation:

“Section 3.6 Absence of Changes. (i) Since the Balance Sheet Date, there has not been any Seller Material Adverse Change.”

and includes a condition “bringing down” the accuracy of Seller’s representations and warranties:

“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.”

### MAC condition details (2020 deals)

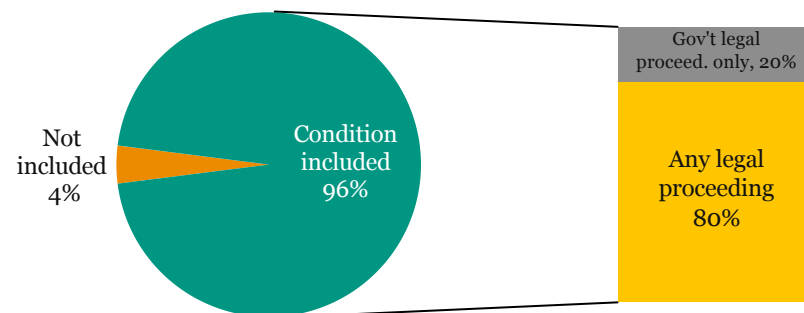


# “No Legal Proceedings” Condition

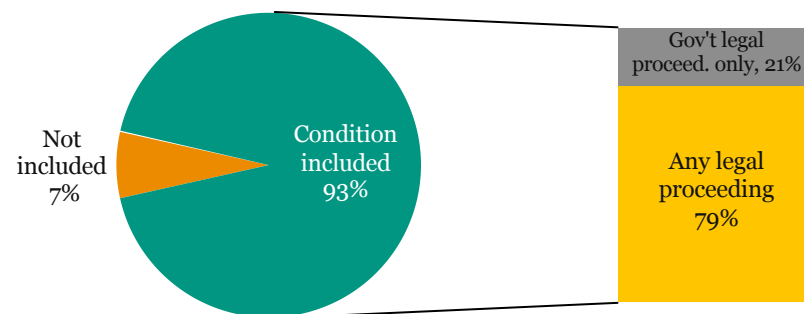
## Example formulation

“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.”

## 2020 Deals

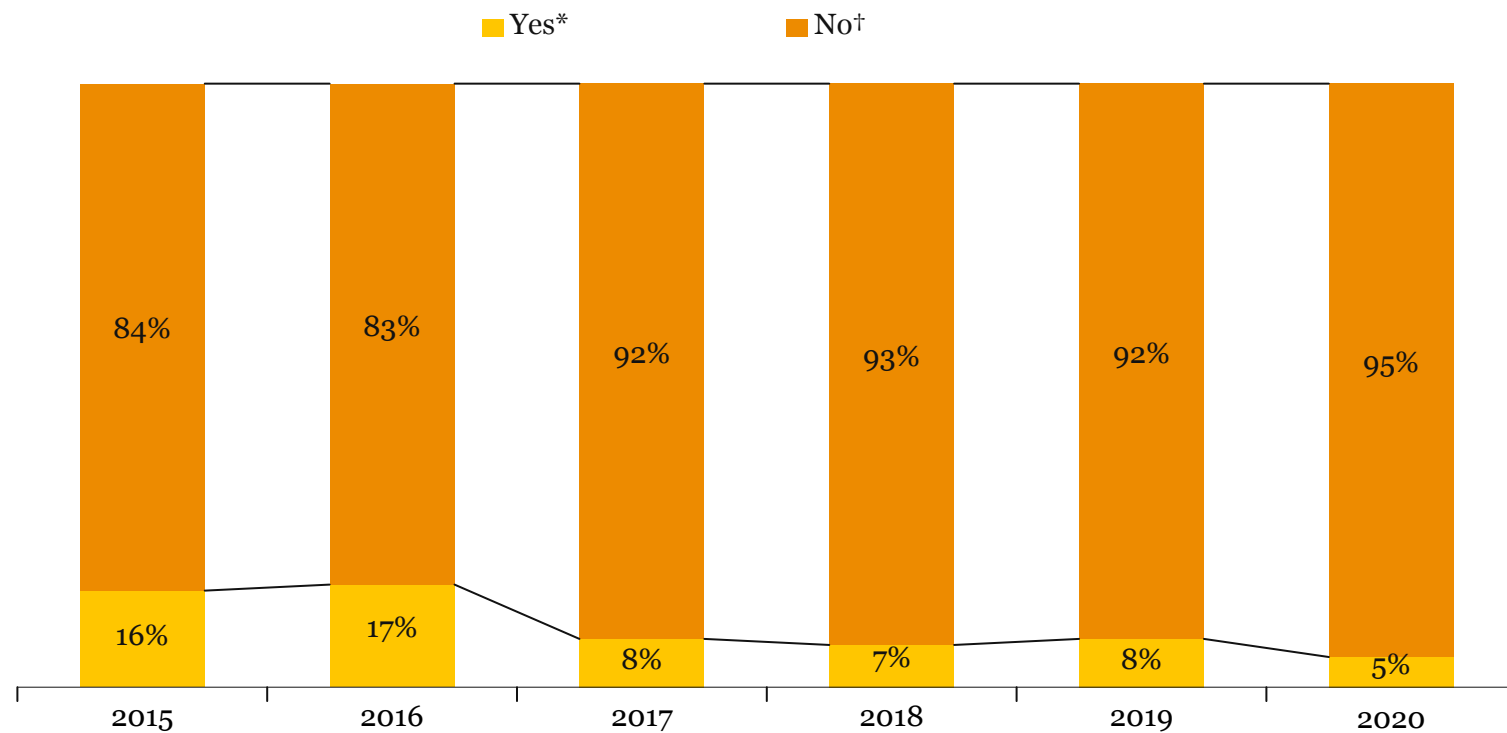


## 2019 Deals



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

### Opinion required as a condition to closing



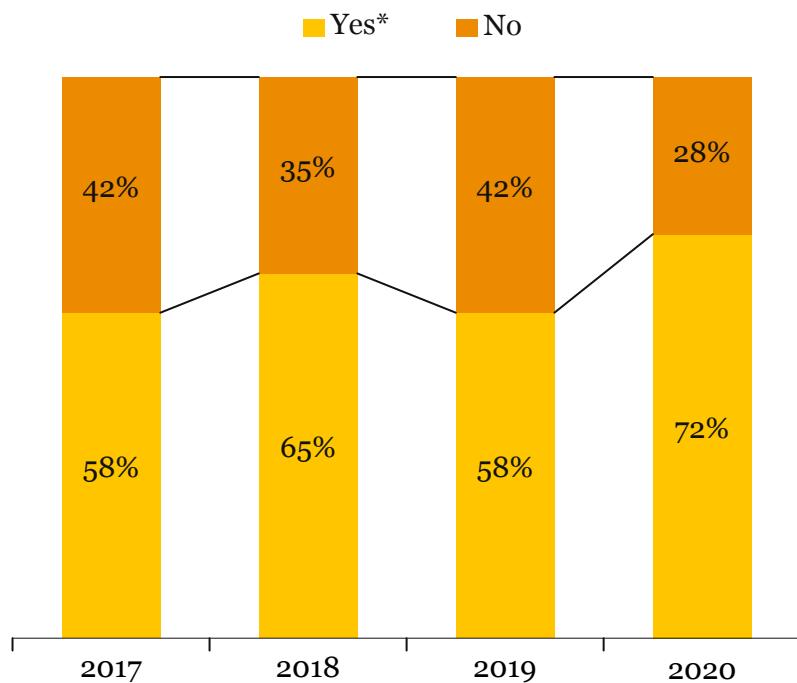
\* Includes opinions delivered pursuant to both stand-alone and “closing deliverables” conditions.

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

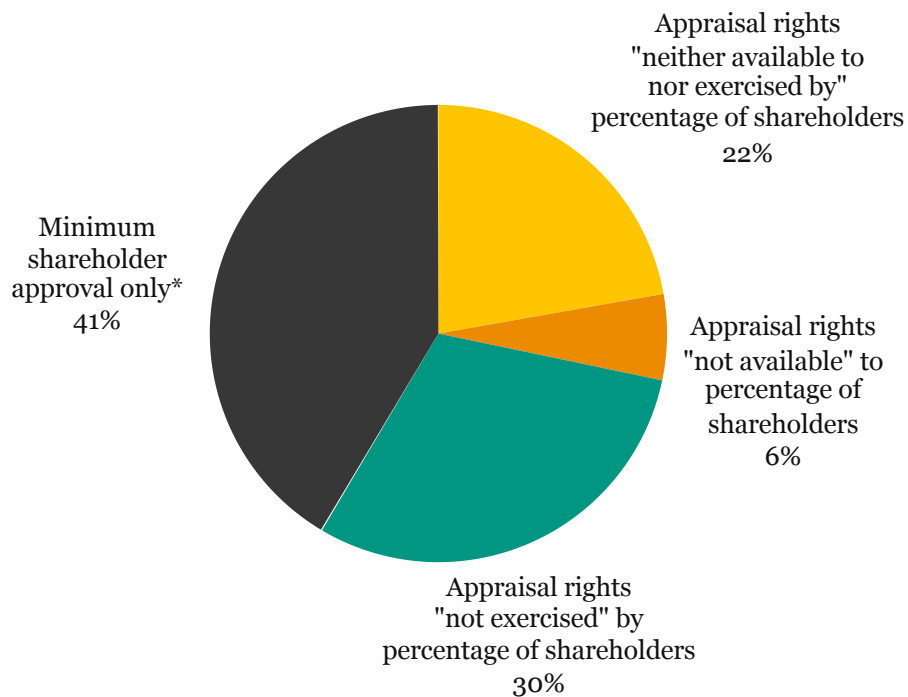
# Appraisal Rights Condition

Subset: Mergers

## Appraisal rights condition included



## Drafting details (2020 deals including condition)



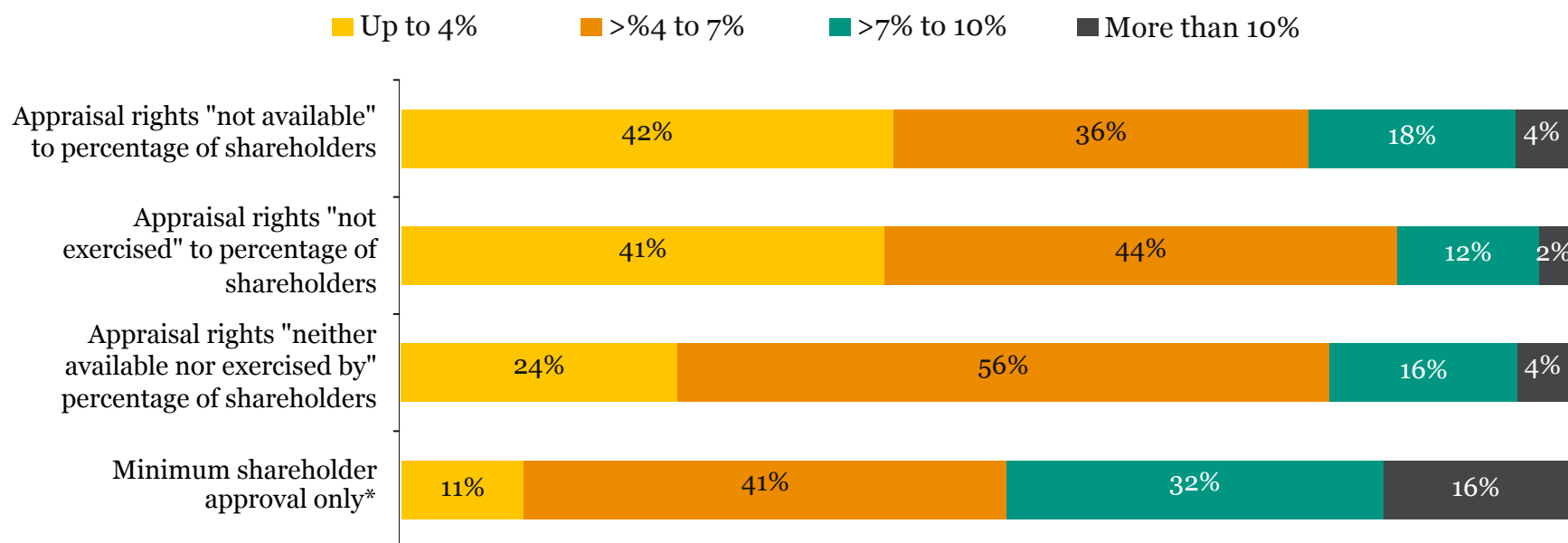
For more information, see the SRS Acquiom white paper "[Understanding Changes in Shareholder Consent Requirements](#)."

\* 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.

# Appraisal Rights Condition: Thresholds

Subset: Mergers since 2017 with an appraisal rights condition

## Condition threshold details



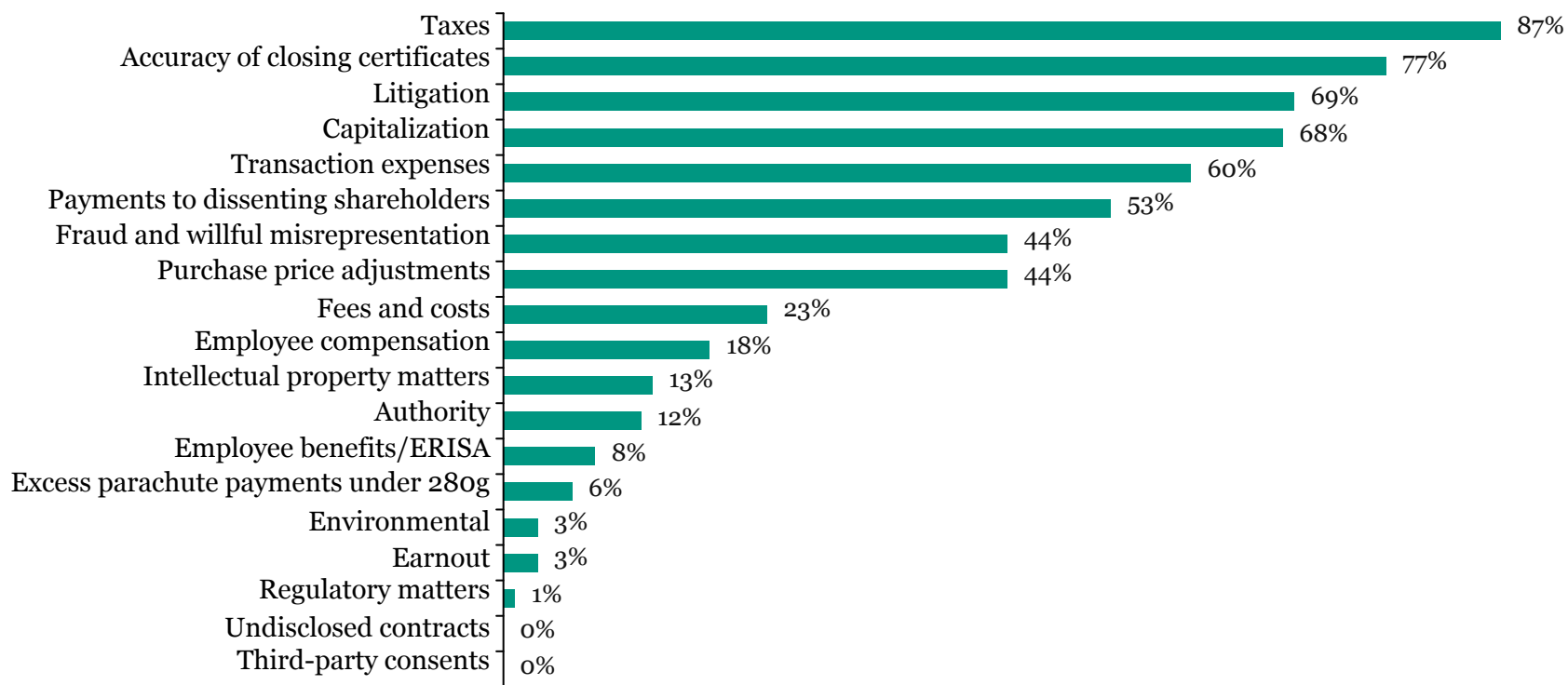
For more information, see the SRS Acquiom white paper "[Understanding Changes in Shareholder Consent Requirements](#)."

\* These deals did not include an express appraisal rights condition, but did include a condition specifying a minimum percentage of shareholder votes (on a fully diluted basis) approving the merger, effectively waiving appraisal rights.

# Indemnification

# Stand-Alone Indemnities\*

## Frequency (2020 deals)



\* 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.



# “Sandbagging”

## Examples

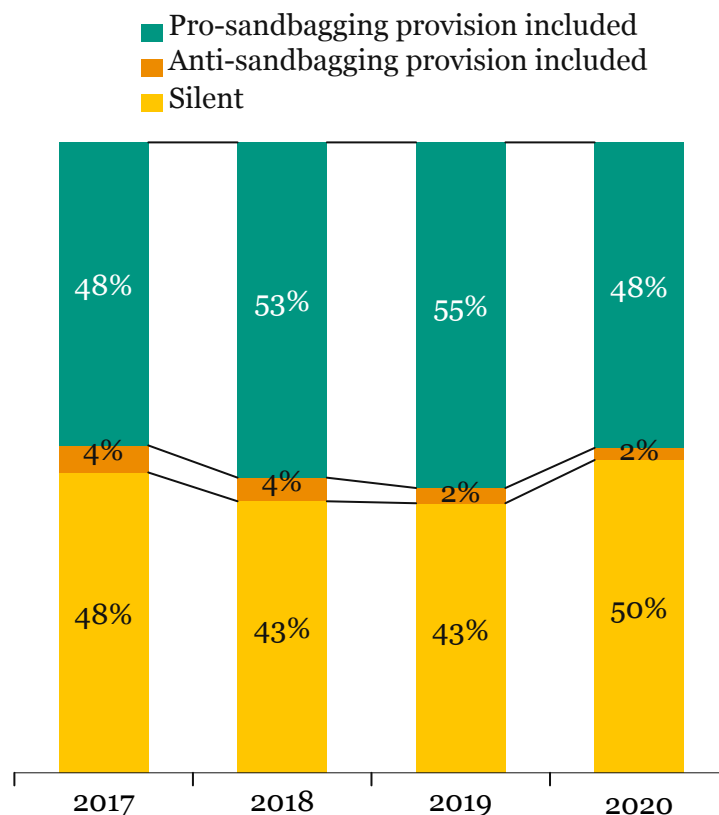
### Pro-sandbagging

“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...”

### 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.”

## Year-over-year trend

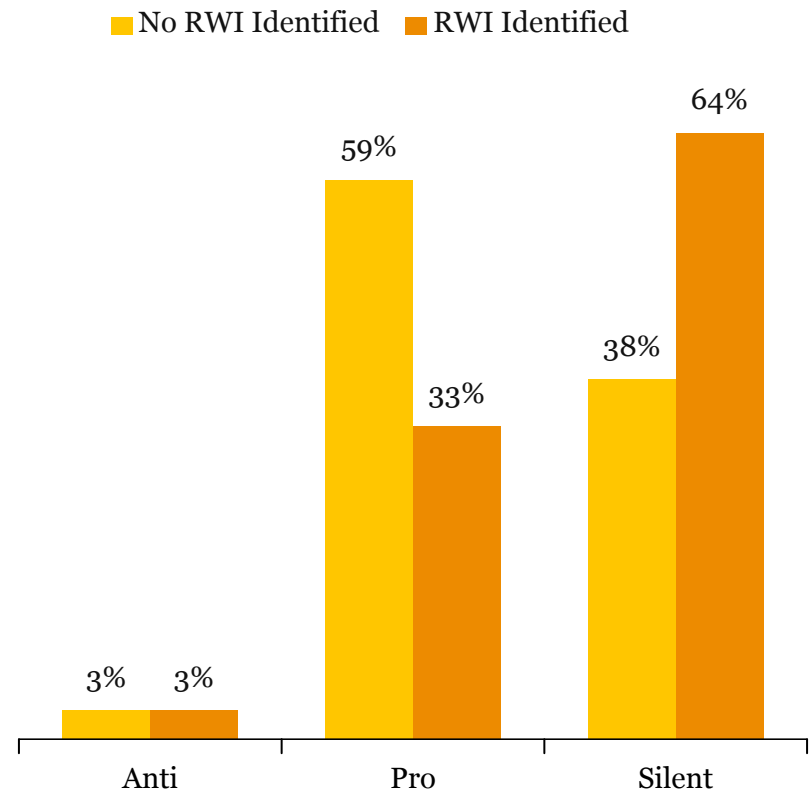


# “Sandbagging”: Influence of RWI

## Correlation to buy-side RWI

Buy-side RWI policies typically contain a knowledge exclusion, rendering pro-sandbagging provisions of little use to buyers with respect to indemnification matters covered by the buy-side RWI policy. This term appears to parallel the insurance coverage—when buy-side RWI is present, only one-third of agreements include a pro-sandbagging provision.

## Sandbagging provision, deal years 2017–2020



## “Materiality Scrape” Example Definitions

### **Materiality qualifications in representations and warranties disregarded for all indemnification purposes (determining breaches and calculating losses)**

“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.”

### **Materiality qualifications in representations and warranties disregarded for calculation of losses only**

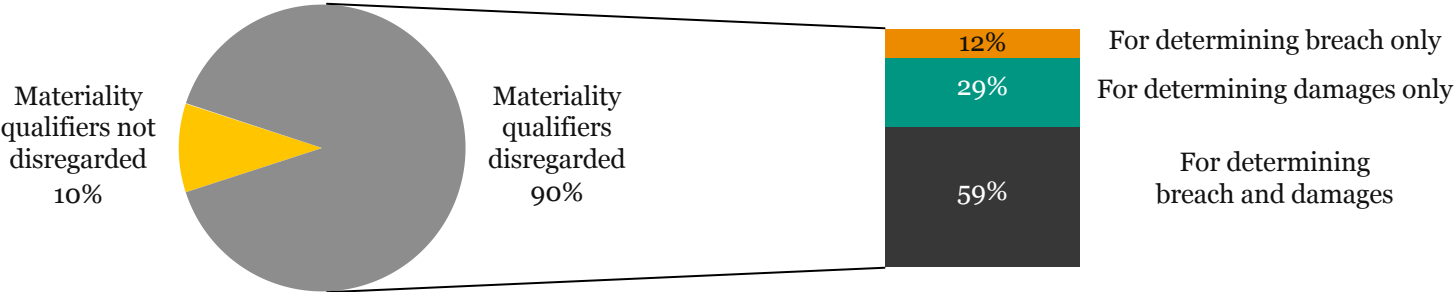
“For the sole purpose of determining Losses (and not for determining whether any breach of any representation or warranty has occurred), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect.”

### **Materiality qualifications in representations and warranties disregarded for determining breaches only**

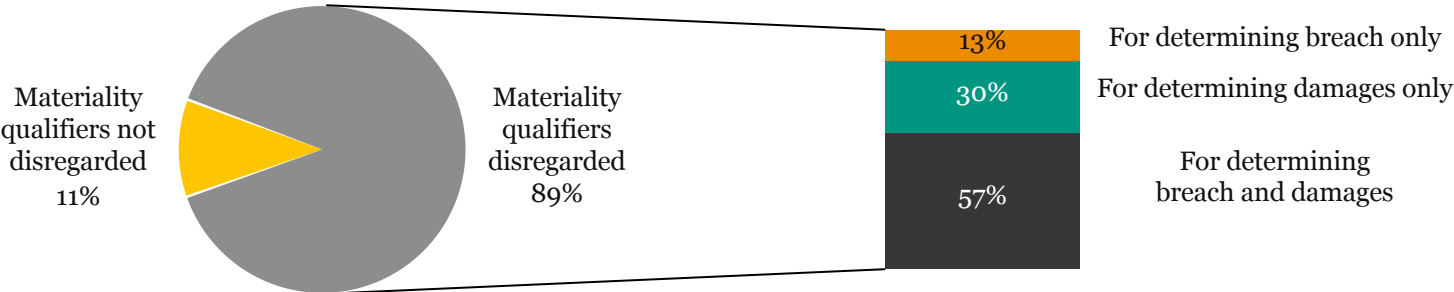
“For purposes of this Article VII (Indemnification), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect in determining whether such representation or warranty has been breached.”

# “Materiality Scrape” Inclusion

## Subset: 2020 deals



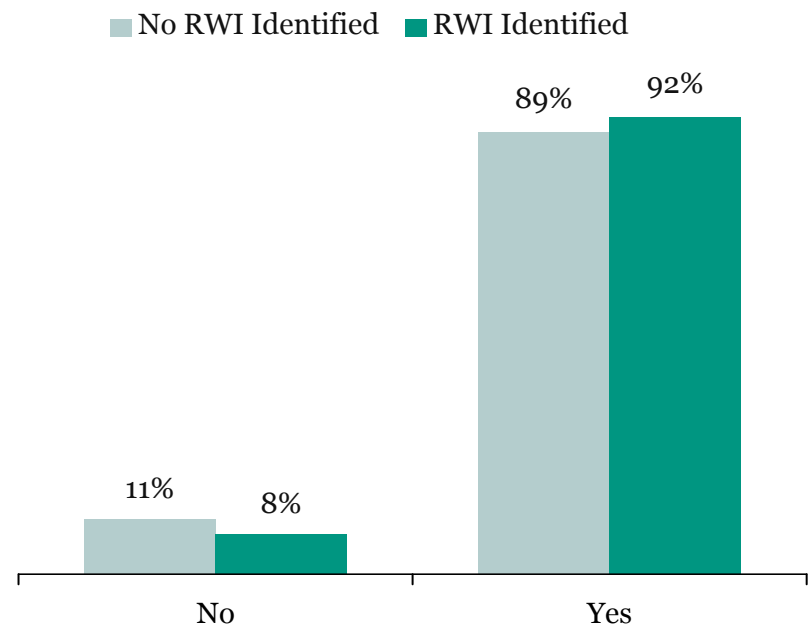
## Subset: 2019 deals



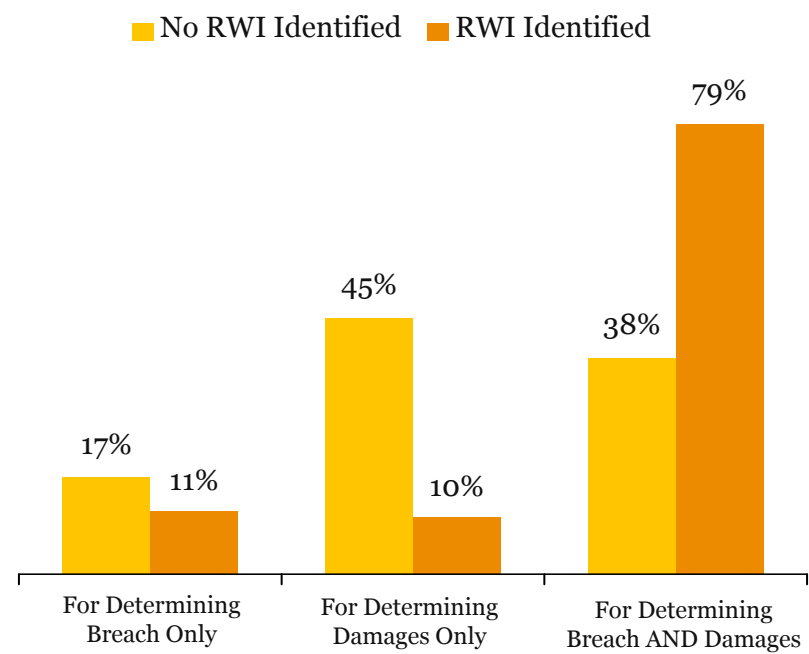
# “Materiality Scrape”: Influence of RWI

Buy-side RWI does not significantly affect the frequency of a materiality scrape, but it affects the details of language, with a preference to disregard materiality qualifiers *both* for determining whether or not breach exists and for determining damage amounts.

Materiality scrape included (2017–2020)

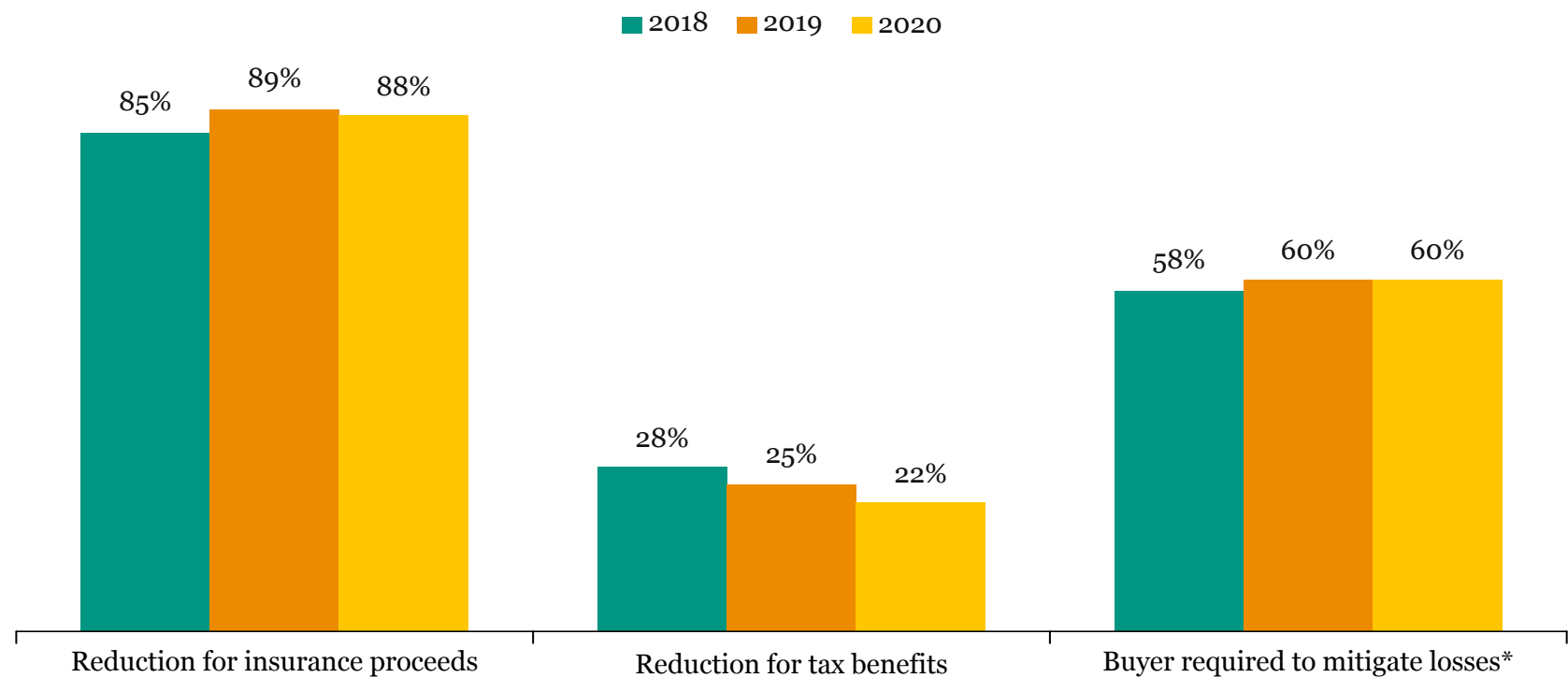


Materiality scrape details (2017–2020)



# Reductions Against Buyer's Indemnification Claims

Provision included



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

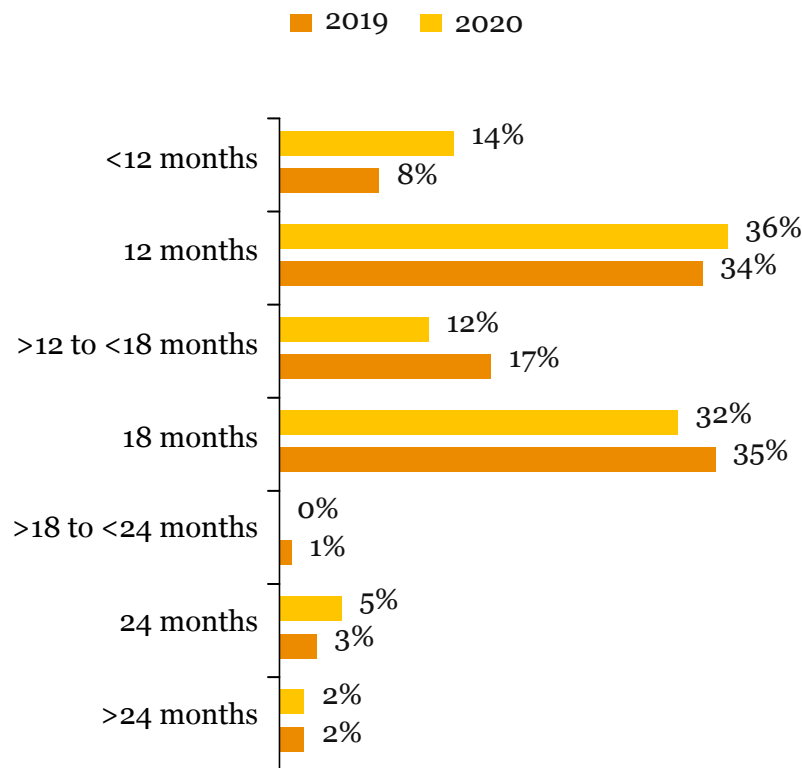
# General Survival Period/Time to Assert Claims

## Example survival provisions

**“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.”

**“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.”

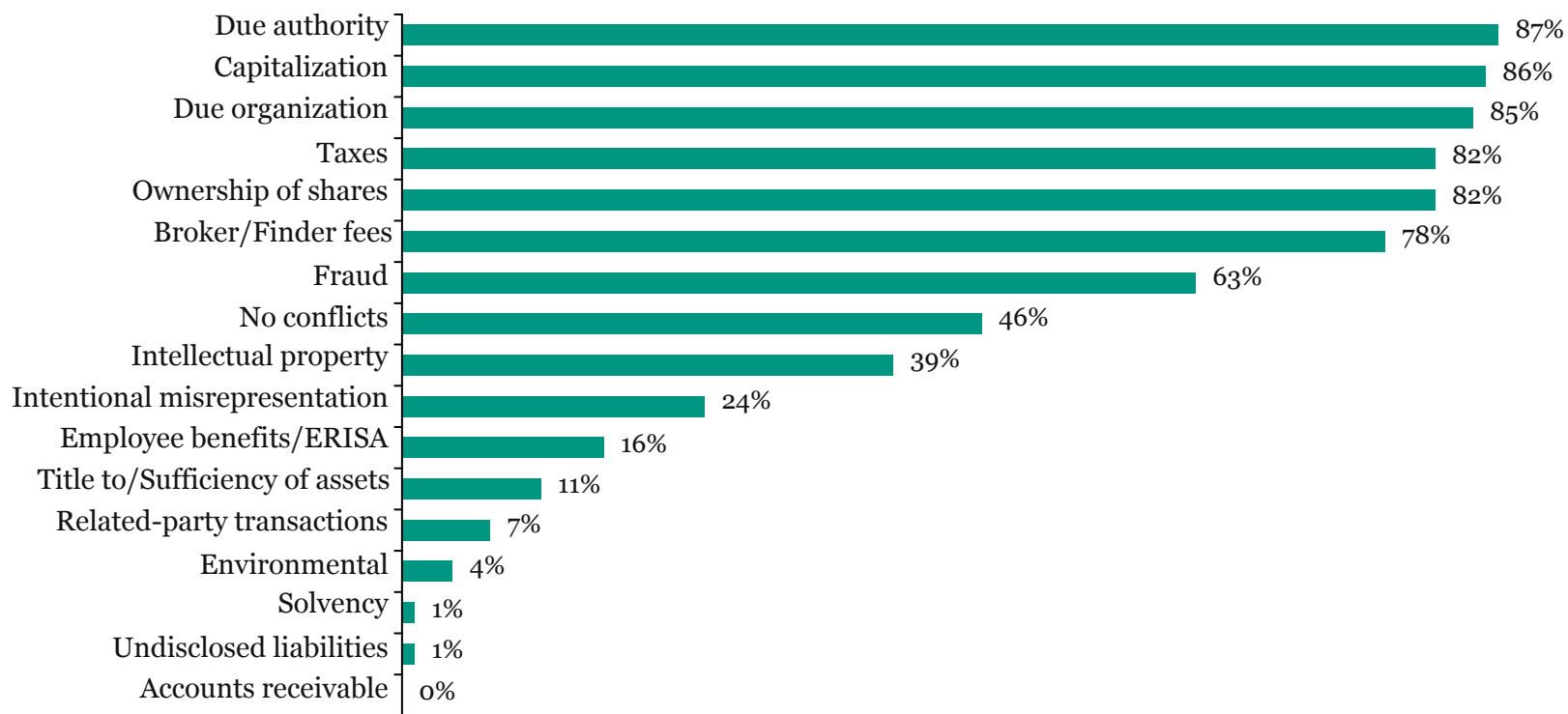
## Survival period (2020 median: 15 months)



*The overall percentage of deals in our data set with zero survival is 22% for 2020 and 17% for 2019. The data above does not include deals that are identified as having no indemnification obligations.*

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

### Carveout frequency (2020 deals)



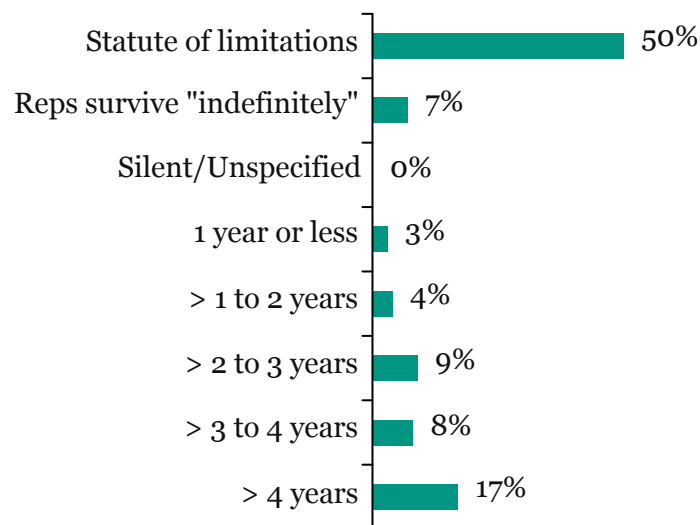
\* Matters subject to carveouts survive longer than the general survival period.



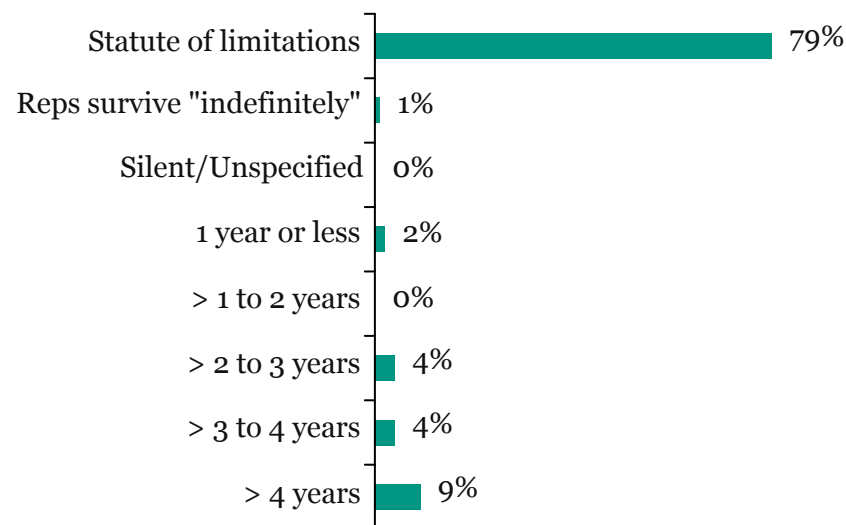
## Second-Level Survival: “Fundamental” and Tax Representations

Subset: 2020 deals that include the specified carveout. Years below denote additional survival time after expiration of the general survival period.

### Group of “fundamental representations”\*



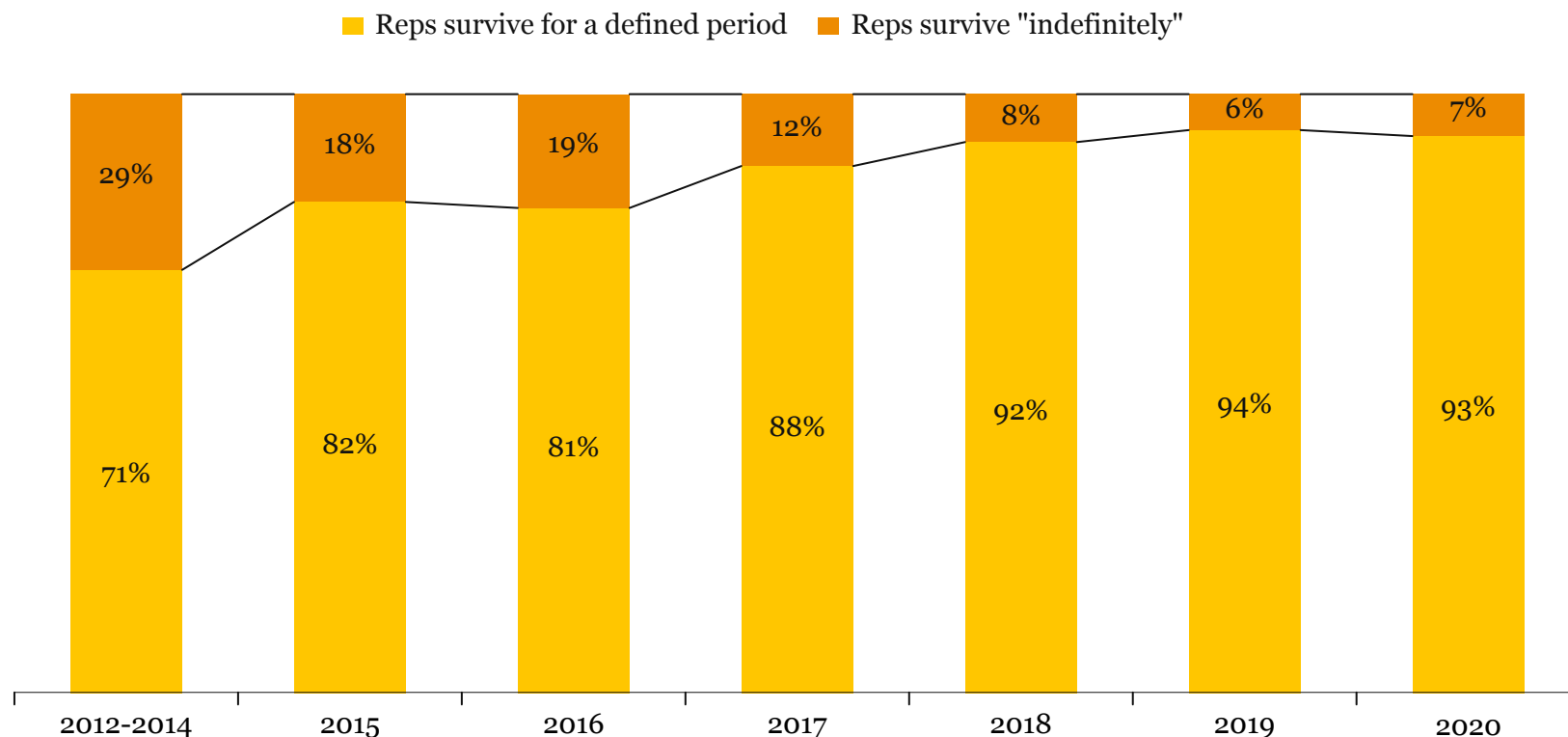
### Tax representations



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

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

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

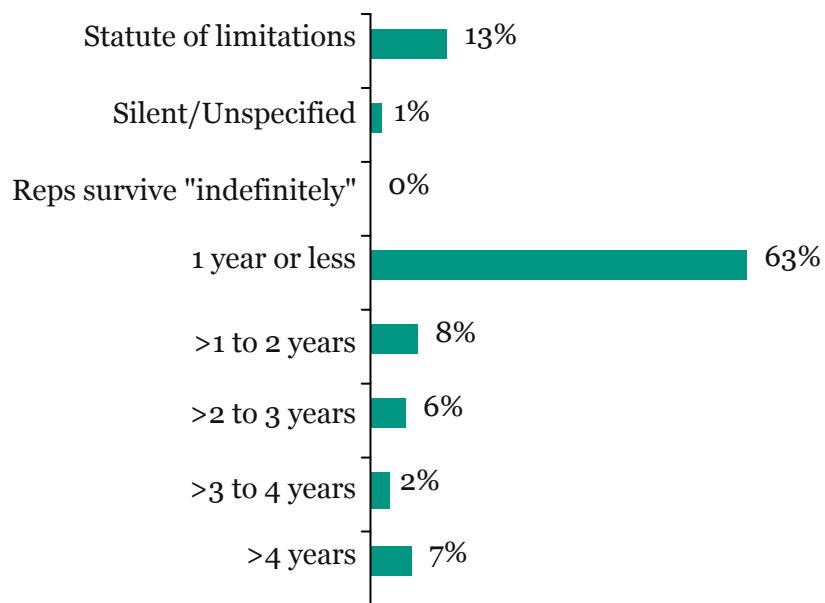


*In late 2014, the Delaware Court of Chancery held that a merger agreement provision allowing a Buyer to claw back consideration from stockholders for breaches of certain representations and warranties (1) up to the purchase price and (2) "indefinitely" after closing violated Delaware law (see *Cigna Health and Life Insurance Co. v. Audax Health Solutions Inc.*, C.A. No. 9405 (Del. Ch. Nov. 26, 2014)). This chart shows a decline in the proportion of mergers with indefinite second-level survival periods.*

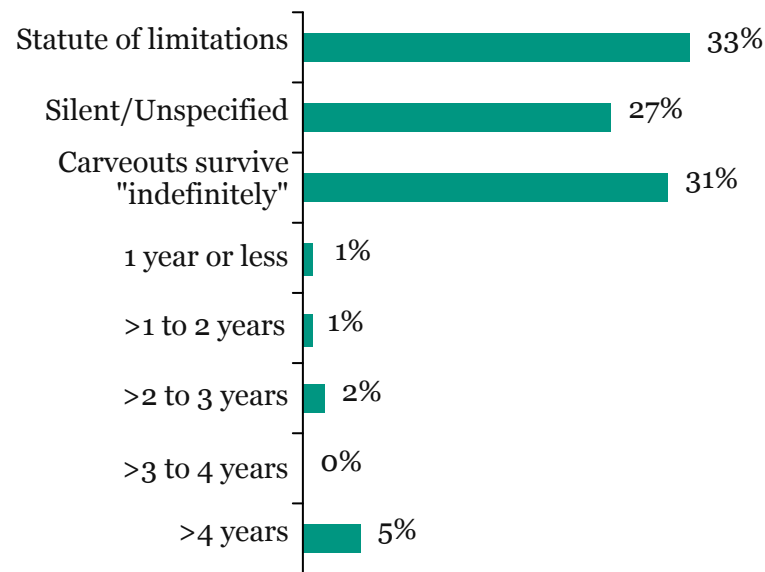
## Second-Level Survival: IP Representations and Fraud

Subset: 2020 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

## Basket formulations

### 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.”

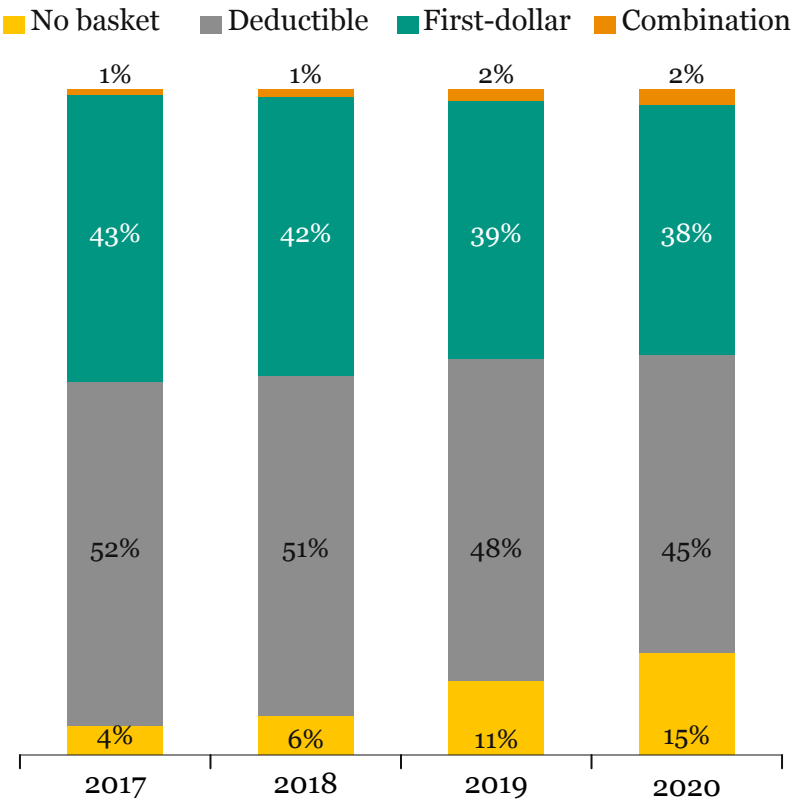
### First-dollar

“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.”

### 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’).”

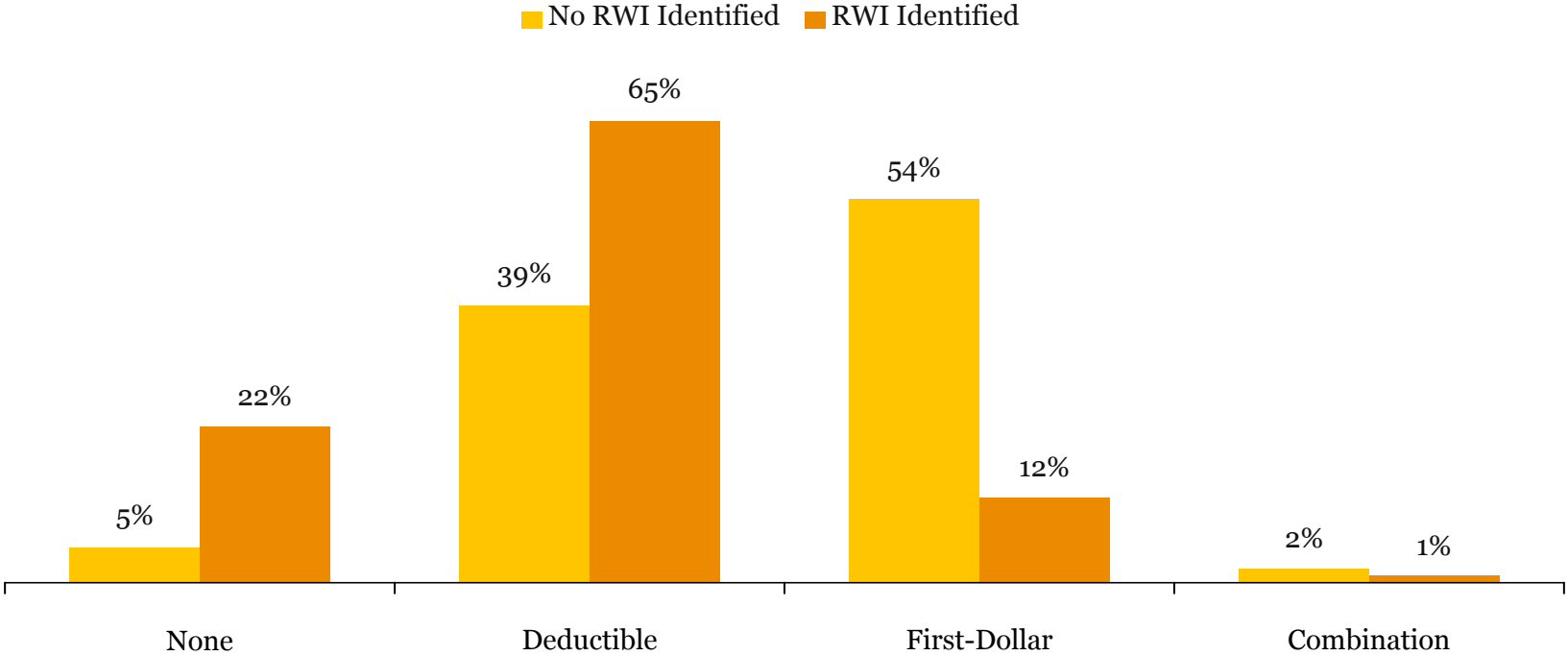
## Basket frequency



# Baskets: Influence of RWI

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

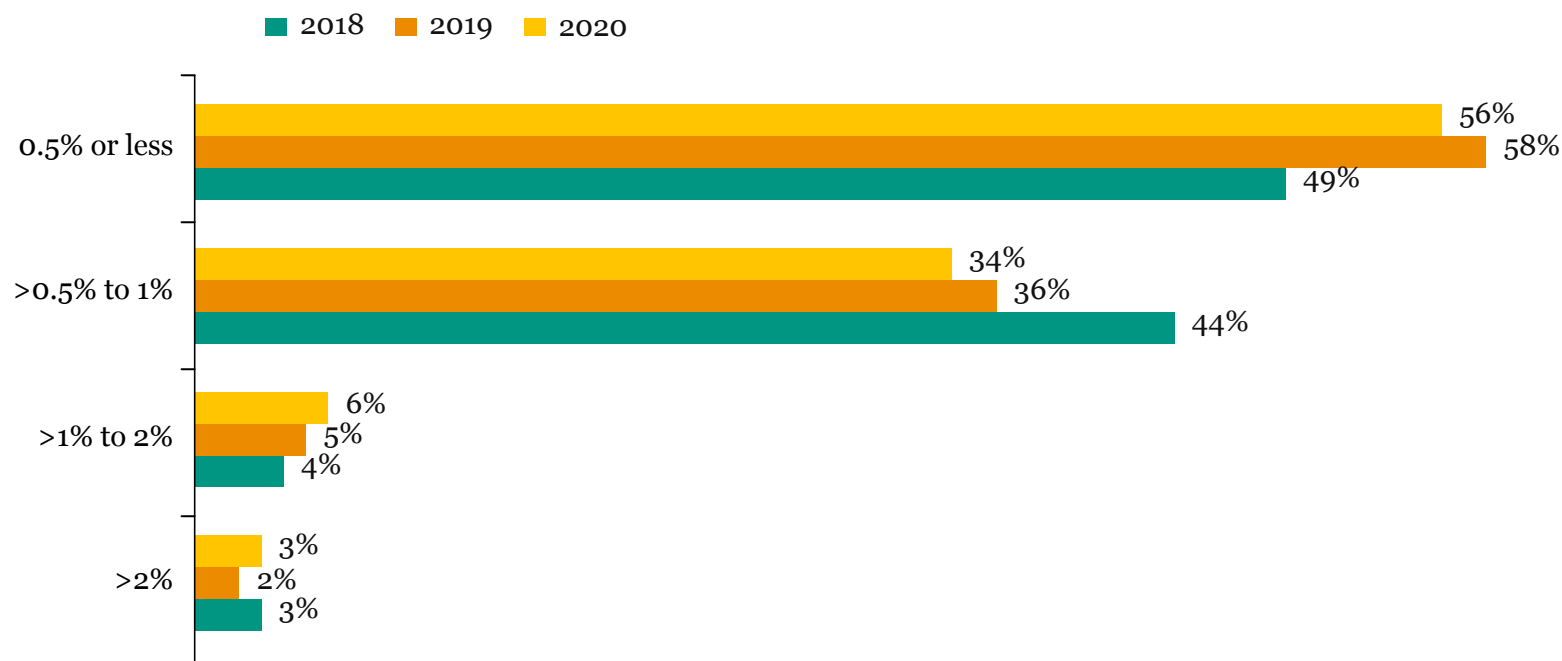
Basket type distribution, deals 2017–2020



# Baskets as a Percentage of Transaction Value

Subset: Deals with deductible and first-dollar baskets

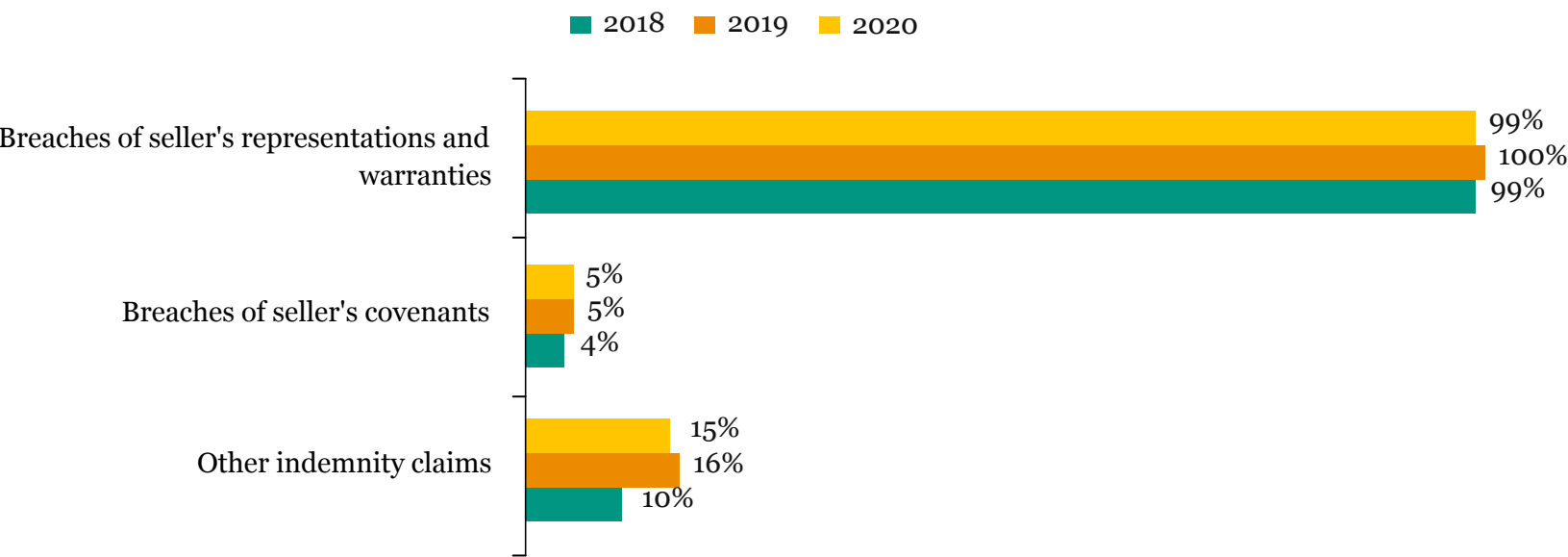
## Basket sizes



# Baskets: General Coverage\*

Subset: Deals with baskets

## Coverage details

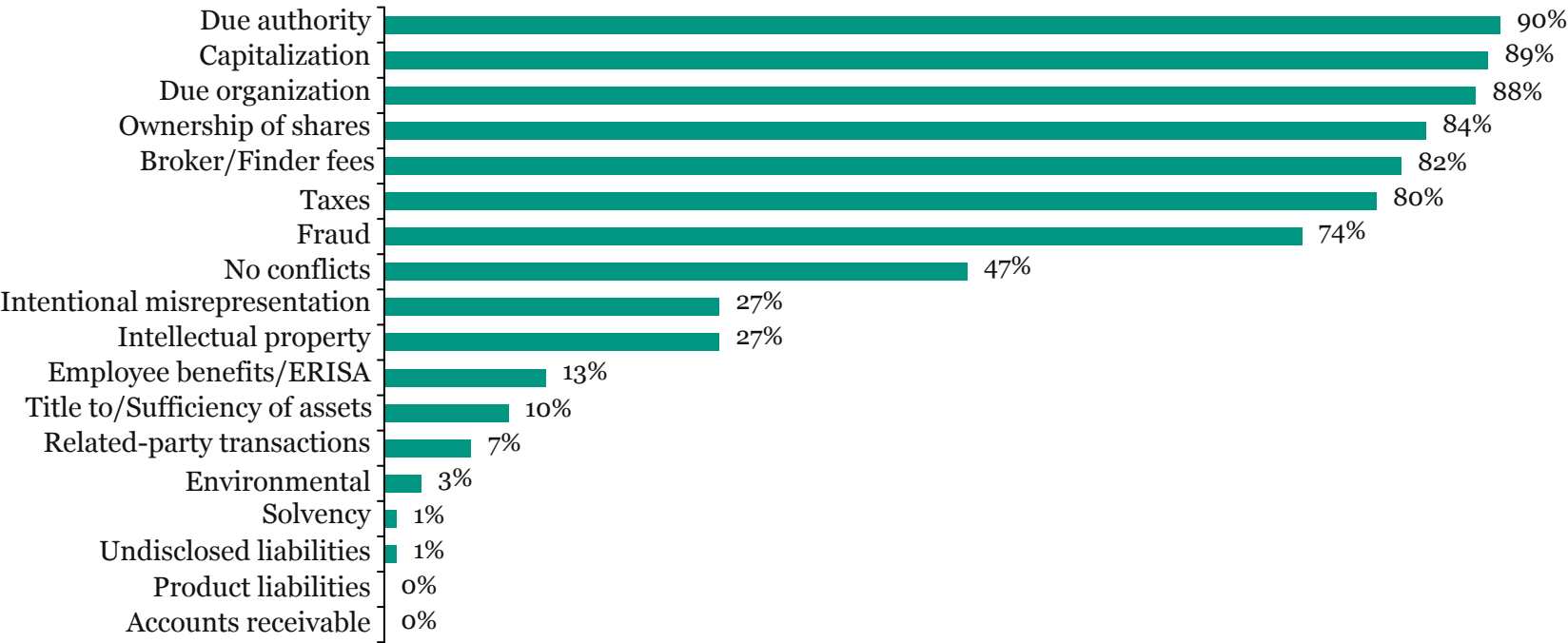


\* Carveouts to general basket coverage are discussed on the next slide.

# Baskets: Carveouts

Subset: 2020 deals with baskets

## Carveout frequency



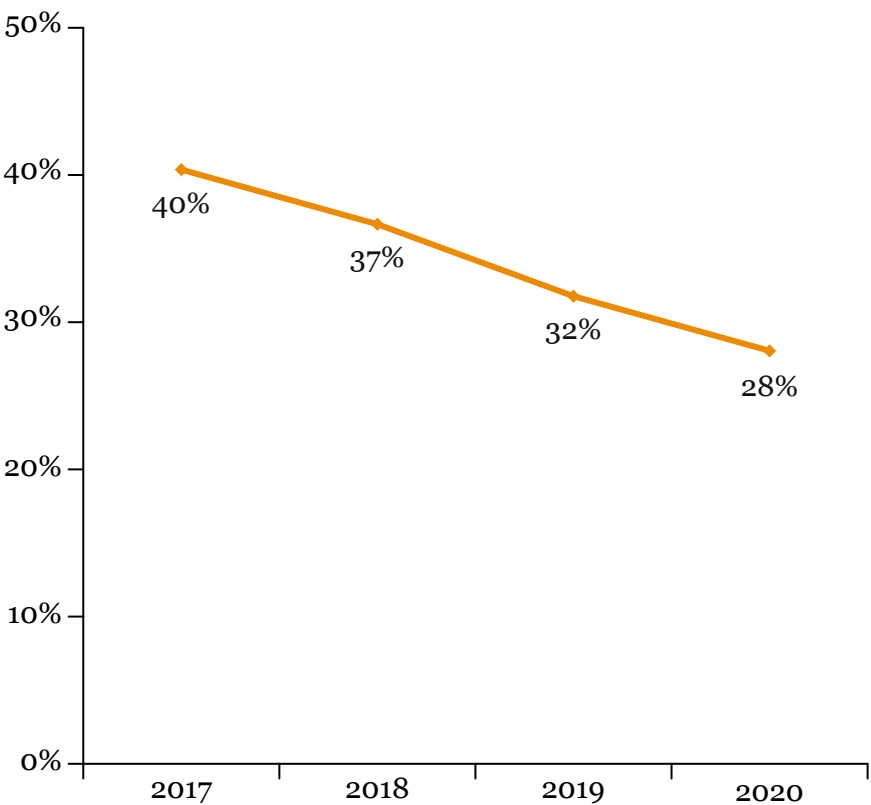


# Baskets: Eligible Claim Threshold

## 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.”

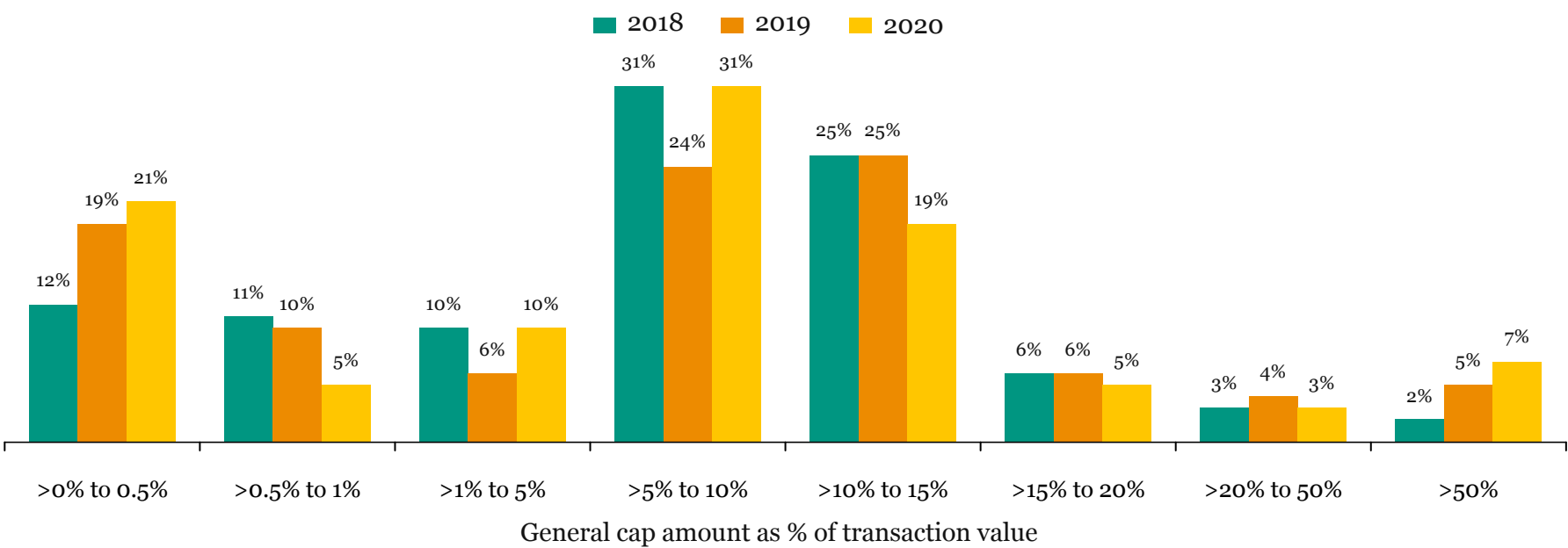
## Threshold included, year-over-year



# Caps as a Percentage of Transaction Value\*: All Deals

For 2020, the average cap was 14.2%; the median was 10.0%. These figures represent all deals, including those in which the buyer has purchased an RWI policy (which generally results in a lower liability cap).

## Details, 2018–2020

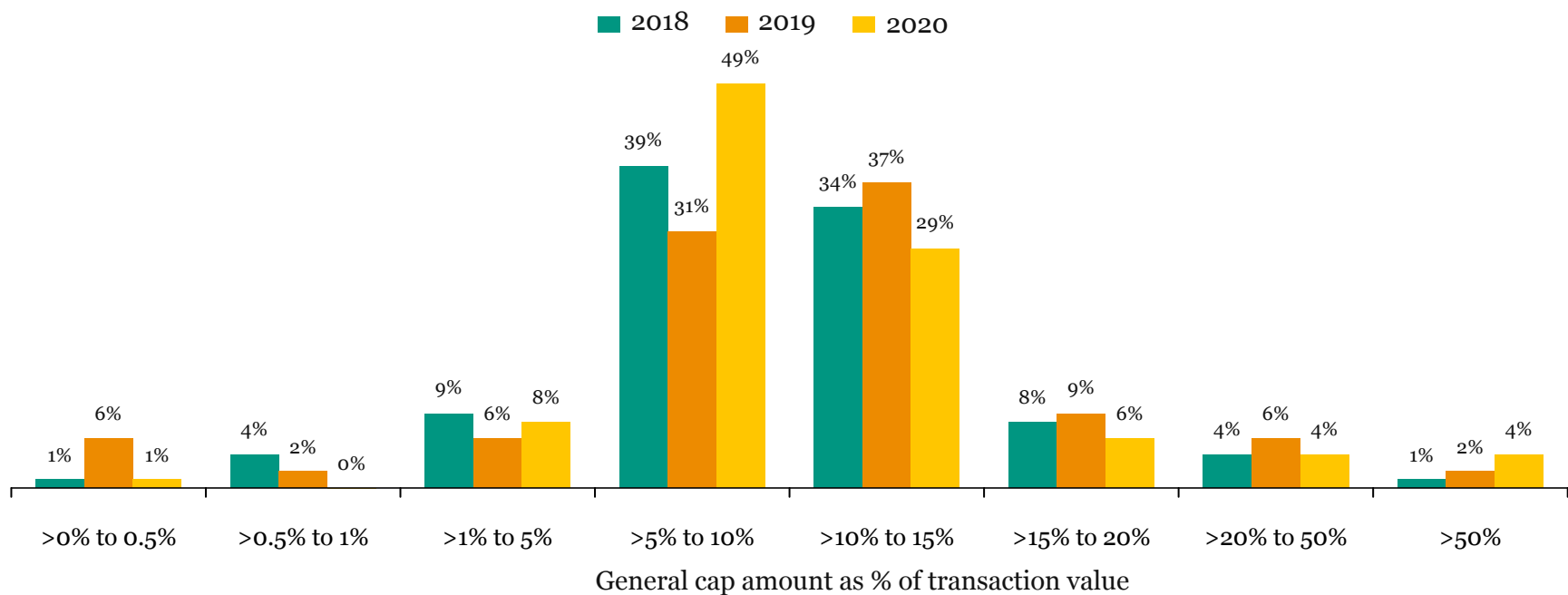


\* In 2020 deals with escrows/holdbacks, 68% of caps equaled the escrowed amount.

# Caps as a Percentage of Transaction Value: No RWI Identified

When deals in which the buyer has definitively purchased an RWI policy are eliminated from the data set, the average cap for the remaining deals in 2020 was 15.0%; the median was 10.0%. Note that buyers do not always disclose the presence of a buy-side RWI policy, so this sample set likely includes some deals with policies.

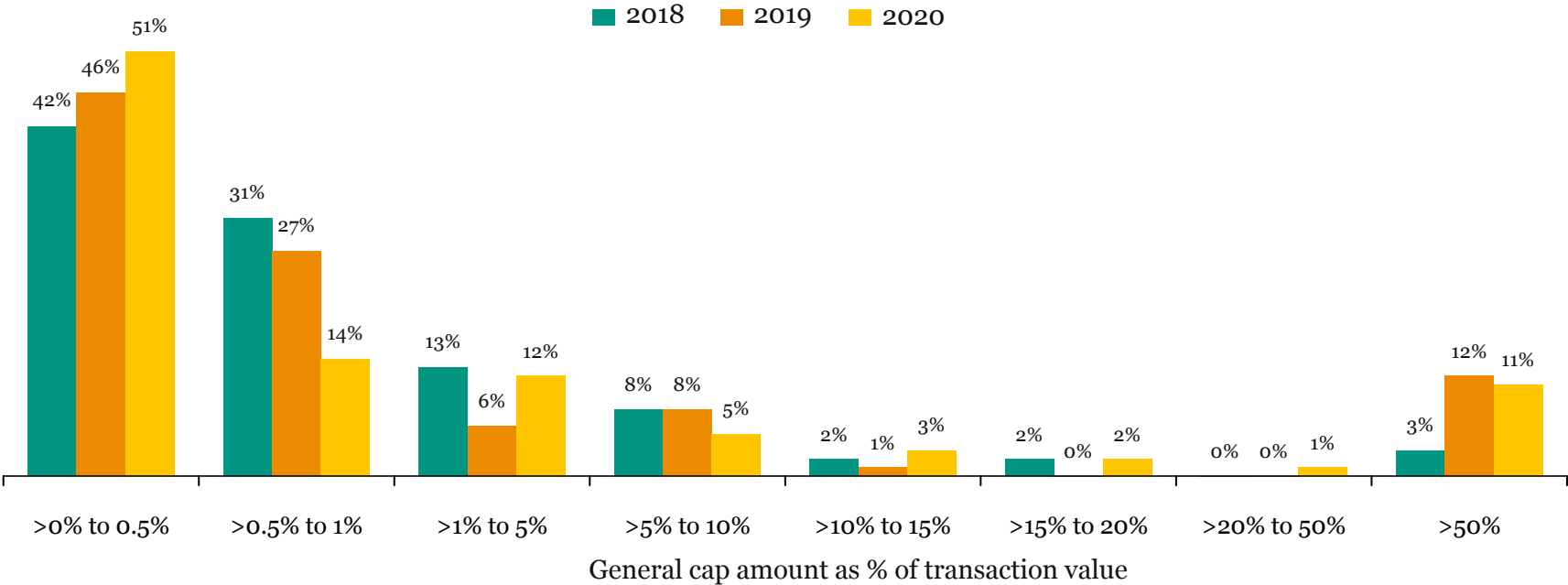
## Details, 2018–2020



# Caps as a Percentage of Transaction Value: RWI Identified

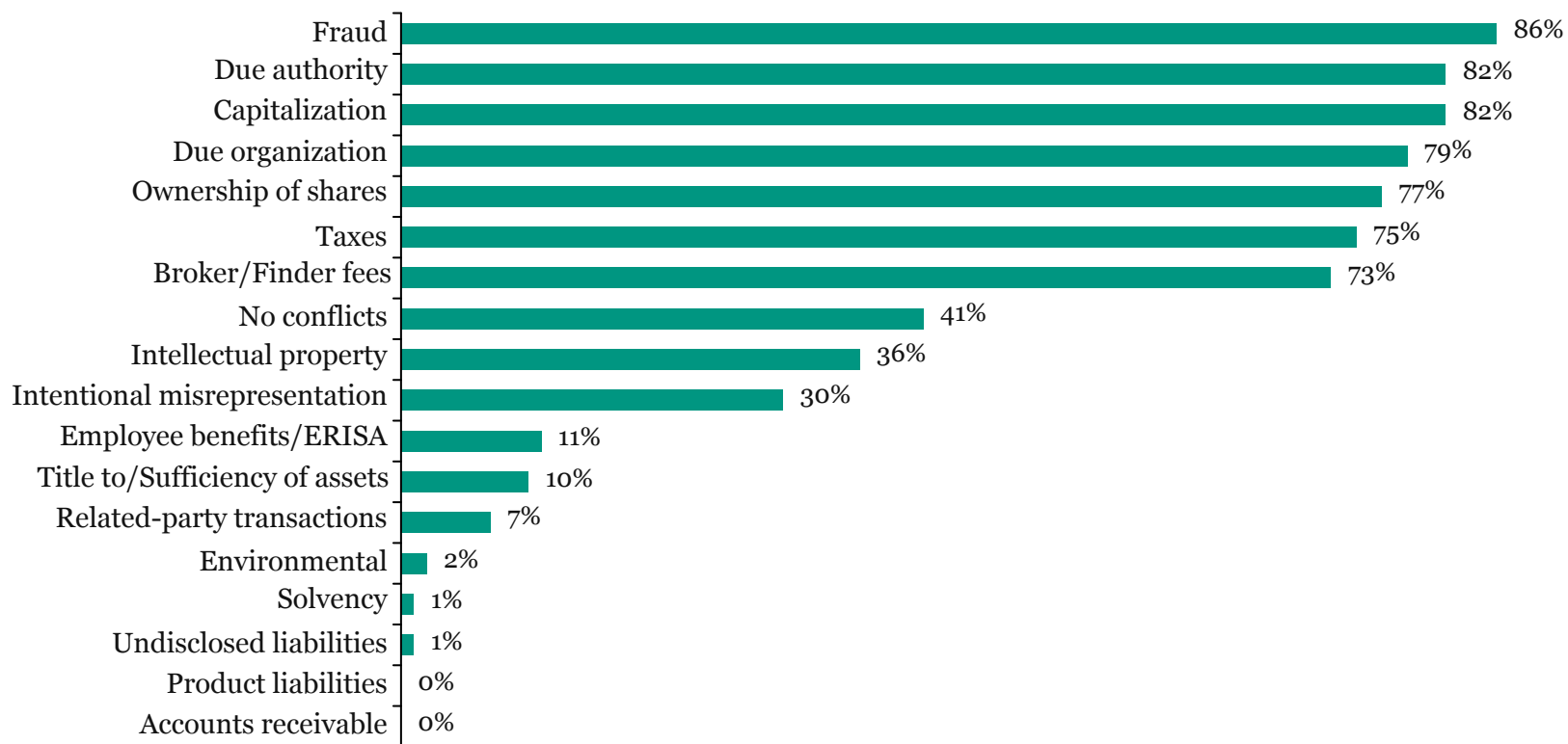
When the data set includes only deals in which the buyer has definitively purchased an RWI policy, the average cap for these deals in 2020 was 13.0%; the median was 0.5%. Note that buyers do not always disclose the presence of a buy-side RWI policy, so this sample set likely misses some deals with policies.

## Details, 2018–2020



## Caps: Carveouts

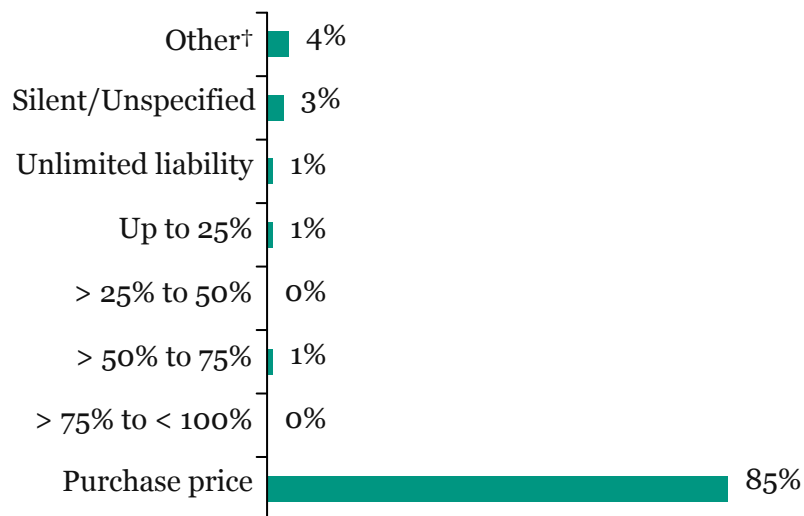
### Frequency (2020 deals)



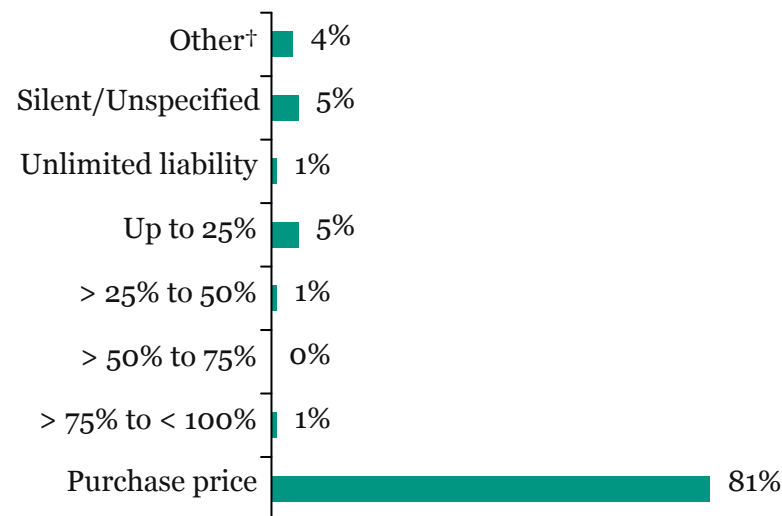
## Second-Level Caps: “Fundamental” and Tax Representations

Subset: 2020 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



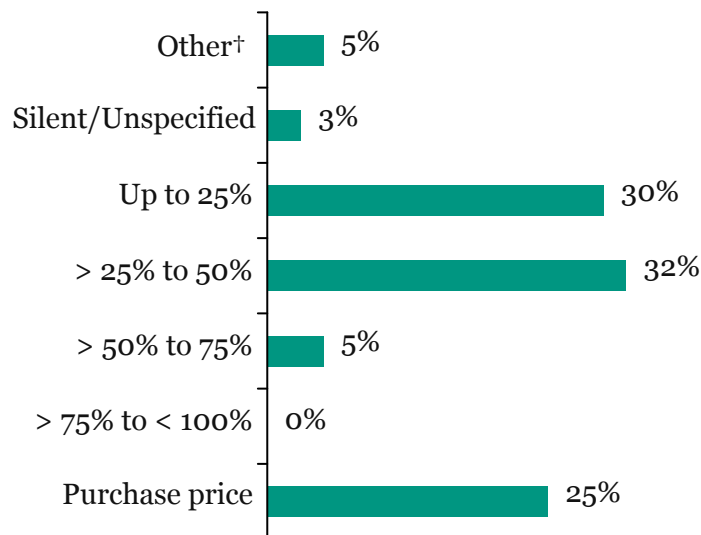
\* For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property, and fraud).

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

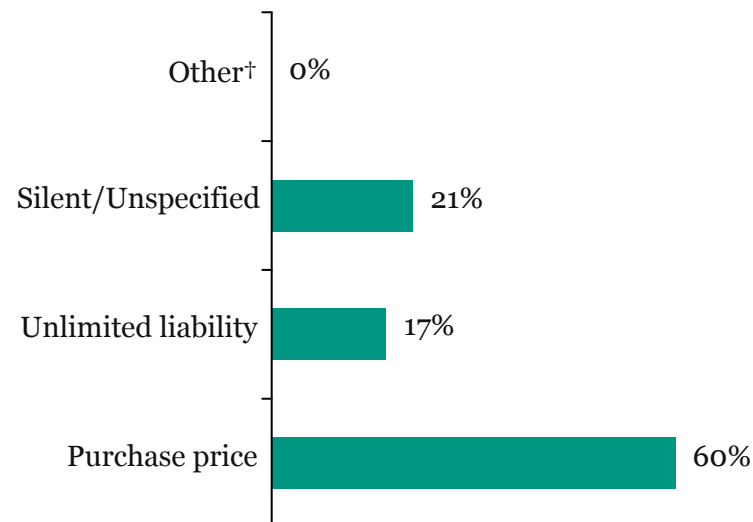
## Second-Level Caps: IP Representations and Fraud

Subset: 2020 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).

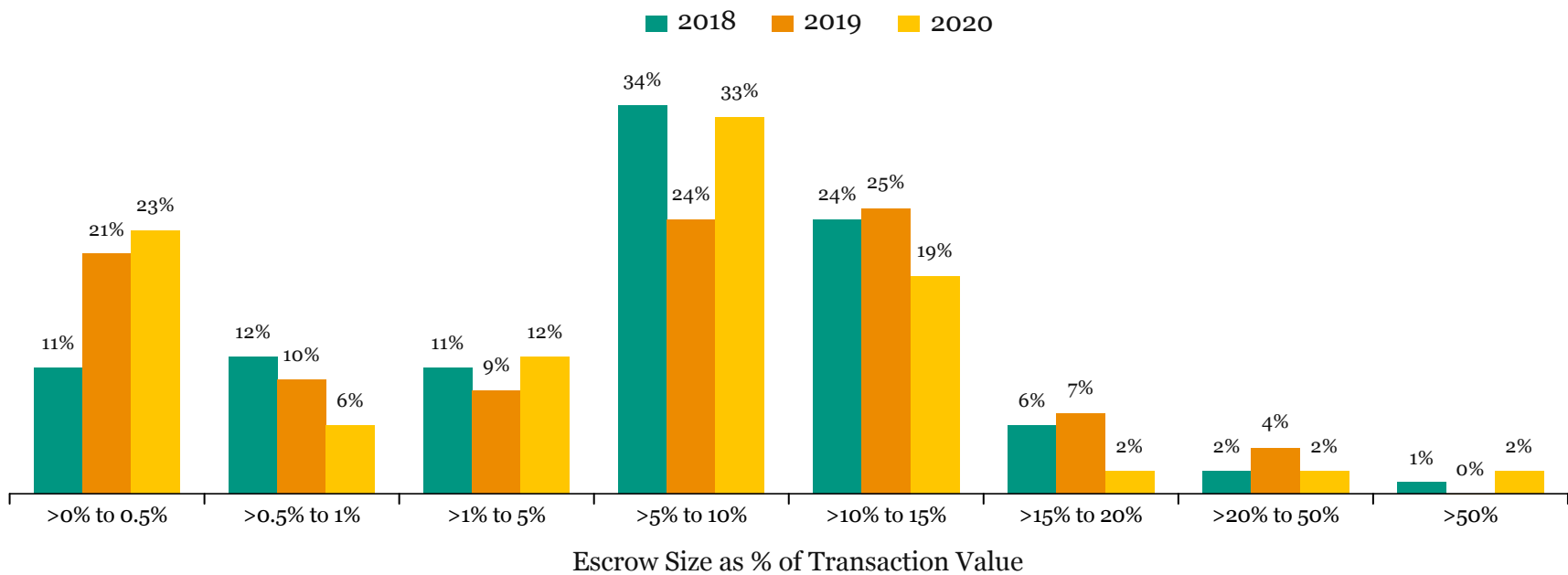
† "Other" includes, for example, offsets against future earnouts above the general cap.

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

For 2020, the average escrow/holdback was 9.1%; the median was 9.0%. These figures represent all deals, including those in which the buyer has purchased an RWI policy (which generally results in a smaller escrow).

\* Implied subset: This data (and the data on the next two slides) does not include deals without a general escrow/holdback, which constituted approximately 32% of all deals in 2020. That is up from 24% on 2019 and 20% in 2018.

## Details, 2018–2020

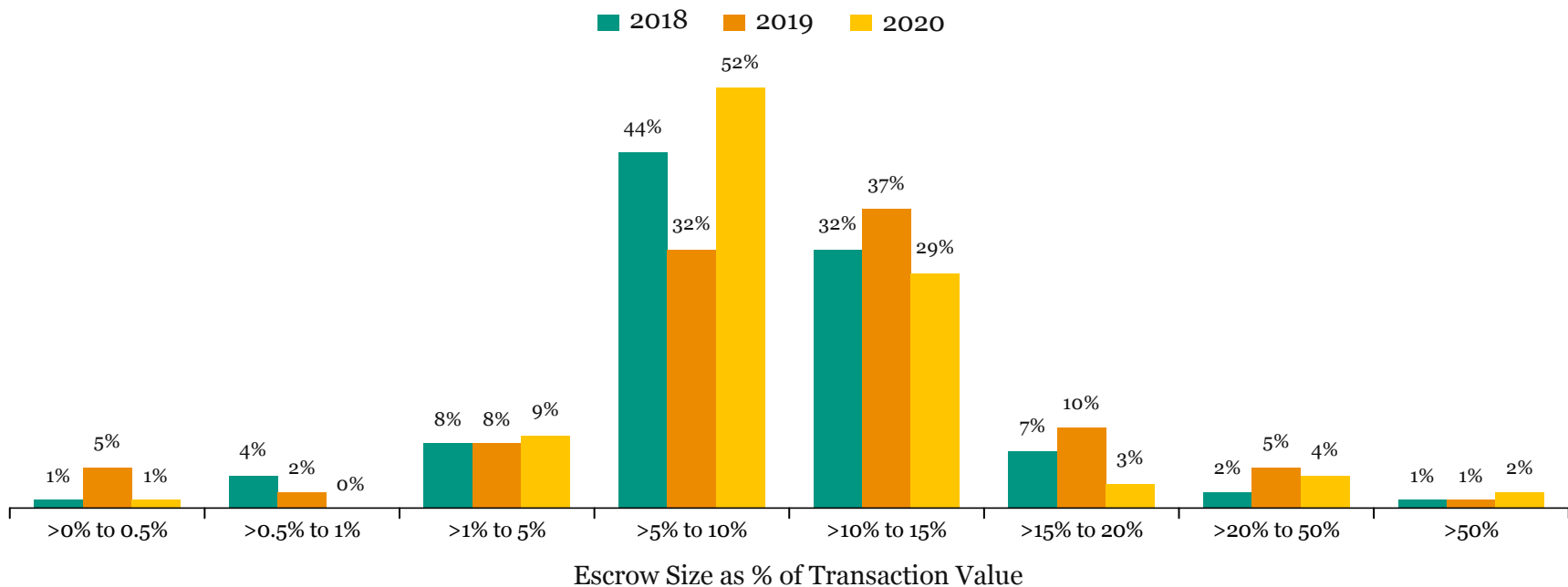




# Escrows/Holdbacks as a Percentage of Transaction Value: No RWI Identified

When deals in which the buyer has definitively purchased an RWI policy are eliminated from the data set, the average escrow/holdback for the remaining deals in 2020 was 12.3%; the median was 10.0%. Note that buyers do not always disclose the presence of a buy-side RWI policy, so this sample set likely still contains some deals with policies.

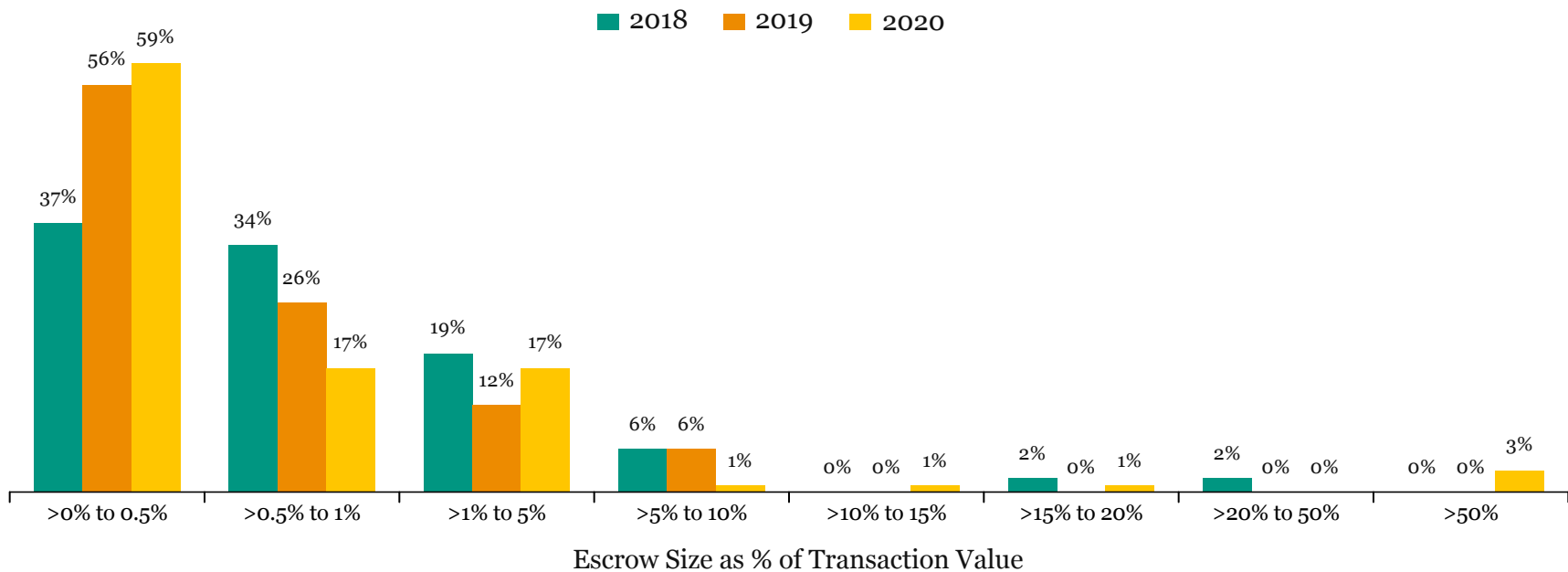
## Details, 2018–2020



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

When the data set includes only deals in which the buyer has definitively purchased an RWI policy, the average escrow/holdback for these deals in 2020 was 3.7%; the median was 0.5%. Note that buyers do not always disclose the presence of a buy-side RWI policy, so this sample set likely misses some deals with policies.

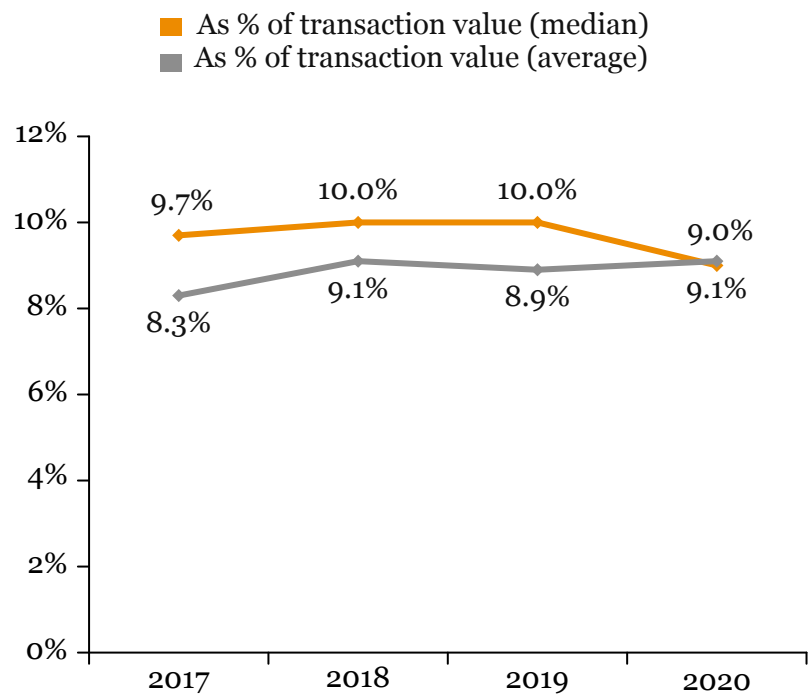
## Details, 2018–2020



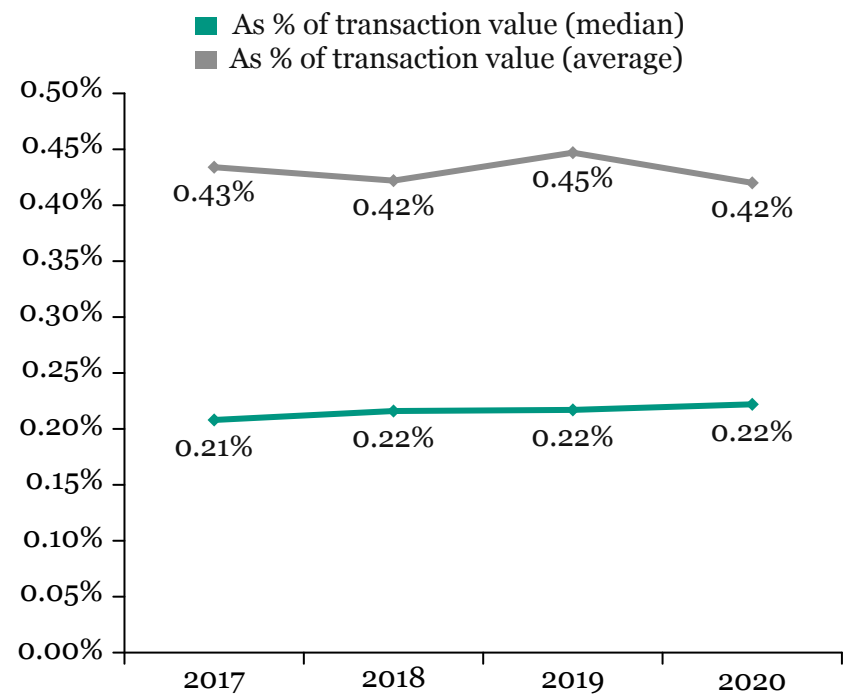
# Escrows/Holdbacks and Expense Fund Sizes

Subset: Deals with escrows/holdbacks and/or expense funds

Median/Average indemnification escrow/Holdback size



Median/Average post-closing expense fund size\*

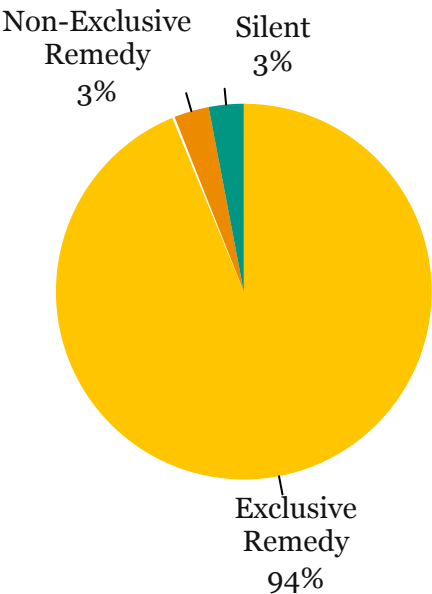


\* Funds established at closing to fund post-closing expenses.

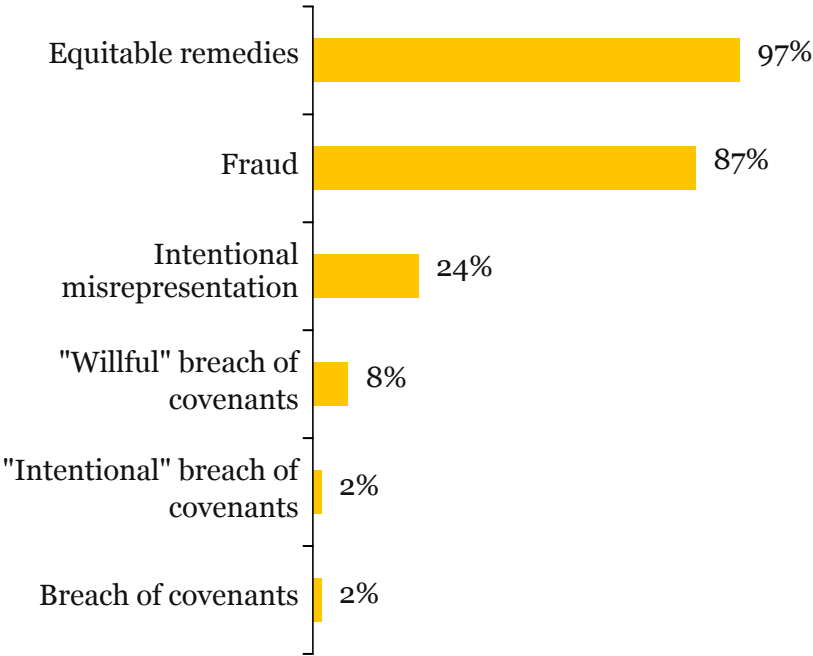
# Indemnification as Exclusive Remedy for Breach

Subset: 2020 deals

## Indemnification as exclusive remedy



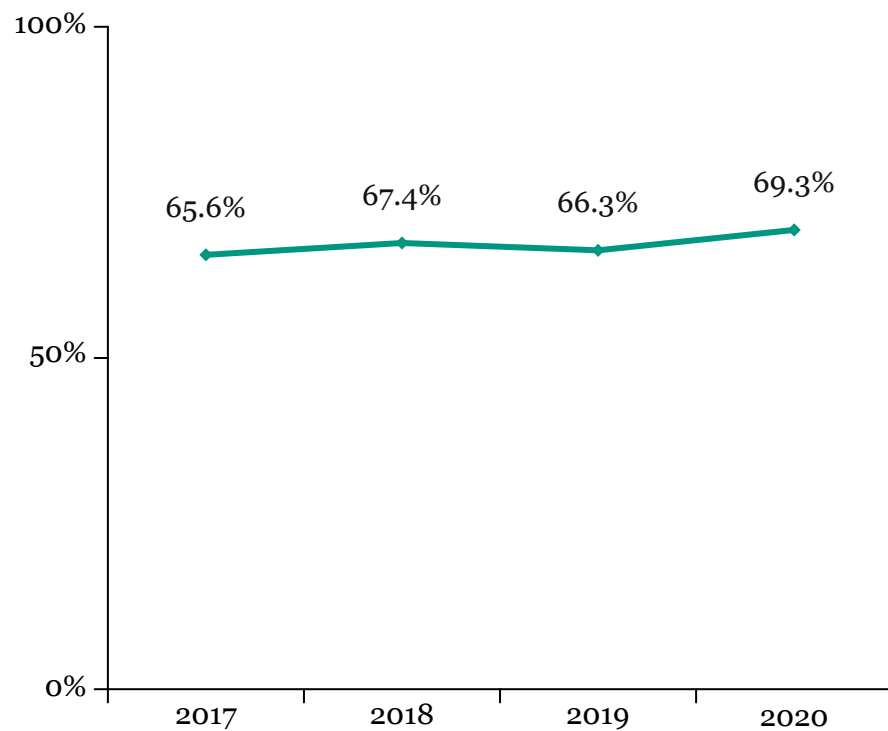
## Carveouts to exclusive remedy



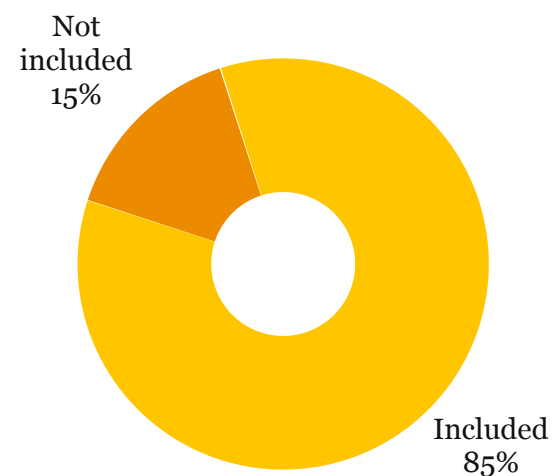
# Dispute Resolution

# Waivers

## Legal representation conflict waiver\* included



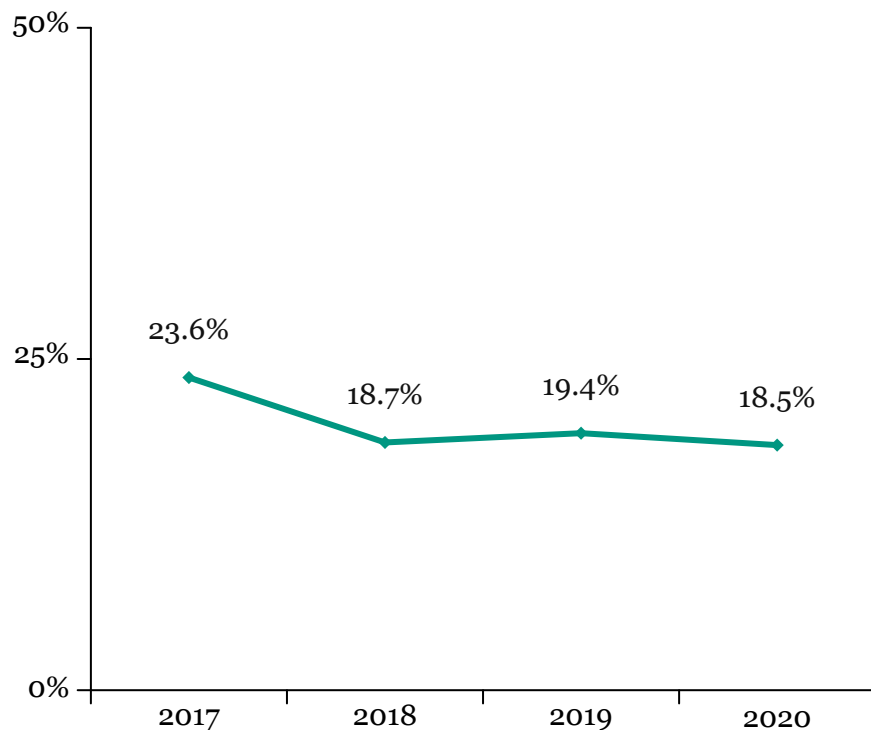
## Waiver of jury trial (2020 deals)



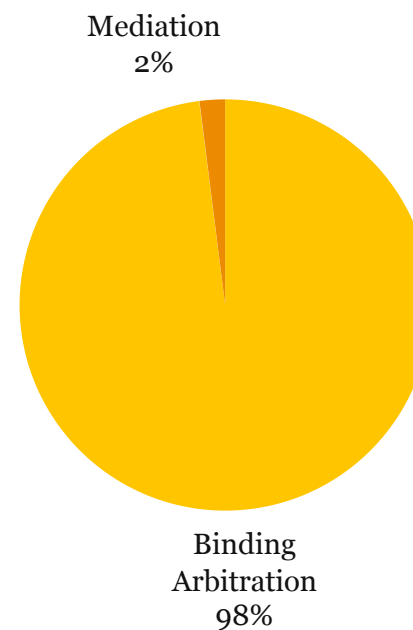
*\* A provision allowing seller's pre-closing counsel to represent the selling shareholders post-closing in matters relating to the acquisition.*

# Alternative Dispute Resolution (“ADR”)\*

ADR inclusion



Type of ADR (subset: general ADR included, 2020)

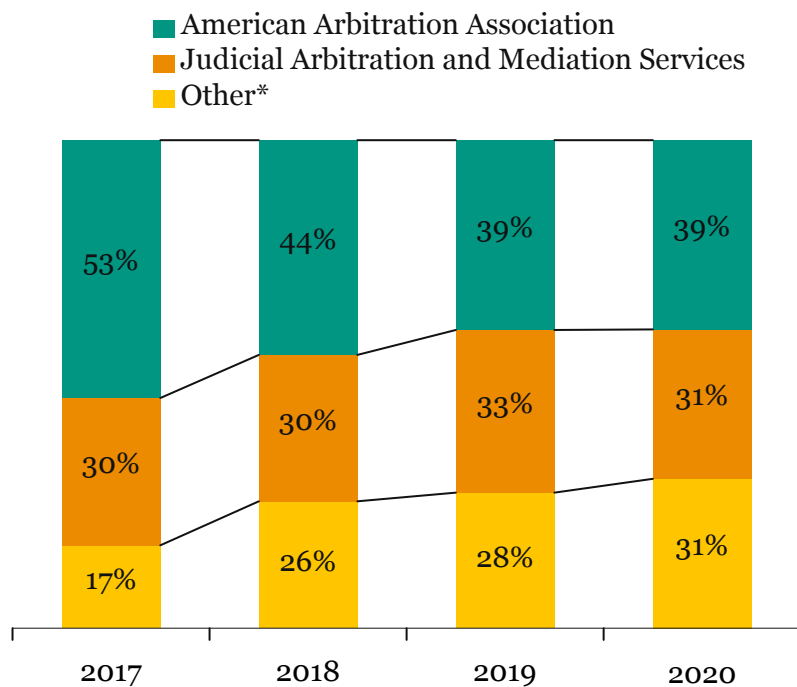


*\* Sample includes ADR provisions that apply to all disputes arising out of the agreement and does not include ADR provisions limited to particular matters such as purchase price adjustments or earnouts.*

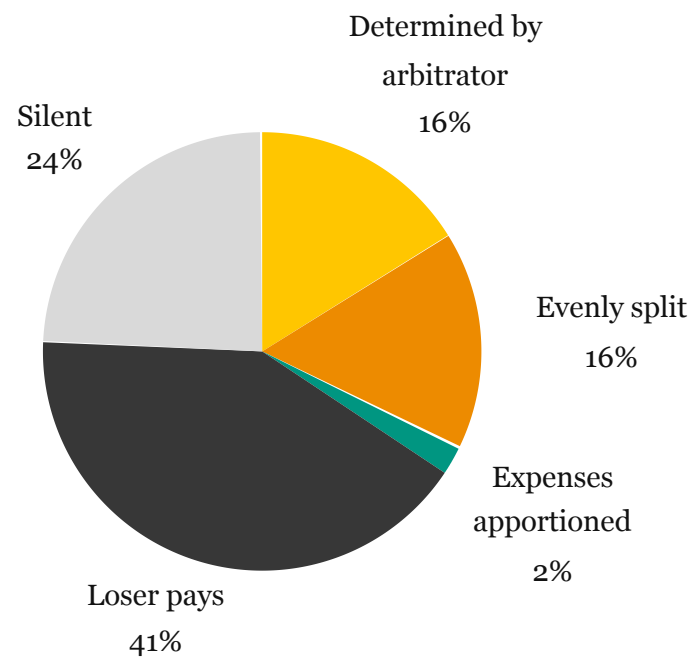
# Alternative Dispute Resolution

Subset: Deals with general ADR included

## Institution/rules governing arbitration



## Who pays arbitration expenses? (2020 deals)



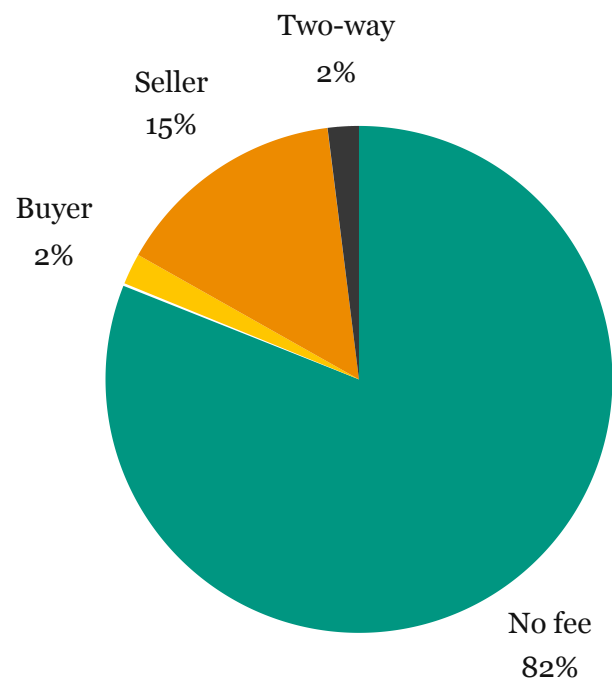
\* "Other" frequently includes the International Chamber of Commerce.



# Termination Fees

# Termination Fees

## Fee paid by... (2020 deals)



## Termination fees

The median termination fee to be paid by buyer was 5% (average 5.8%) of transaction value.\*

The median termination fee to be paid by seller is 6.6% (average 6.6%) of transaction value.\*

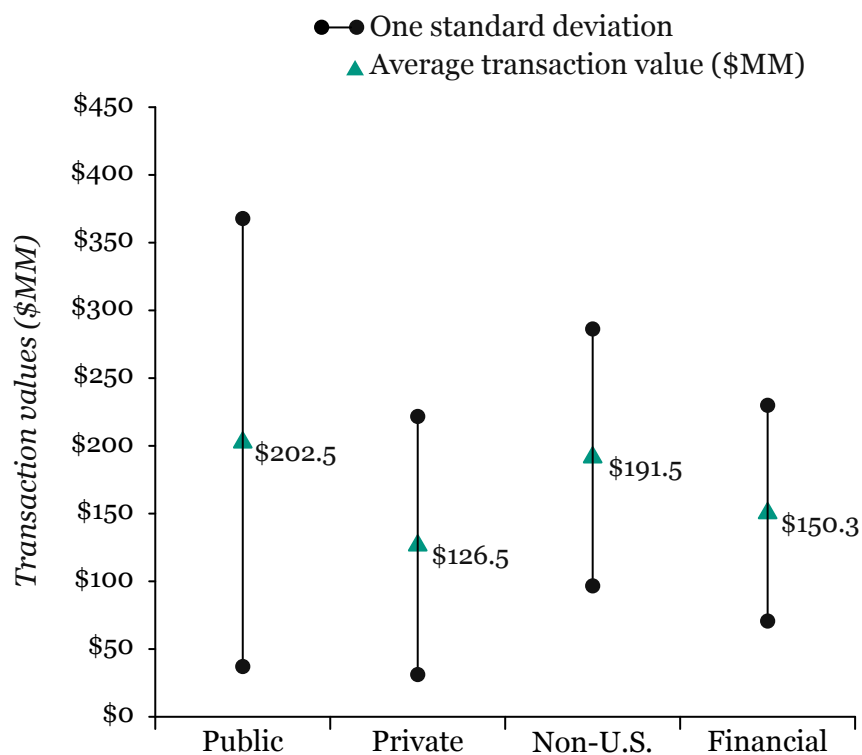
- **COVID-19 pandemic, target industry, and other factors may have influenced this deal point. Visit [srsacquiom.com/marketstandard/](https://srsacquiom.com/marketstandard/) to explore.**

\* "Transaction value" includes escrowed amounts but does not include potential earnout consideration.

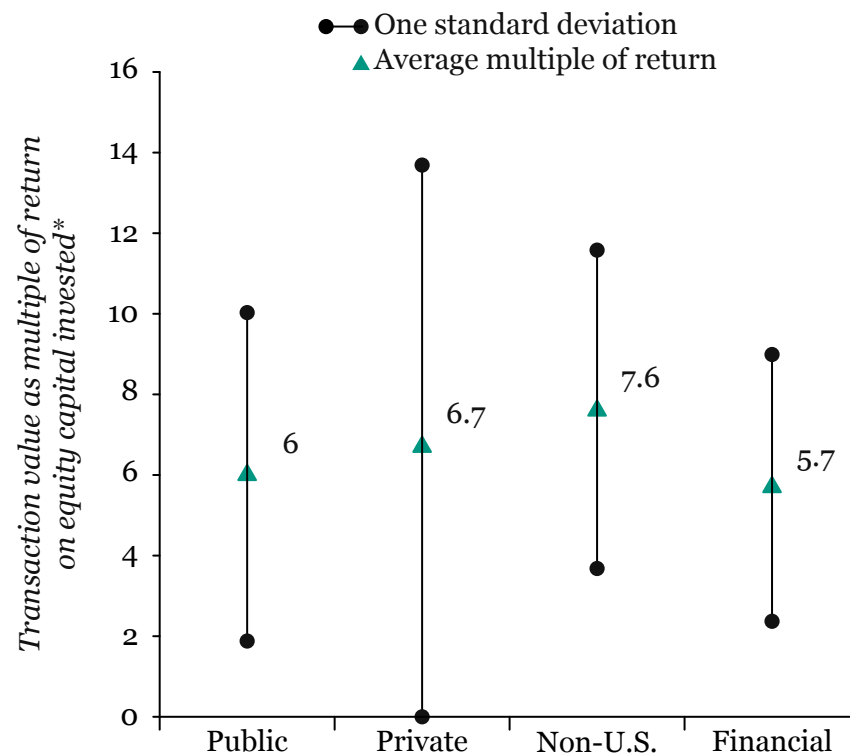
# Correlations

# Correlations: Transaction Value and Multiples by Buyer Type

## Transaction value vs. buyer type (2020 deals)



## Multiple of return\* vs. buyer type (2020 deals)



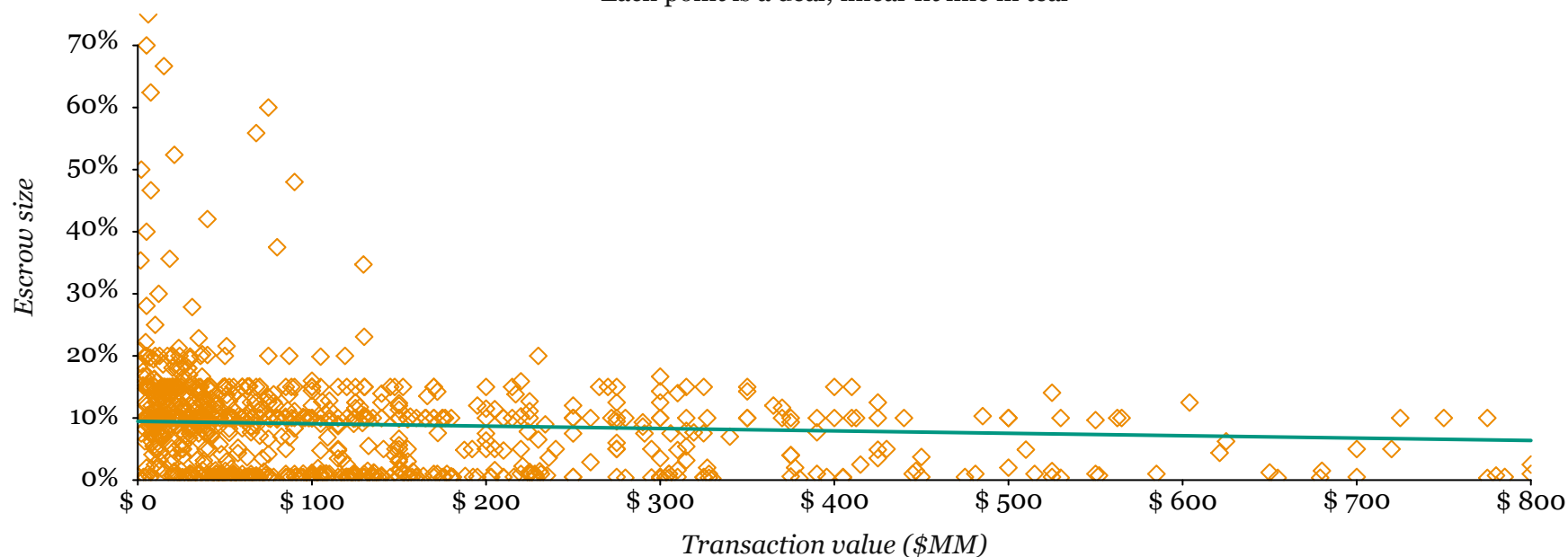
\* Equity capital investment data provided by S&P Capital IQ™ and other databases.

## Correlations: Transaction Value and Escrow Size

Data set: All deals closing in 2017–2020

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

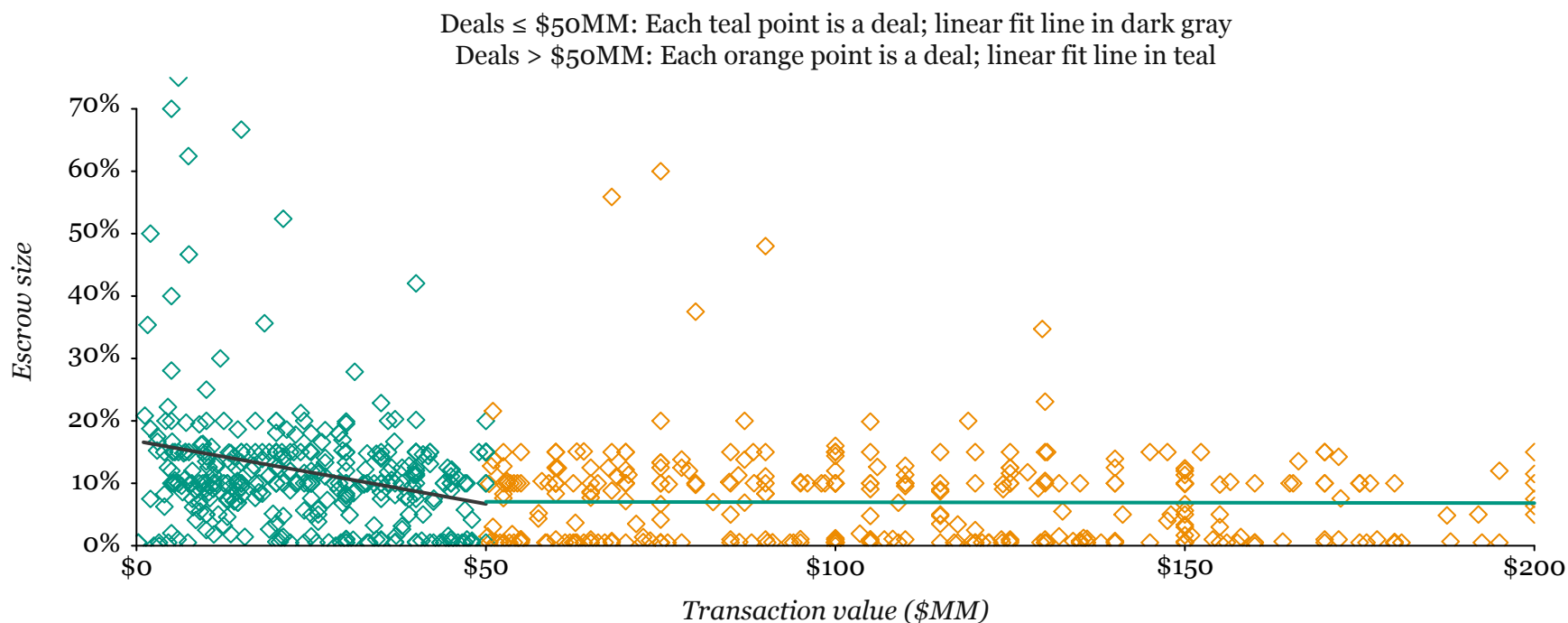
Each point is a deal; linear fit line in teal



## Correlations: Transaction Value and Escrow Size (Detail)

Data set: All deals closing in 2017–2020

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



# 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.

## Buyer Power Ratio

Buyer Power Ratio is a numeric predictor of merger parties’ relative negotiating strengths and their ability to obtain favorable deal terms. This metric was developed by the American Bar Association Mergers & Acquisitions Committee and SRS Acquiom. The Buyer Power Ratio for a particular transaction is determined by dividing a publicly traded buyer’s market capitalization by the applicable purchase price paid by the buyer (including escrow amounts but not potential earnouts). Buyer Power Ratio is available within the SRS Acquiom MarketStandard tool.

## 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 of 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).



# Glossary C–H

## 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.

## 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).

## EBITDA

Earnings Before Interest, Taxes, Depreciation and Amortization; a metric for evaluating the financial performance of the core operations of an entity.

## 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.

## Financial Buyer (U.S.)

Buyer that acquires a target as an investment rather than for the purpose of expanding its own business or for other strategic purposes.

## Foreign Buyer (non-U.S.)

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

## GAAP

Generally Accepted Accounting Principles; guidance promulgated by certain policy authorities and commonly accepted accounting practices used for consistency in reporting financial information.

## Holdback

A portion of the consideration otherwise payable to the Seller at closing held back by the Buyer to satisfy contingent amounts payable to the Buyer (or third-party) post-closing such as a Purchase Price Adjustment, indemnification claim, pending litigation or PPP Loan forgiveness.

# Glossary I-M

## 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.

## 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.

## 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).

# Glossary M-O

## 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.

## 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-T

## 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, often payable by the Seller to the Buyer, 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.

# Glossary T-Z

## 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.

## Contact Information

### Phone

303.648.4085

### Web

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### Existing clients

[support@srsacquiom.com](mailto:support@srsacquiom.com)



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### Additional resources

- 2020 SRS Acquiom Claims Insight Report:  
<https://www.srsacquiom.com/resources/ma-claims-report/>
- 2020 Buy-side Representations and Warranties Deal Terms Study:  
<https://www.srsacquiom.com/resources/representations-warranties-insurance/>
- 2019 Life Sciences M&A Study:  
<https://www.srsacquiom.com/resources/2019-life-sciences-study/>
- Impact of "Buyer Power Ratio" on M&A Deal Terms:  
<https://www.srsacquiom.com/resources/impact-of-buyer-power/>
- MarketStandard:  
<https://www.srsacquiom.com/marketstandard/>

