SRSACQUIOM

2023 M&A Deal Terms Study

An analysis of deal terms in private-target
M&A transactions that closed between 2017–2022

Please direct inquiries to: dts@srsacquiom.com

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SRSACQUIOM
MARKETSTANDARD

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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

Loan Agency

Tax and Accounting Advisory

Pre-closing prep for a smoother post-closing. Experienced, in-house tax and accounting professionals address potential issues during diligence.

Enhanced Stockholder Solicitation

A digital, efficient and secure process for collecting consents, joinders, 280G elections, and more —helping to facilitate a timely close.

Payments

We continue to set the standard for tech-enabled disbursement of merger consideration. Most shareholders are paid in less than 24 hours.

Escrows

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

Shareholder Representation

The most experienced team in the industry. We proactively solve post-closing issues to reduce potential risks and protect shareholder interests.

Loan Agency

Unbiased third-party loan agency services for syndicated and bilateral loans. Gain a team with an unparalleled depth and breadth of experience.

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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.

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

10%+ of all U.S. private M&A transactions served*	**7,350+** deals engaged on	**$775B+** aggregate deal value
$680B+ in payments	**99%** of shareholders are paid within 24 hours†	**600K+** total shareholders paid

**Statistics contained herein are derived from publicly available sources.*
†Consideration given to those that have completed a Letter of Transmittal (LoT).

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ABOUT THIS STUDY AND THE DATA

The 2023 M&A Deal Terms Study is powered by SRS Acquiom MarketStandard®, a tool to analyze our proprietary database of more than 3,900 private-target M&A deals with customizable searches best suited to your specific transaction.

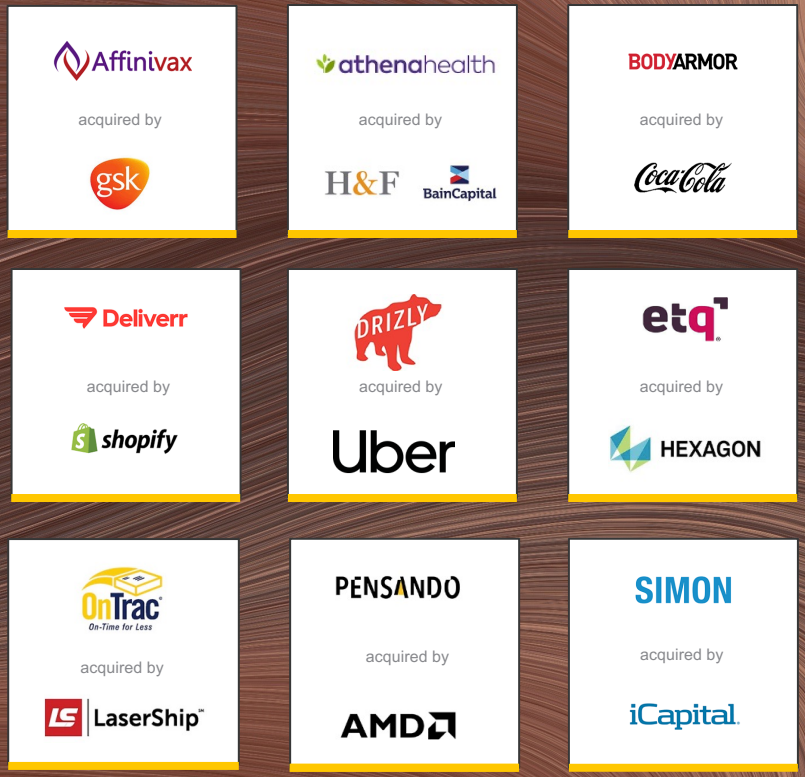
SRS Acquiom continually updates our databases for reporting deal-term data for 2017 through 2022. Therefore, results for prior years' data that is included in prior-year studies may in some cases differ in immaterial amounts from the 2023 SRS Acquiom Deal Term Study. This study includes the most comprehensive 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.

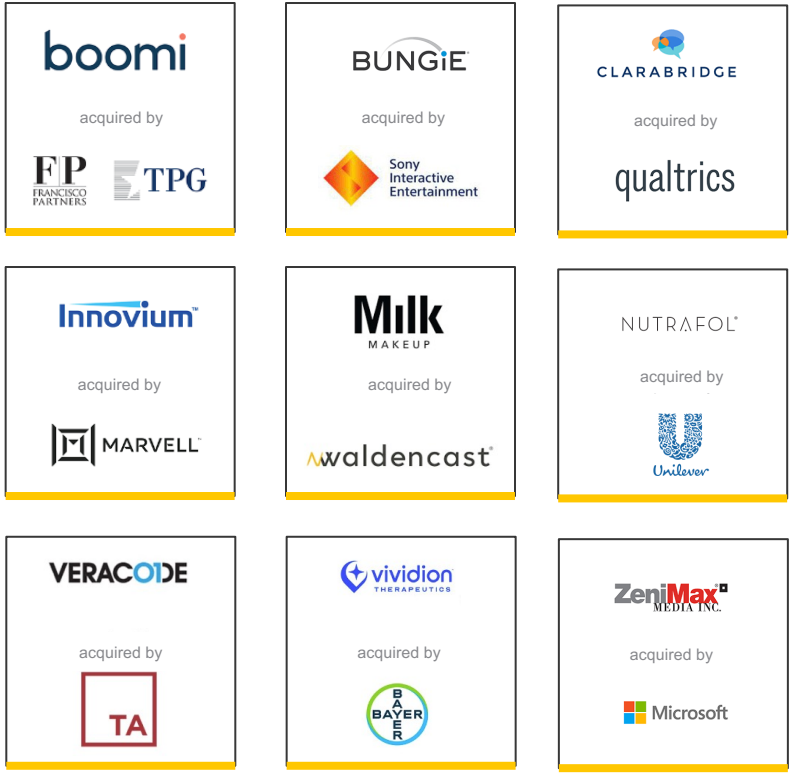
To benefit study users comparing data from different sources, this study presents similar data and terms with similar formatting and structure to the Private Target Deal Points Study published by the Mergers & Acquisitions Committee of the American Bar Association's Business Law Section, available at: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

- *This study analyzes more than 2,100 private-target acquisitions ($460 billion) that closed from 2017 through 2022, including more than 400 deals that closed in 2022.*
- *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 40% of 2022 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.*

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REPRESENTATIVE DEALS





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KEY FINDINGS (1 of 3)

Valuations: Deal Size, Return on Investment, and Management Carveouts

- Transaction values were lower in 2022 relative to the record-breaking 2021 M&A market (Slide 11 ➤); lower-middle market targets may have been more attractive for buyers avoiding regulatory scrutiny, with limited financing options, or being mindful of uncertain economic conditions.
- The median return on investment for 2022 deals was 4x (Slide 13 ➤), down from 5.2x in 2021 but still higher than 2019 and 2020 levels at 3.4x and 3.5x, respectively.
- The average return on investment increased to 9.1x from 8.5x in the previous year, owing to the top 5% of M&A deals having high transaction values and ROI (Slide 13 ➤).
- Use of management carveouts continued a years-long downward trend, included on less than 4% of 2022 deals (Slide 16 ➤), but the median size of such carveouts as a percentage of transaction value increased to 10% (Slide 17 ➤).

Deal Structure: Buyer Types, Consideration Mix

- **New Data Point:** Private M&A activity levels in 2022 were down compared to 2021, with Private Equity (and P.E.-backed private buyers) staking a larger share similar to 2020 levels (Slide 11 ➤).
- **New Data Point:** Fewer deals in 2022 used buyer equity, and the SRS Acquiom dataset now reflects all cash deals that include a management equity rollover component (Slide 15 ➤).

NEW DATA POINT

< "New Data Point" buttons appear on all slides featuring new data points throughout the study.

KEY FINDING

< Click on the "Key Finding" button throughout the study to return to the Key Findings on pages 7, 8, and 9.

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KEY FINDINGS (2 of 3)

Purchase Price Adjustments (aka Working Capital Adjustments or PPAs)

- PPAs are nearly universal in private M&A; 94% of 2022 deals included a PPA, predominately via a separate mechanism in the consideration section (Slide 20 ➤).
- **New Data Point:** More than one in four PPAs used a customized approach for accounting methodology, typically via a calculation worksheet attached as an exhibit (Slide 21 ➤).
- 73% of deals with a separate PPA mechanism also included a special PPA escrow, with a median size of 0.88% of the transaction value (Slide 23 ➤).
- **New Data Point:** 98% of deals with a separate PPA mechanism include a cap on any buyer-favorable adjustment (Slide 22 ➤).

Earnouts

- Shifting trends in earnout structures resulted in a higher prevalence of earnouts (Slide 24 ➤), increased use of earnings or EBITDA metrics (Slide 24 ➤), longer performance periods (Slide 25 ➤), and virtually no deals with a buyer covenant to run the business in a way that maximizes the earnout (Slide 26 ➤).

Deal Escrows

- **New Data Point:** 93% of deals had at least one escrow; 52% of deals had at least two escrows (e.g., indemnification, PPA, or other special escrow) (Slide 76 ➤).
- **New Data Point:** The median size of all escrows combined as a percentage of transaction value on deals with an indemnification escrow that do not use RWI was 11.3% and 2.5% for deals with RWI identified (Slide 76 ➤), compared to 10% and 0.5%, respectively, for the median size of only the indemnification escrow (Slide 78 ➤, and Slide 79 ➤).

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KEY FINDINGS (3 of 3)

Indemnification

- 2022 saw fewer “walk-away” or no survival indemnification structures for deals that do not use RWI (Slide 53 ➤).
- A notable increase in 2022 deals with no materiality scrape in the acquisition agreement, largely driven by the presence of RWI (Slide 57 ➤), although the inclusion of a materiality scrape remains the prevailing practice.
- Survival periods, caps, and escrow sizes held steady for deals that do not use RWI (Slide 59 ➤, Slide 71 ➤, and (Slide 78 ➤).

Fraud Provisions

- **New Data Point:** “No Other Representations” clauses included a fraud carve out 21% of the time, and “Non-reliance” clauses included a fraud carveout 19% of the time (Slide 39 ➤).
- **New Data Point:** Deal parties use the Delaware courts definition of fraud in about 30% of acquisition agreements, while 15% of agreements did not expressly define fraud (Slide 82 ➤).

Effect of Reps 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 37 ➤, and Slide 40 ➤), survival (Slide 53 ➤), sandbagging (Slide 55 ➤), materiality scrapes (Slide 57 ➤), baskets (Slide 65 ➤), caps (Slide 72 ➤), and escrows (Slide 76 ➤, and Slide 79 ➤).

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Financial Terms and Provisions

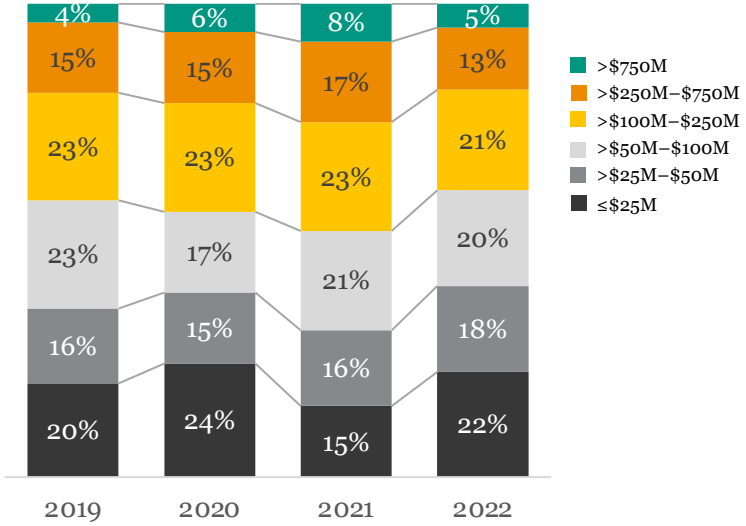
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Transaction Values* and Buyer Types

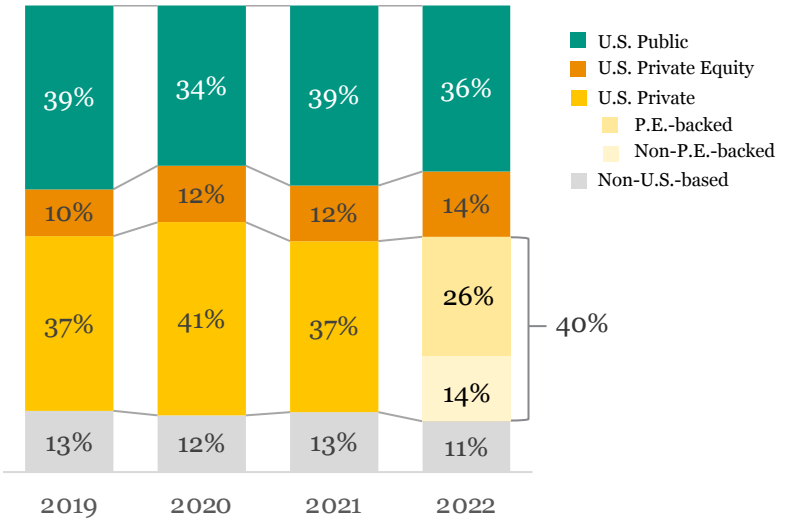
KEY FINDING

NEW DATA POINT

Transaction values



Buyer types



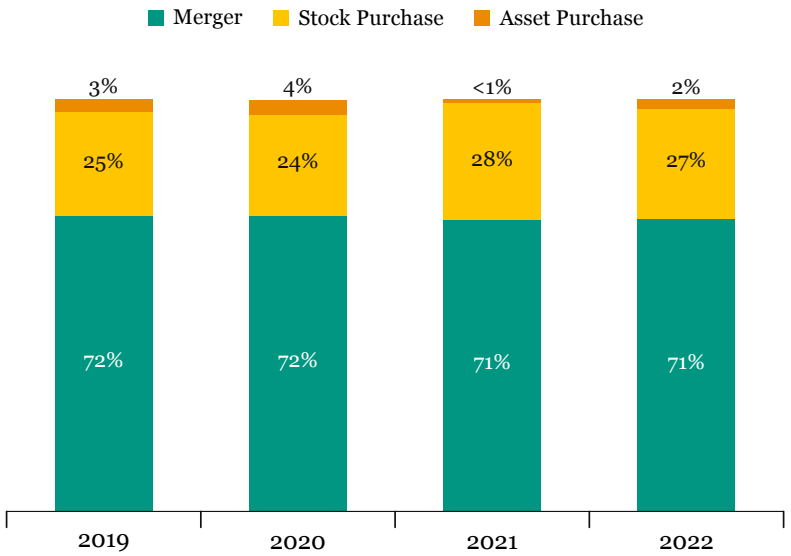
** The term "transaction values" includes escrowed amounts but does not include potential earnout consideration.*

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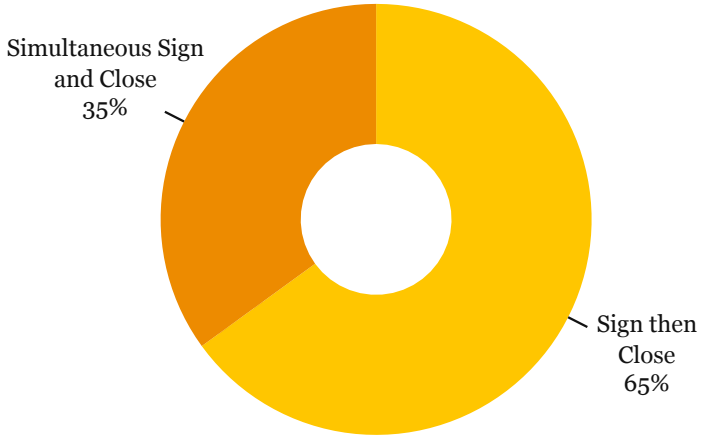
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Transaction Structure and Sign/Close Timing

Transaction Structure (2019–2022)



Timing of Signing and Closing (2022)

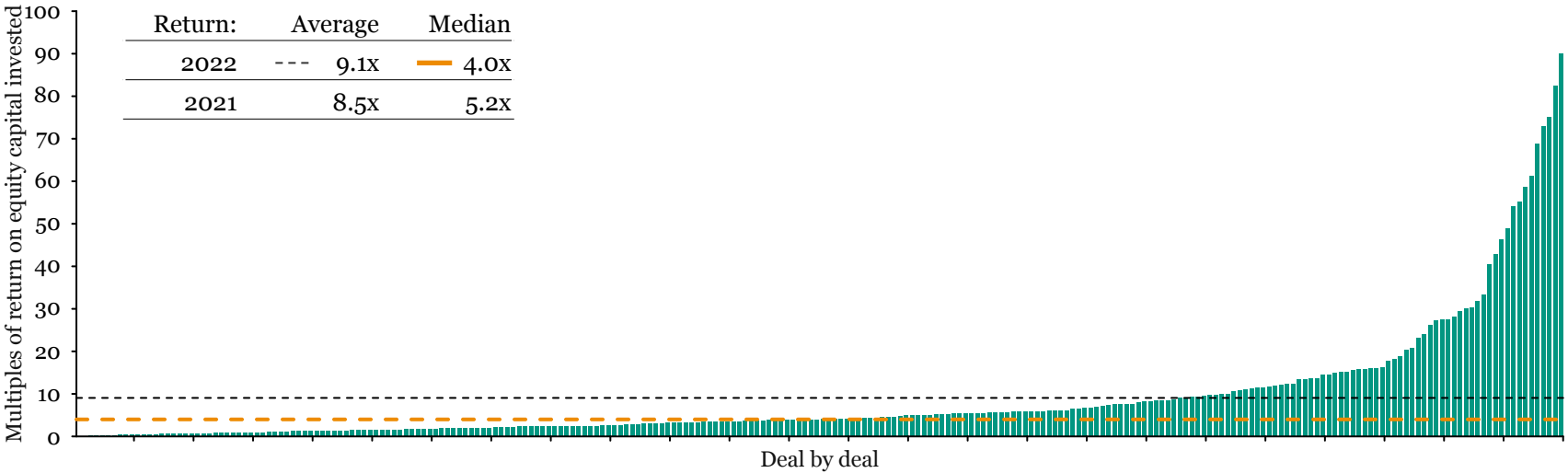


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Transaction Values as Multiples of Equity Capital Invested*

KEY FINDING

2022 Deals



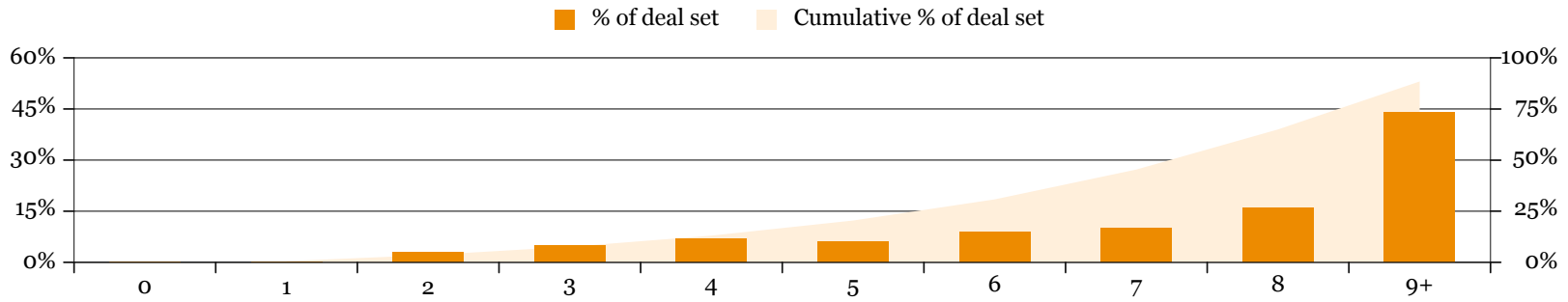
** Provided by S&P Capital IQ™ and other databases.*

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Investment Exit Timing

2022 Deals



	Years to exit (from date of first investment*)	Equity financing rounds at exit	Equity capital invested*
Median (2022/2021)	6.5 / 7.1	3.0 / 4.0	$19M / $21M
Average (2022/2021)	7.0 / 7.4	3.9 / 4.0	$49M / $54M

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

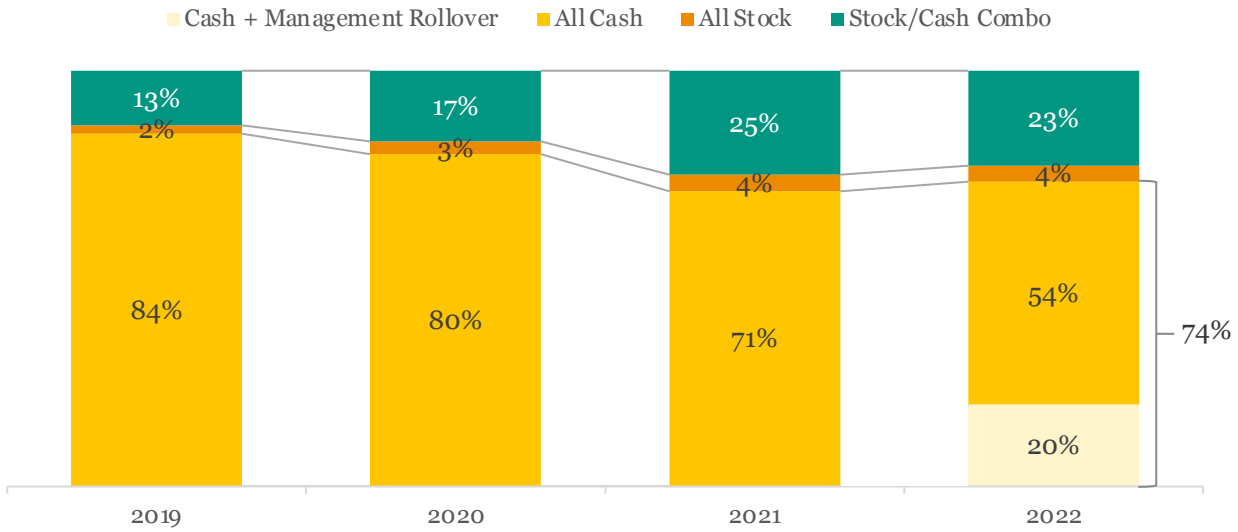
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Closing Consideration Trends

KEY FINDING

NEW DATA POINT

Consideration type



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

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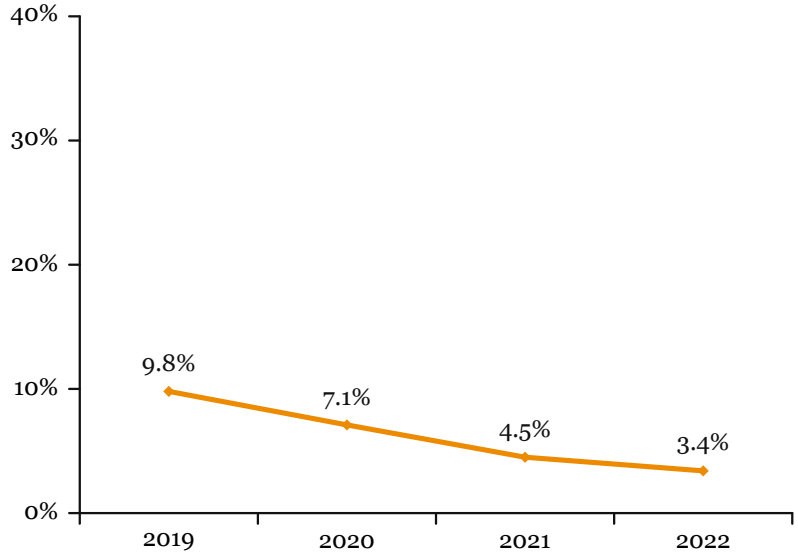
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Management Carveouts*: Frequency

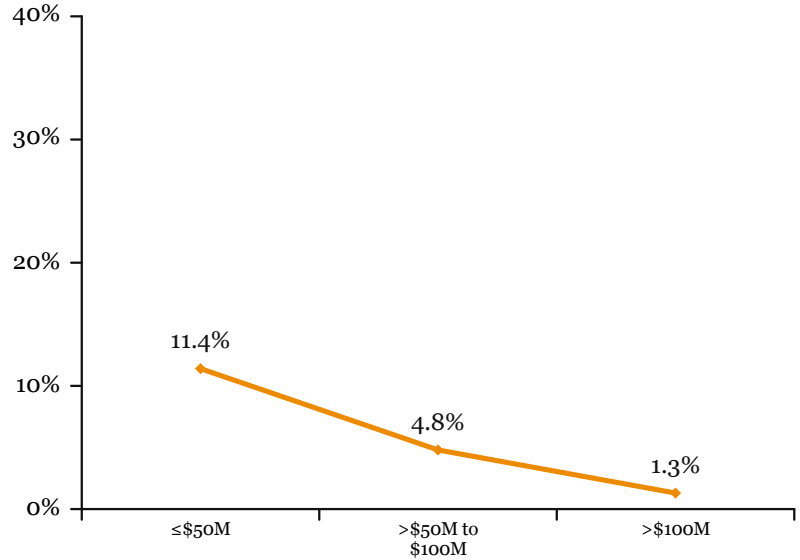
KEY FINDING

Subset: 2022 deals

Deals including a management carveout



Management carveout frequency by transaction value



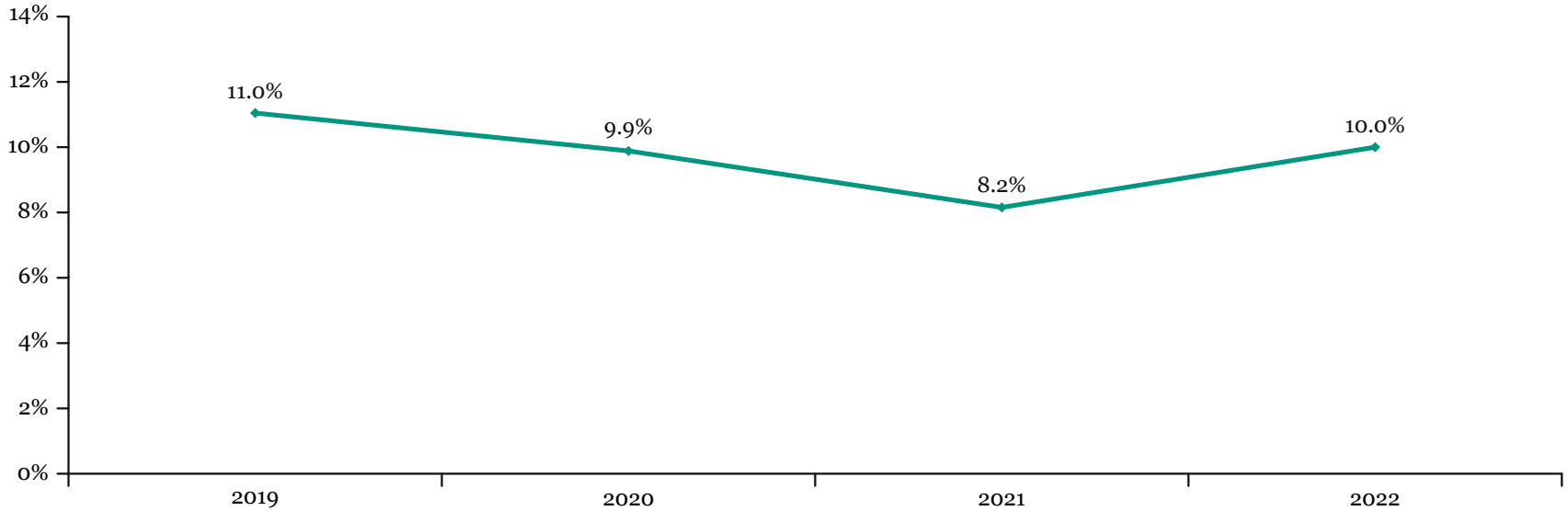
* *A "management carveout" in this study is a portion of deal proceeds guaranteed to seller's management when management would otherwise receive little or nothing for their equity ownership due to liquidation preferences. Transaction bonuses, which often differ materially from management carveouts in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

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Management Carveouts: Size

KEY FINDING

Median size as a percentage of transaction value*

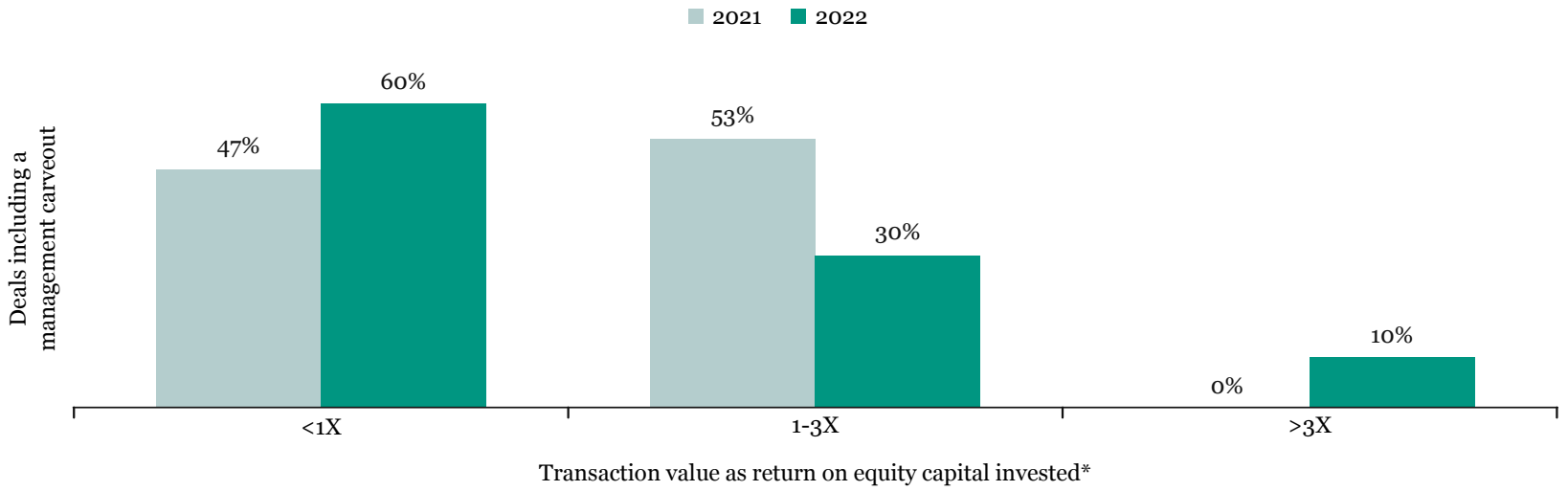


** Measures size of carveout only, disregarding consideration received by seller management in respect of equity ownership (if any).*

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Management Carveouts: Frequency by Return on Equity Capital Invested

Deals including a management carveout

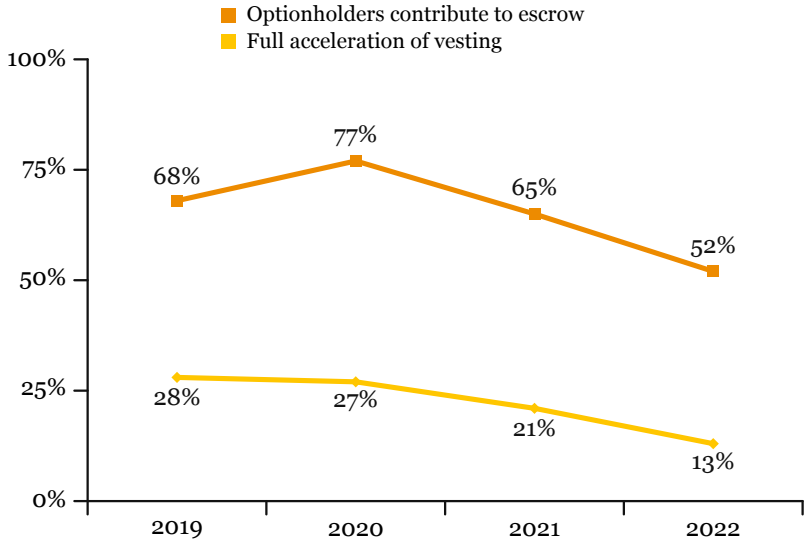


** Equity capital data provided by S&P Capital IQ™ and other databases.*

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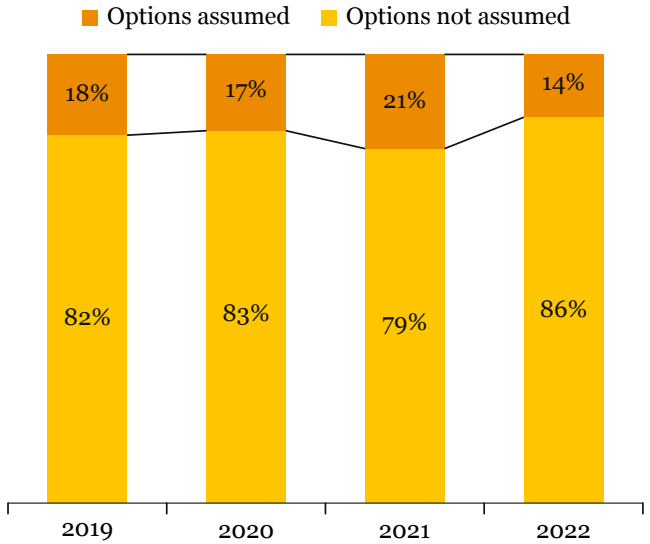
Treatment of Options: Contribution, Acceleration, and Assumption

Contribution and acceleration*



** Excludes deals where optionholders received no consideration.*

Assumption of options by buyer



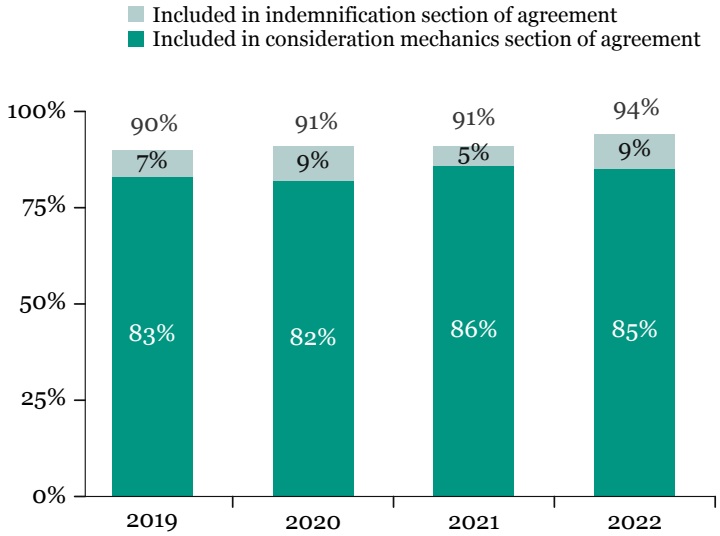
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Post-closing Purchase Price Adjustments

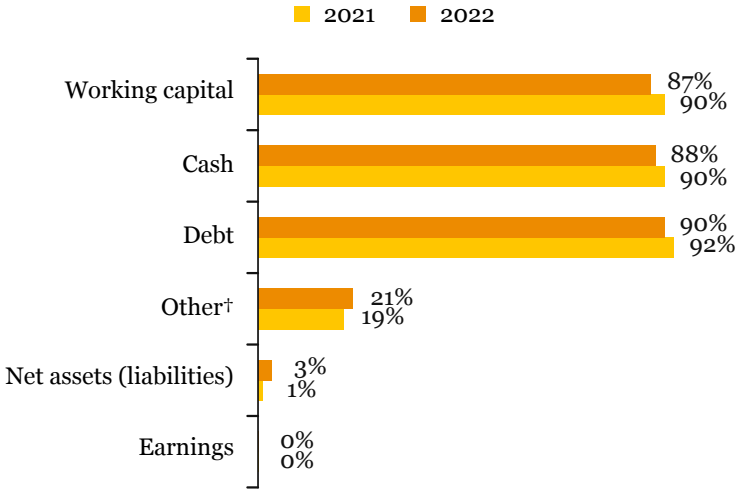
KEY FINDING

Buyers had a contractual right to review the estimated PPA calculations at or near the time of closing in 11% of 2022 deals with a PPA.

Adjustment provision included



Adjustment metrics*



** 96% of post-closing purchase price adjustments in 2022 deals were based on more than one metric.*
† Does not include post-closing adjustments for transaction expenses.

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Post-closing Purchase Price Adjustments: Working Capital Excludes Tax-related Items and Accounting Methodology

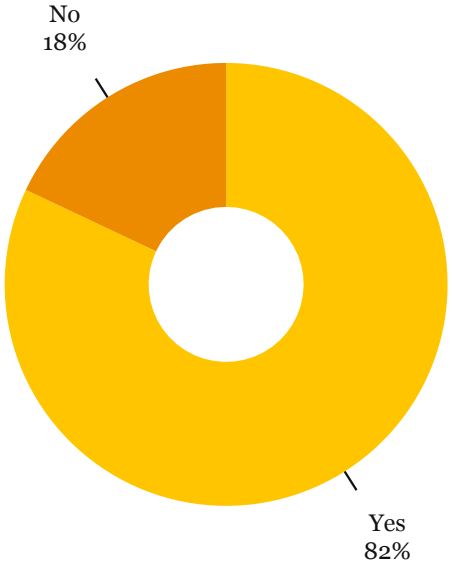
KEY FINDING

NEW DATA POINT

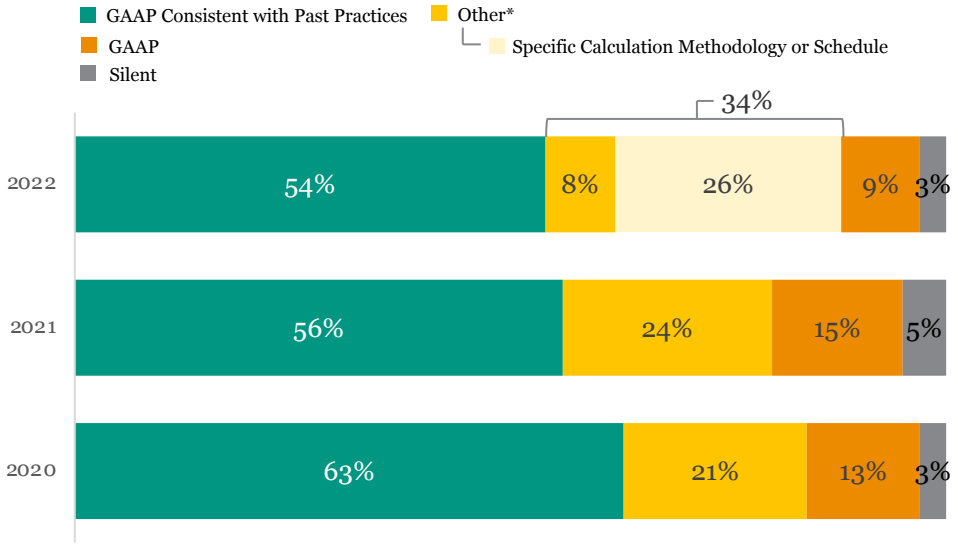
See example terms on slide 94

Subset: 2022 deals with a Working Capital adjustment

Adjustment excludes tax-related items



Subset: Deals with post-closing purchase price adjustments



** "Other" methodology includes, among other things, non-US accounting guidance (e.g., IFRS) or a specific calculation methodology or schedule, the latter of which is most common.*

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Post-closing Purchase Price Adjustments: Thresholds and Caps

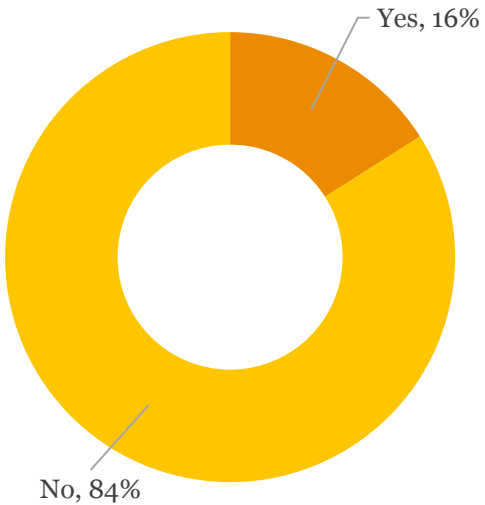
KEY FINDING

NEW DATA POINT

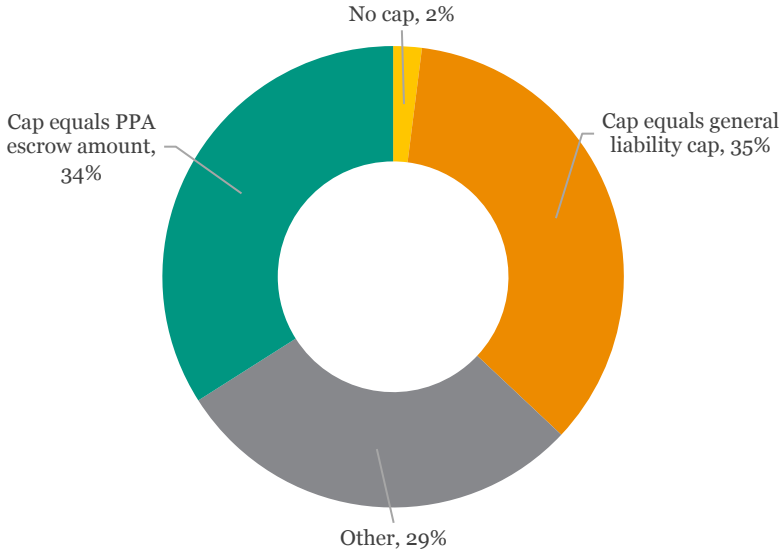
Subset: 2022 deals with post-closing purchase price adjustments in the consideration mechanics section of the acquisition agreement (as opposed to the indemnification section only)

See example terms on slide 94

Adjustment only if threshold exceeded



Cap on buyer-favorable purchase price adjustment claims



"Other" includes specified dollar amounts not expressly tied to another deal term (unless such amount equals the PPA escrow amount or general liability cap).

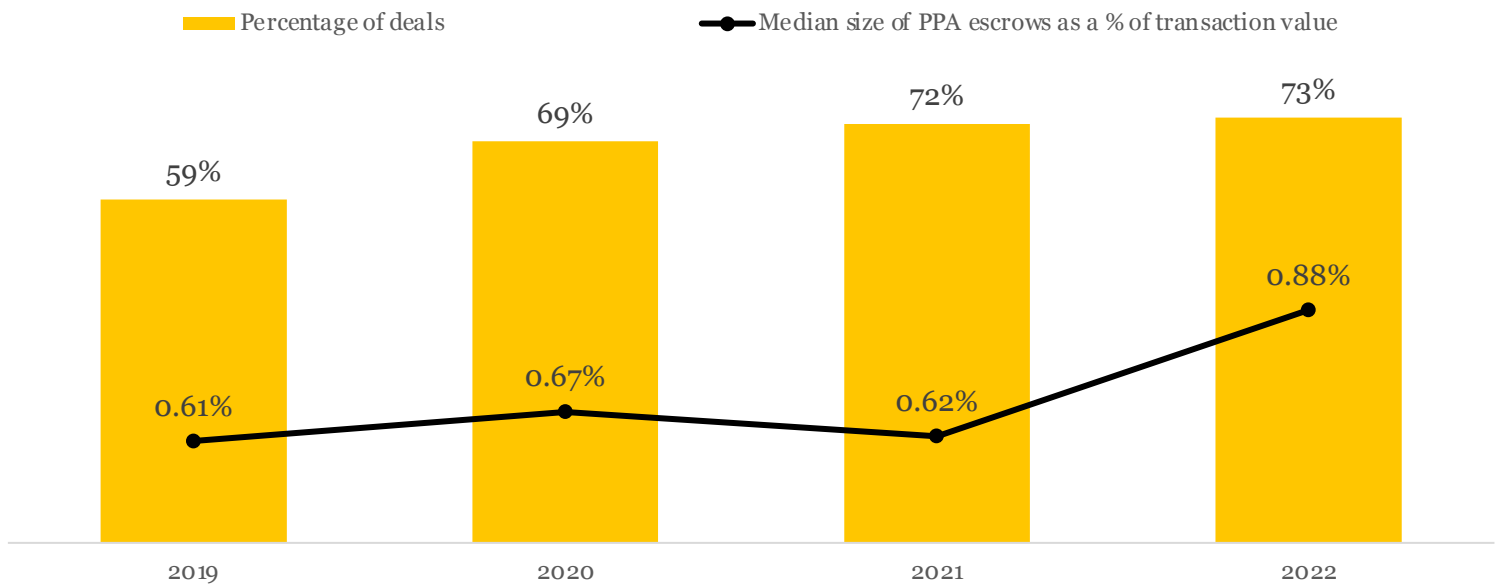
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Post-closing Purchase Price Adjustments: Separate Escrows

KEY FINDING

For 2022 deals without a separate PPA escrow, the source of payment for a buyer-favorable adjustment is the indemnity escrow 81% of the time.

Percentage of deals with a separate PPA mechanism that include a PPA escrow, and median sizes*



* *For 2022 deals with a separate PPA mechanism, 93% with RWI identified and 56% with no RWI included a PPA escrow.*

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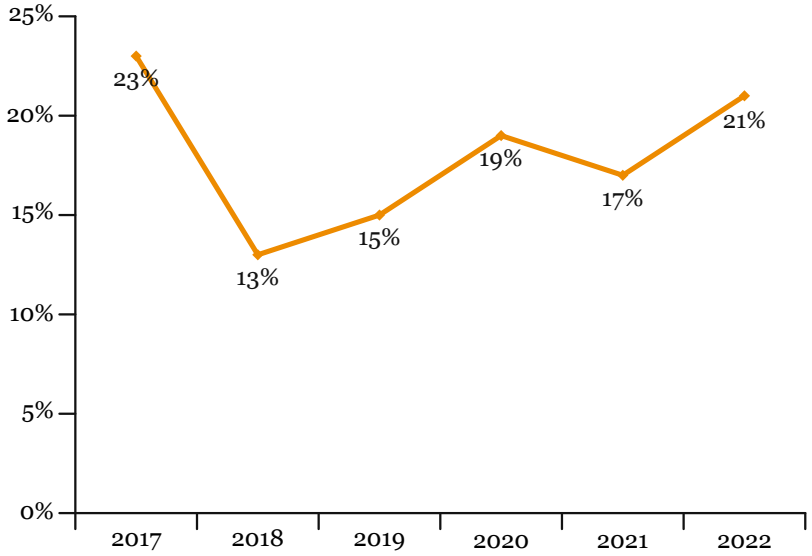
Earnouts (Non-Life Sciences Deals*)

KEY FINDING

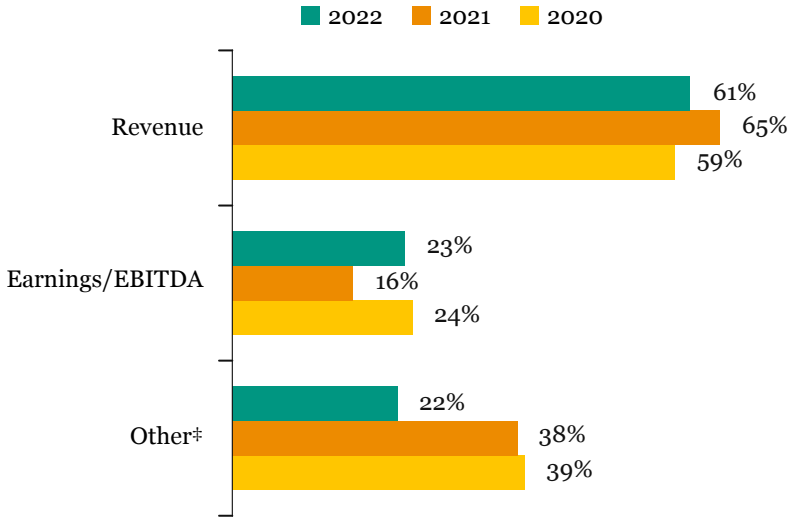
NEW DATA POINT

Of the 21% of 2022 non-Life Sciences deals with an earnout, 42% had a single trigger event and 58% had multiple trigger events.

Earnout included



Earnout metrics†



** For a more detailed analysis of SRS Acquiom's 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.

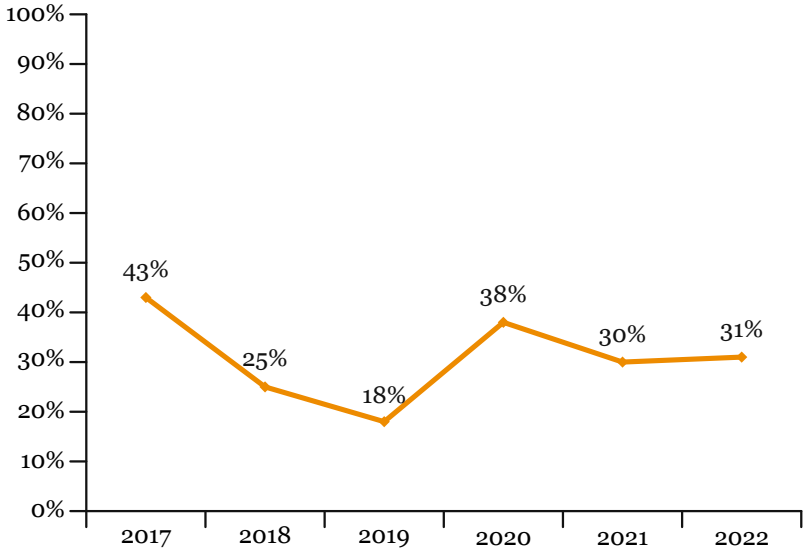
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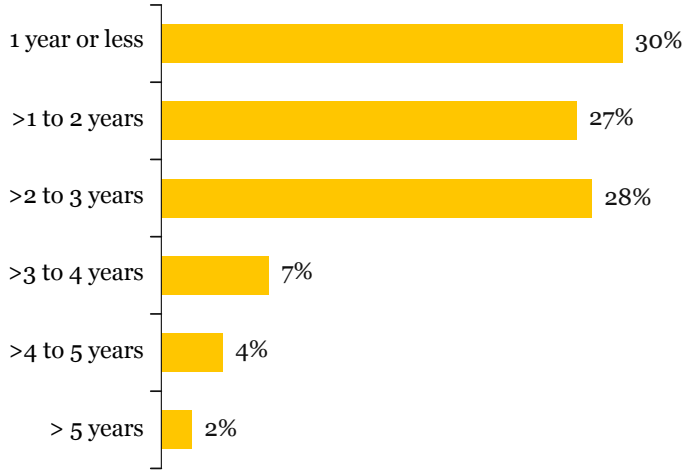
Earnouts (Non-Life Sciences Deals*)

KEY FINDING

Median earnout potential as % of closing payment†



Earnout length‡ (2022 median: 24 months)



** For a more detailed analysis of SRS Acquiom's 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.

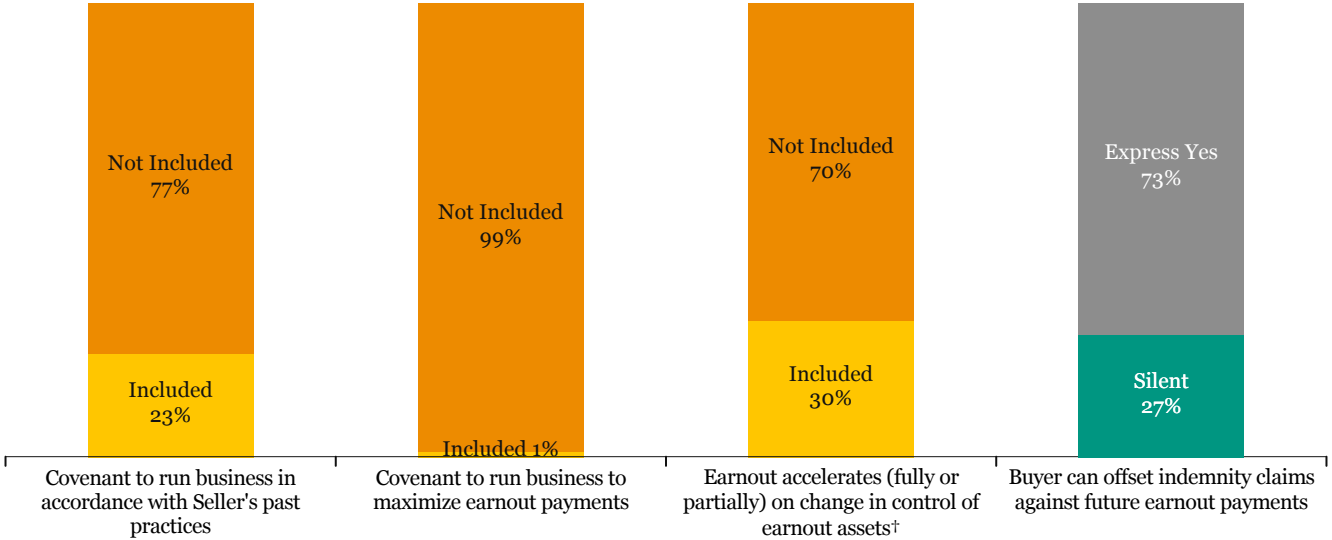
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Earnouts (Non-Life Sciences Deals*):
Covenants, Acceleration, and Offsets

KEY FINDING

Subset: 2022 deals with earnouts, excluding life sciences deals



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

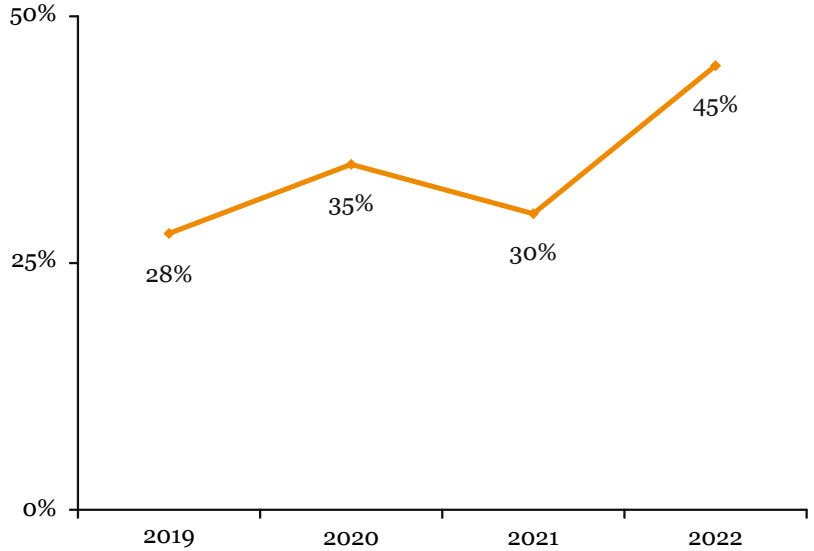
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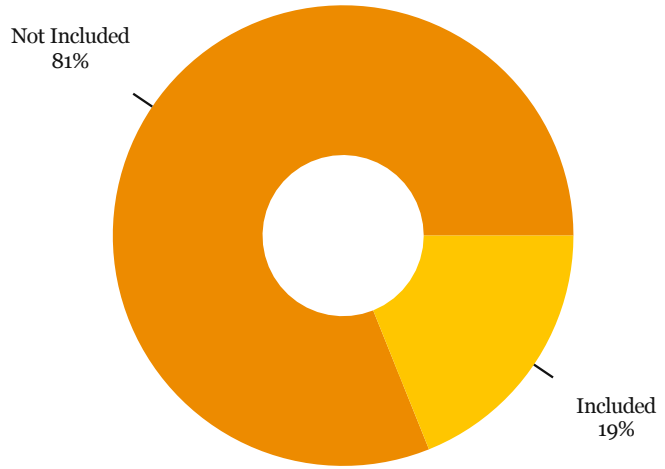
Earnouts (Non-Life Sciences Deals*): Additional Provisions

See example terms on slide 94

"Earnout is not a security" provision included



Disclaimer of fiduciary relationship (2022 deals)



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

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Pervasive
Qualifiers

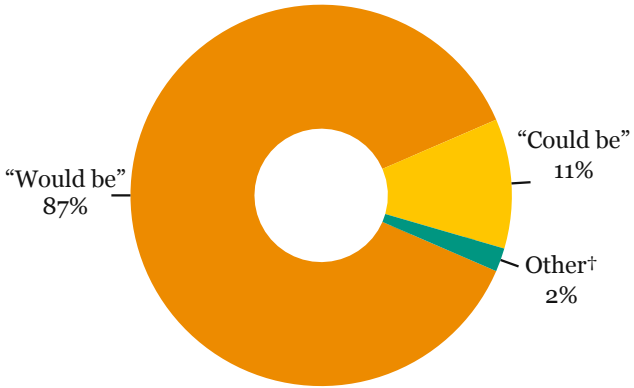
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Definition of Material Adverse Effect ("MAE"):
"Prospects" Included and Forward-Looking Language

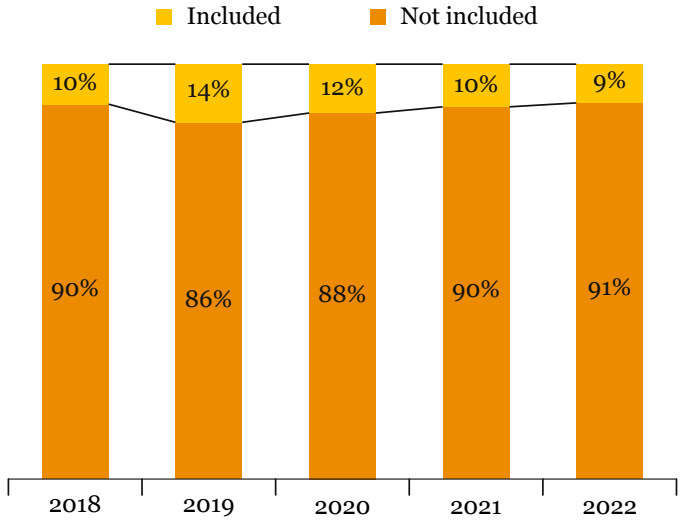
See example terms on slide 94

96% of 2022 deals with an MAE definition had forward-looking language.*
Subset: 2022 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.*

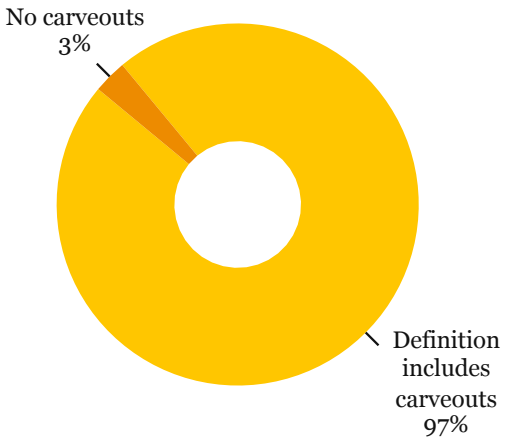
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Definition of Material Adverse Effect: Carveouts

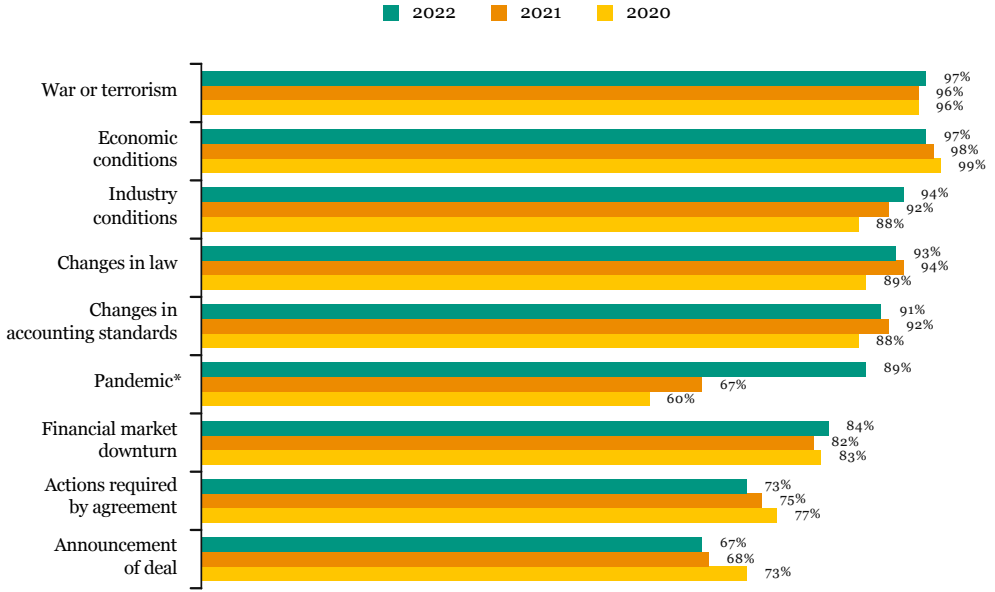
See example terms on slide 95

Subset: MAE definition has carveouts

Deals with carveouts



Carveout frequency (2022 deals)



**For 2020 deals, this data point was tracked beginning in March 2020.*

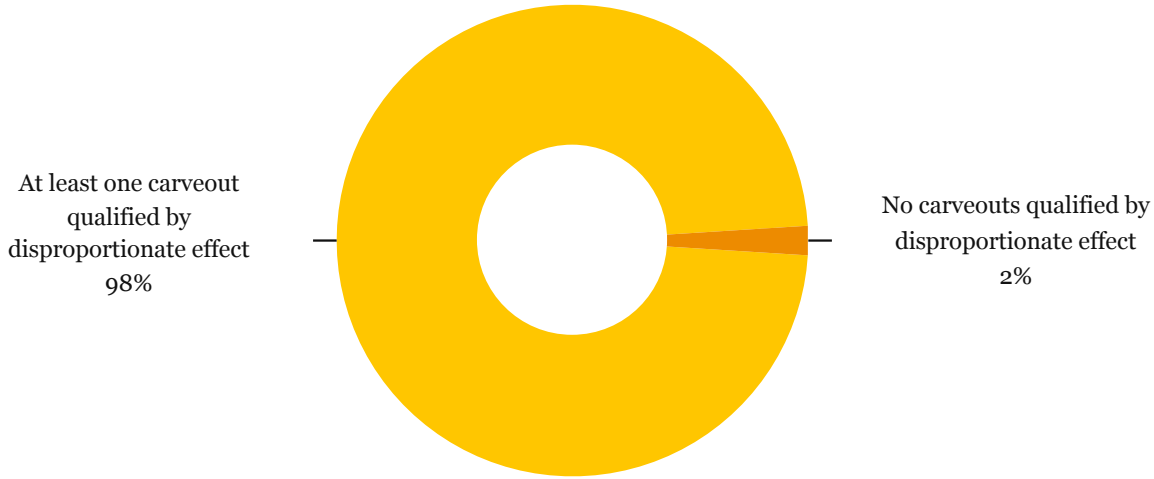
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Definition of Material Adverse Effect:
Carveouts Qualified by Disproportionate Effect

Subset: 2022 deals with an MAE definition with carveouts

See example terms on slide 95

Disproportionate effect details



This data point is influenced by Transaction Value.

Visit SRS Acquiom MarketStandard® to learn more.

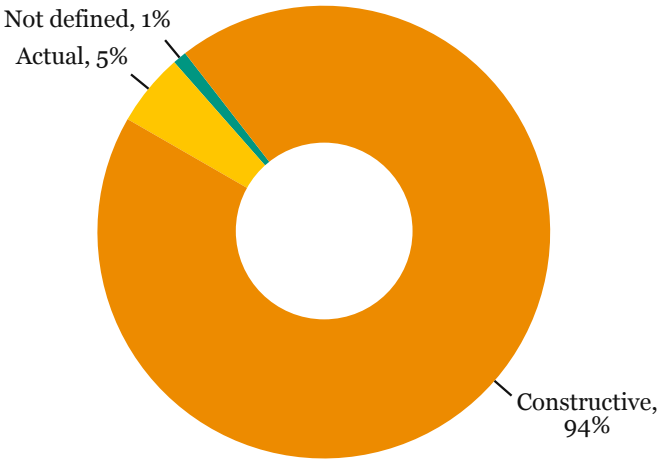
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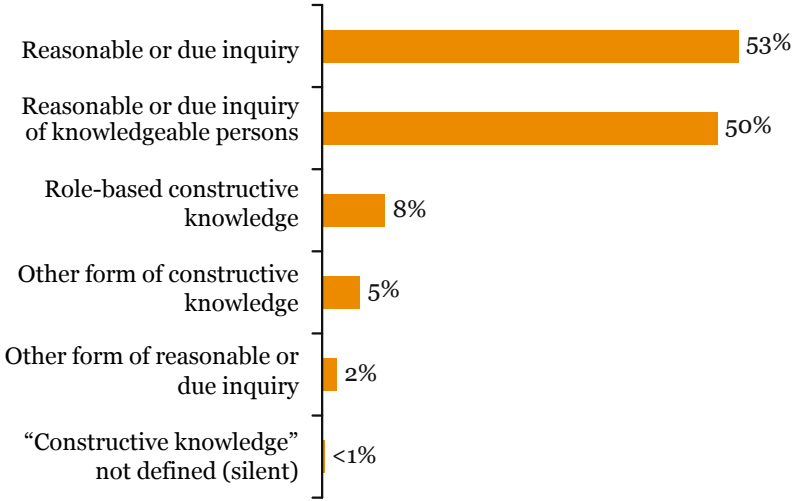
Knowledge Standards

See example terms on slide 95

Knowledge definition details (2022 deals)



Subset: Constructive*



** 16% of 2022 deals include more than one constructive knowledge element, e.g., a due inquiry requirement as well as role-based deemed knowledge.*

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Seller's Representations, Warranties, and Covenants

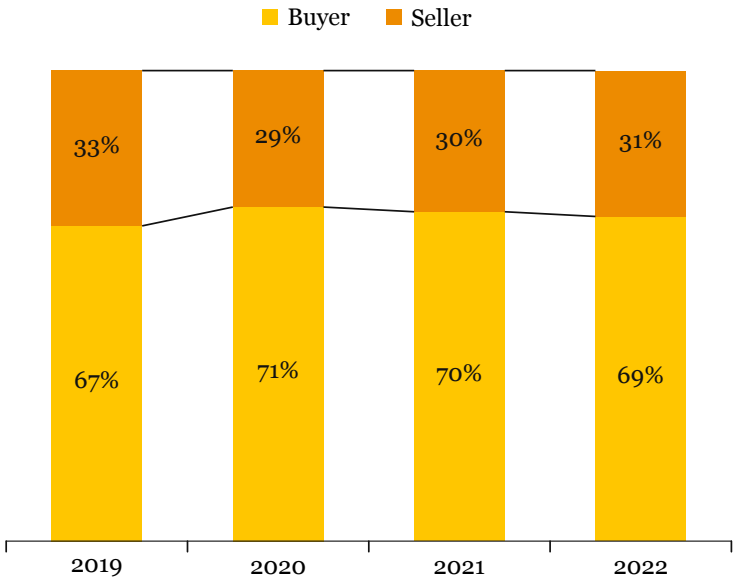
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“No Undisclosed Liabilities” Representation

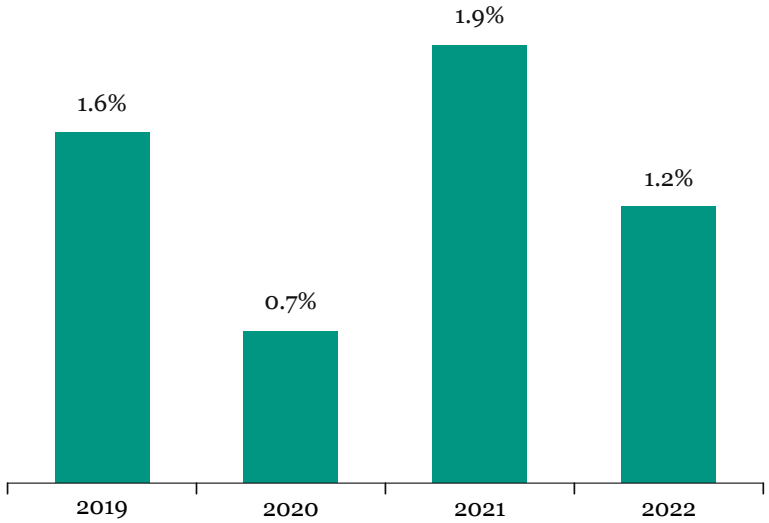
99% of 2022 deals contain “No Undisclosed Liabilities” representation.

See example terms on slide 96

Party favored by definition



Representation is knowledge-qualified



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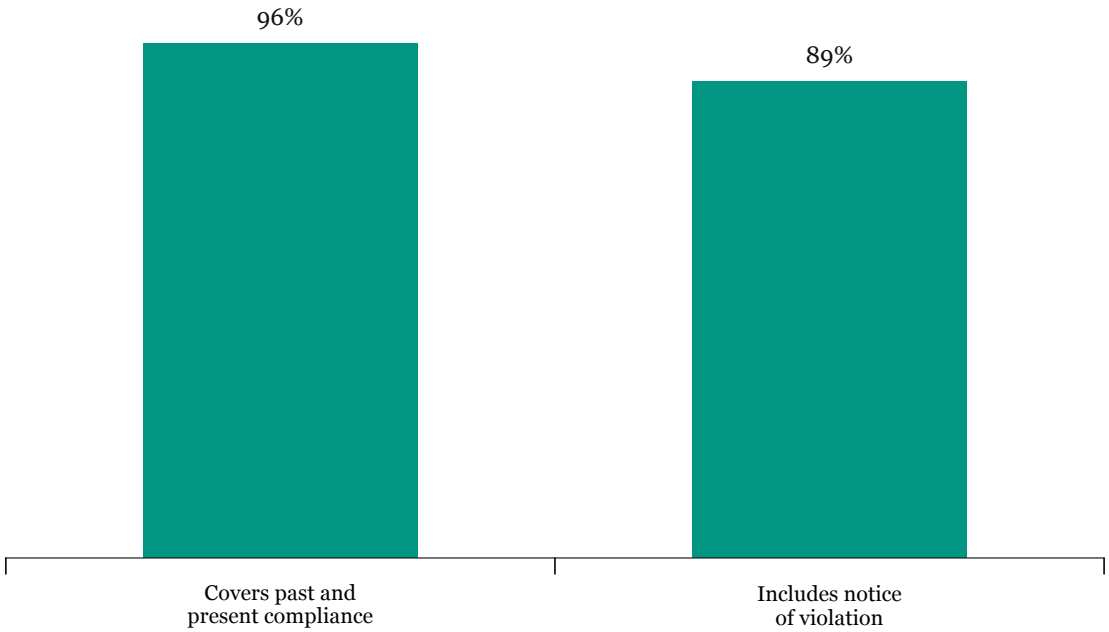
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“Compliance with Laws” Representation

See example terms on slide 96

99% of 2022 deals included this representation.

“Compliance with Laws” representation details, 2022



This data point is influenced by Target Industry.

Visit SRS Acquiom MarketStandard® to learn more.

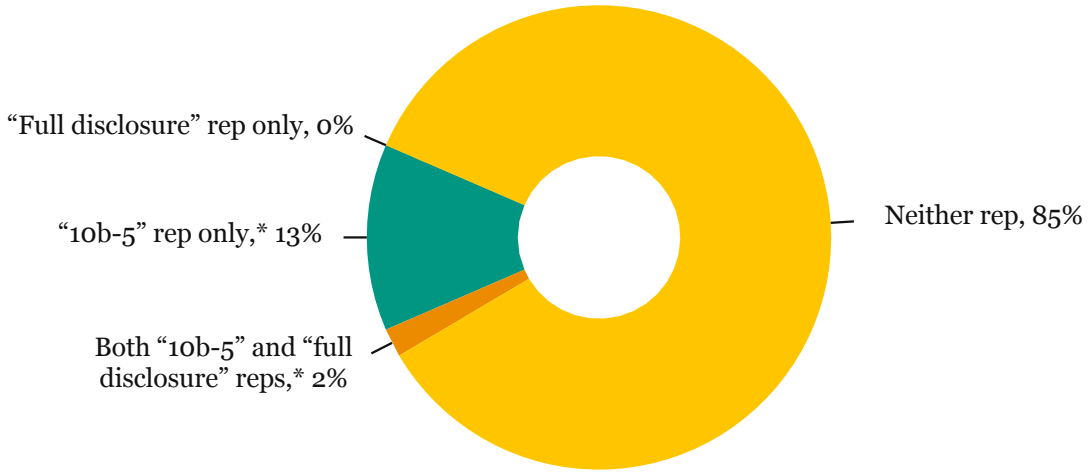
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“10b–5” and “Full Disclosure” Representations

See example terms on slide 96

Inclusion of representations (2022 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.

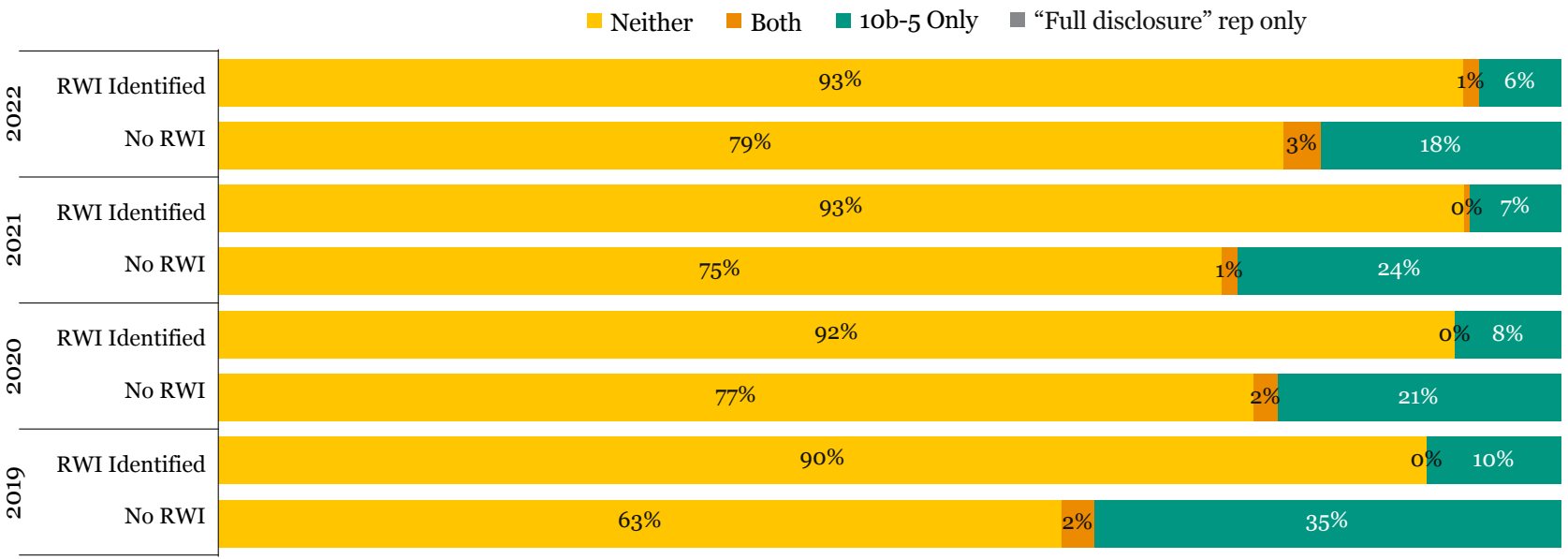
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“10b–5” and “Full Disclosure” Representations: Effect of RWI

KEY FINDING

Deal years 2019–2022

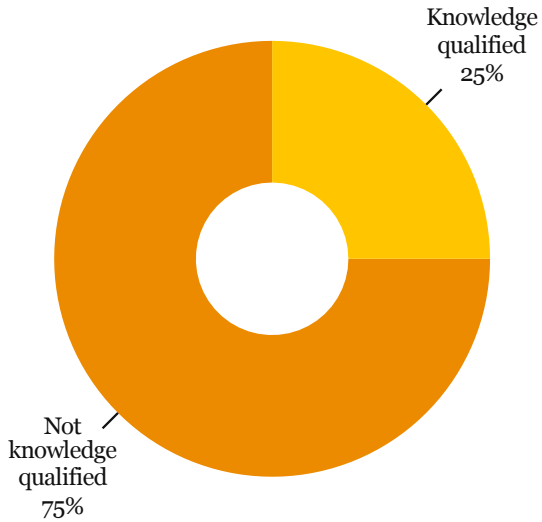


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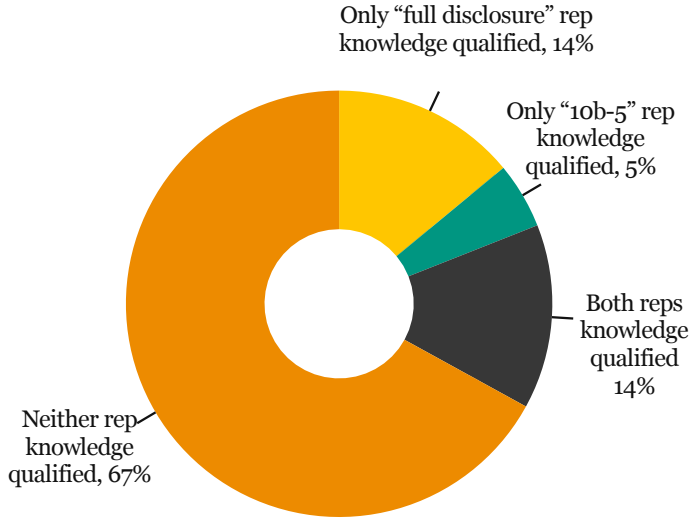
“10b–5” and “Full Disclosure” Representations: Knowledge Qualifiers

Subset: 2019–2022 deals

Subset: “10b–5” rep only



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



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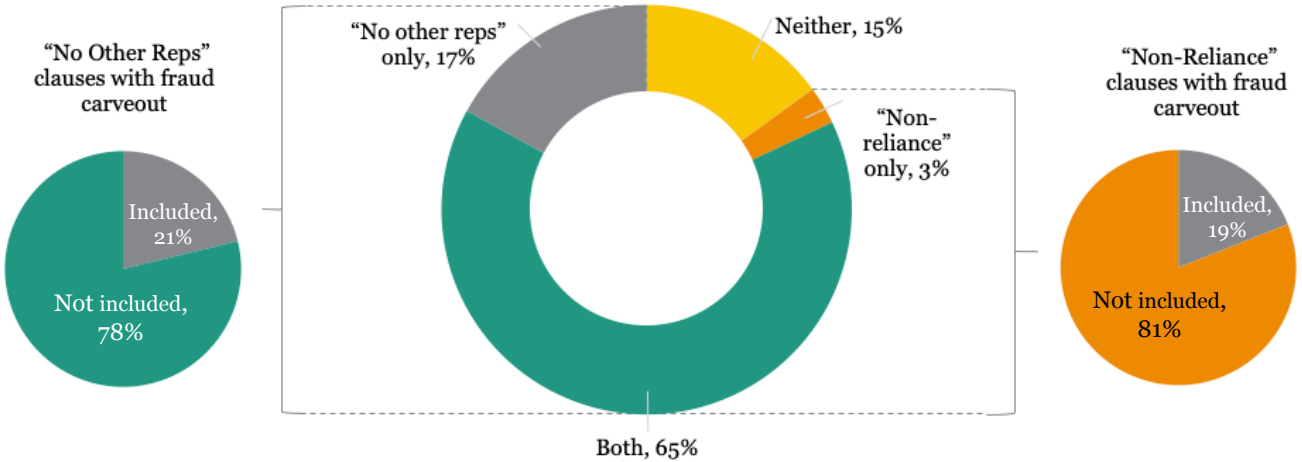
“No Other Representations” and “Non-Reliance” Clauses

KEY FINDING

NEW DATA POINT

See example terms on slide 97

Inclusion of representations and fraud carveouts (2022 deals)



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

Visit SRS Acquiom MarketStandard® to learn more.

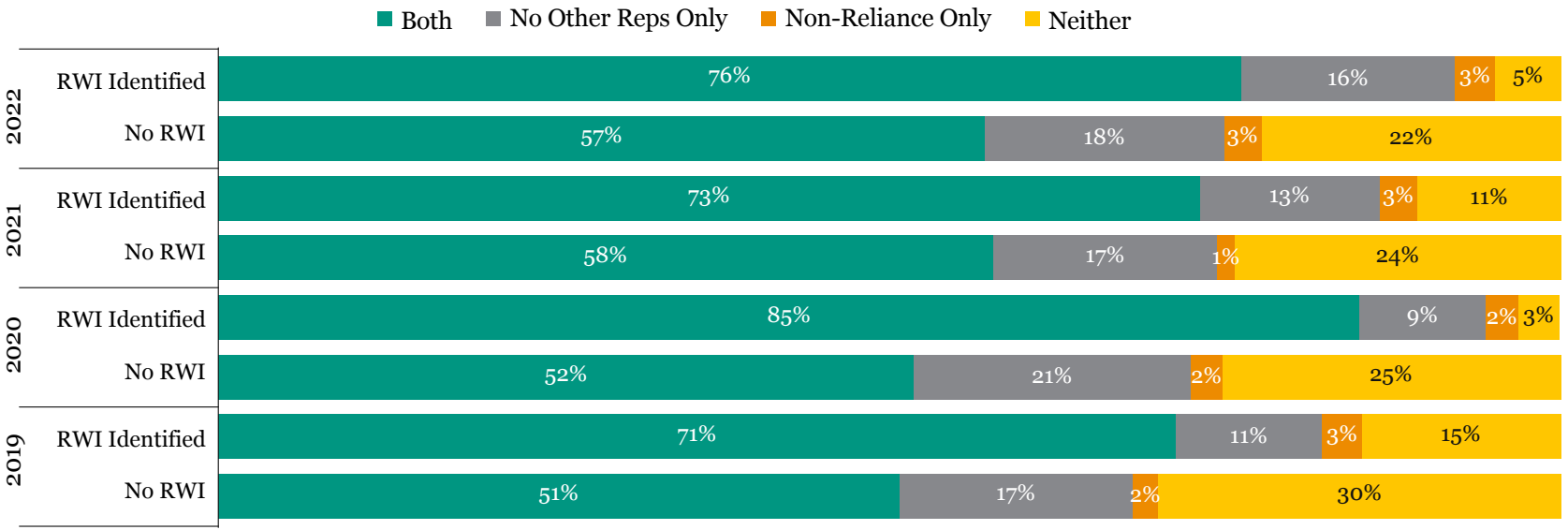
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“No Other Representations” and “Non-Reliance” Clauses: Influence of RWI

KEY FINDING

2019–2022 Deals



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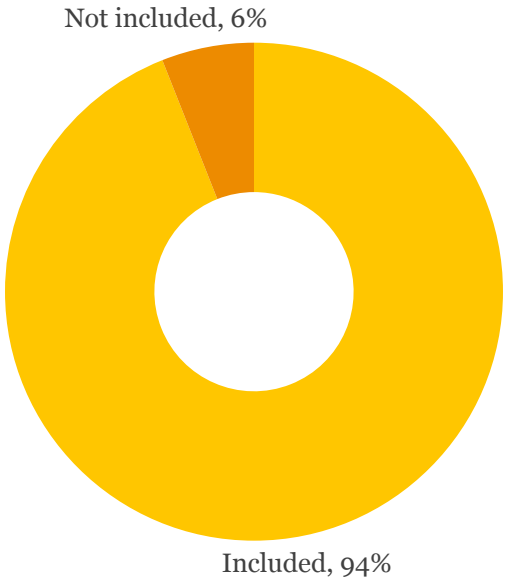
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Privacy Representation

NEW DATA POINT

See example terms on slide 97

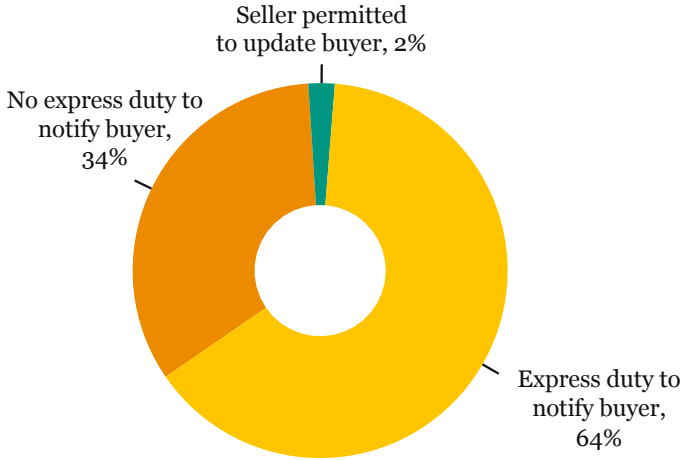
Inclusion of privacy representations (2022 deals)



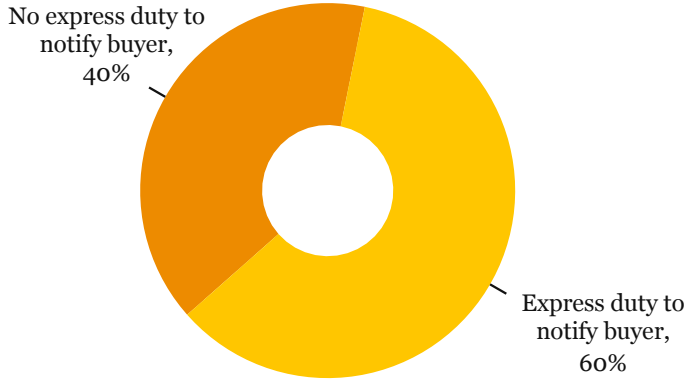
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Covenants: Seller's Duty to Notify Buyer of Pre-Closing Breaches*

Breaches of representations and warranties (2022 deals)



Breaches of covenants (2022 deals)

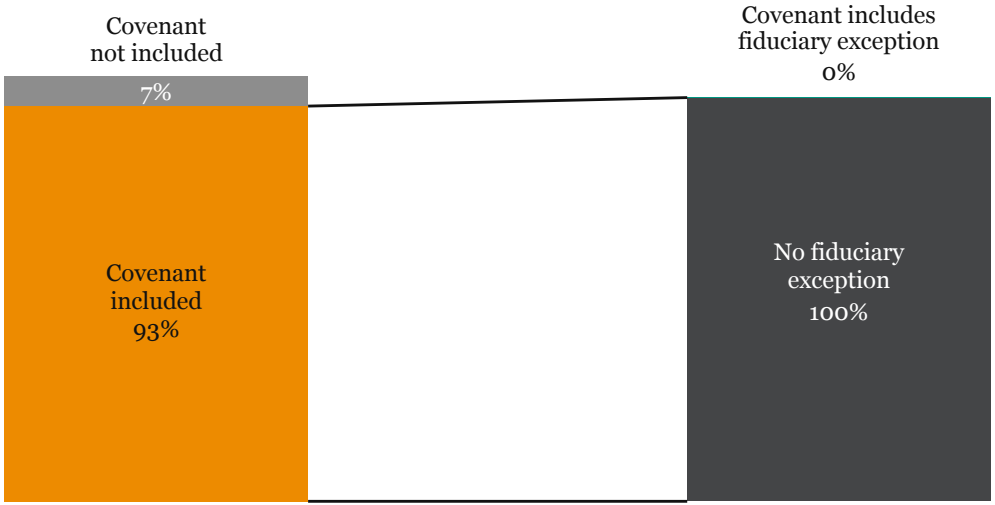


** Sample excludes "sign-and-close" deals.*

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Covenants: No-Shop/No-Talk*

No-shop/No-talk covenant inclusion† (2022 deals)



** Sample excludes "sign-and-close" deals.*
† Fiduciary exception subset excludes stock-purchase deals.

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Closing Conditions*

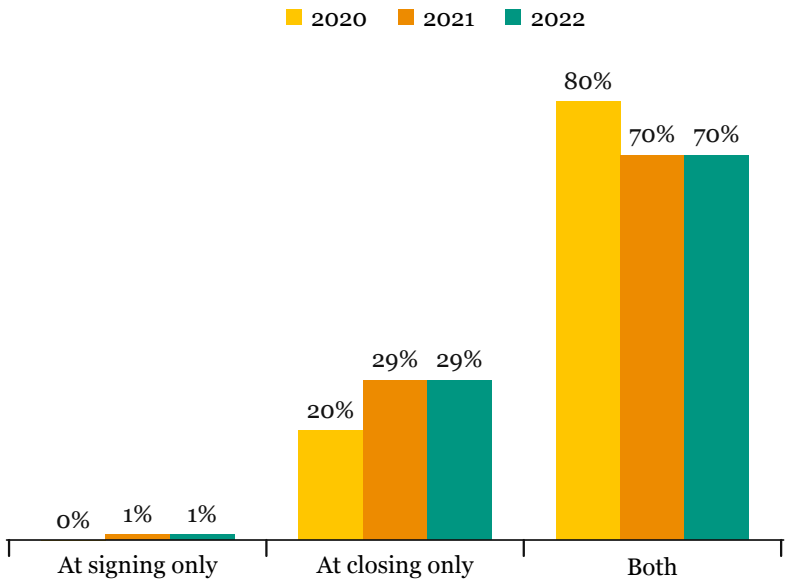
* This section's analyses exclude "sign-and-close" deals.

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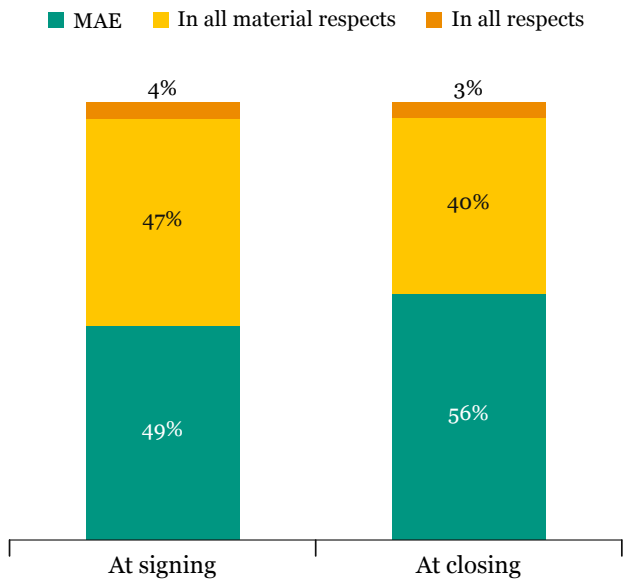
Accuracy of Seller's Representations: Accuracy and Materiality

See example terms on slide 98

Accuracy: Timing



Accuracy: Materiality (2022 deals)



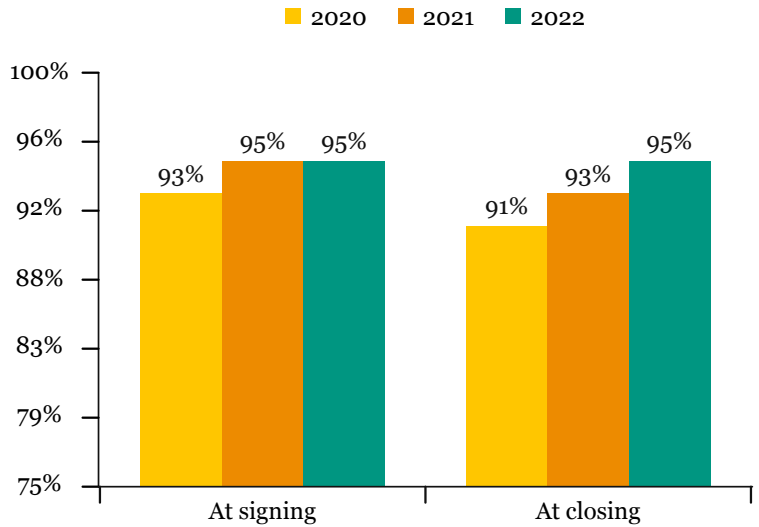
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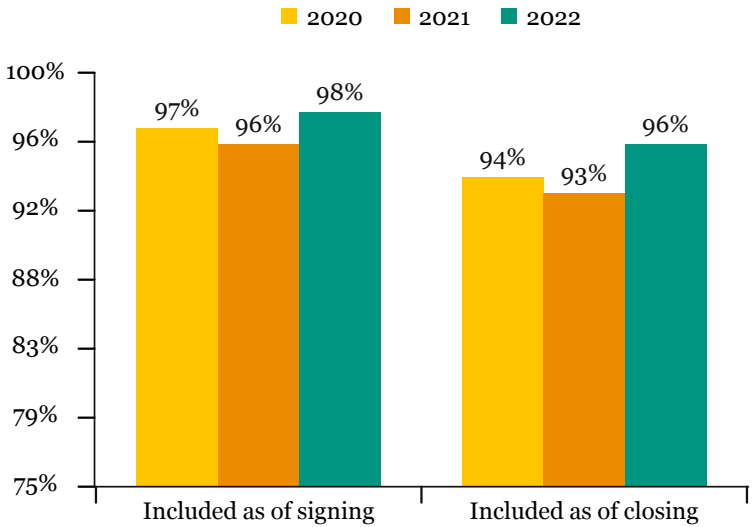
Accuracy of Seller's Representations: Materiality

See example terms on slide 99

MAE Qualifier with Capitalization Represenation Carveout*



Materiality Scrape Frequency†



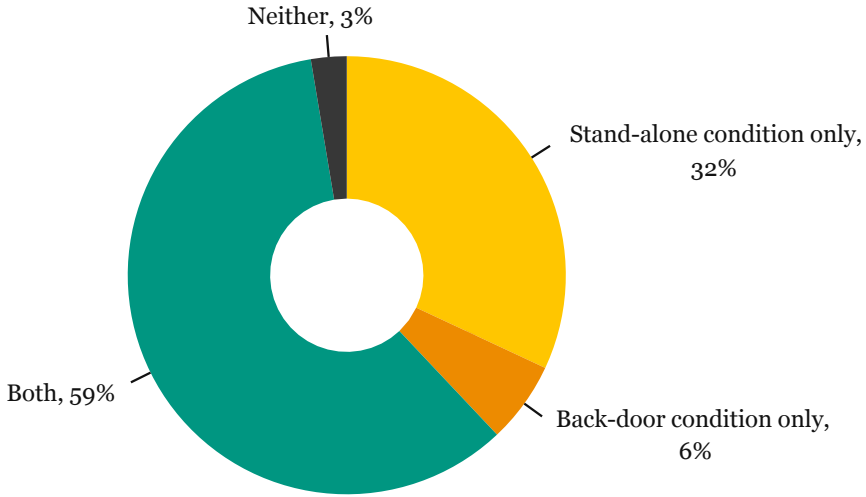
** Subset: Deals with materiality or MAE qualifiers in the "accuracy of representations" condition*
† Deals with materiality or MAE qualifiers in the "accuracy of representations" condition

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“Material Adverse Change” Condition (“MAC”)

See example terms on slide 100

MAC condition details (2022 deals)



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

Visit SRS Acquiom MarketStandard® to learn more.

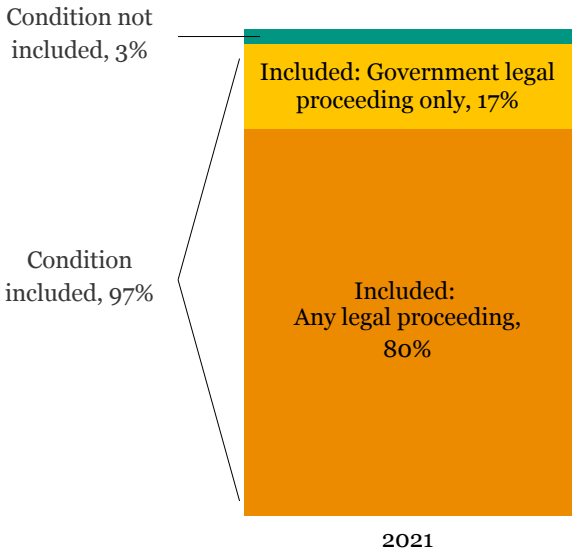
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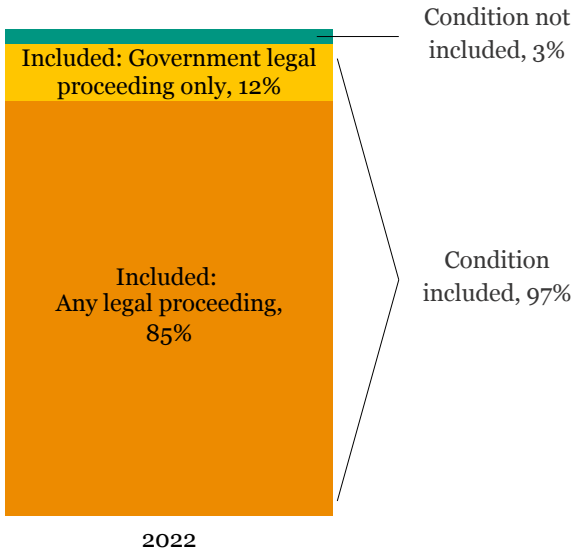
“No Legal Proceedings” Condition

See example terms on slide 100

Subset: 2021 Deals



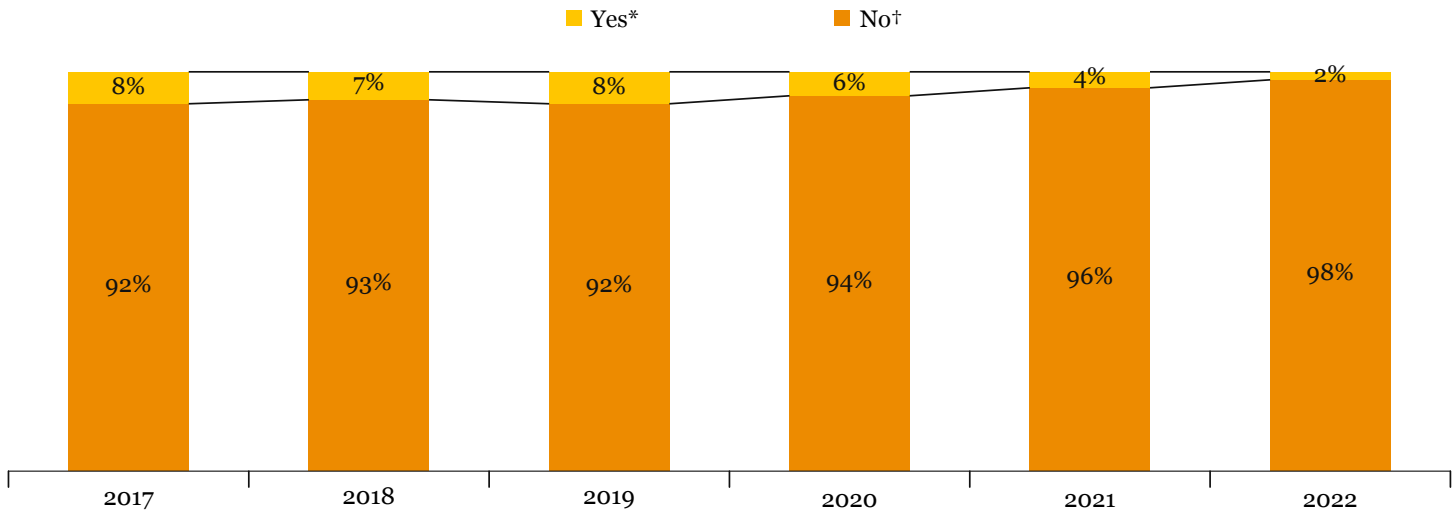
Subset: 2022 Deals



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

Opinion required as a condition to closing



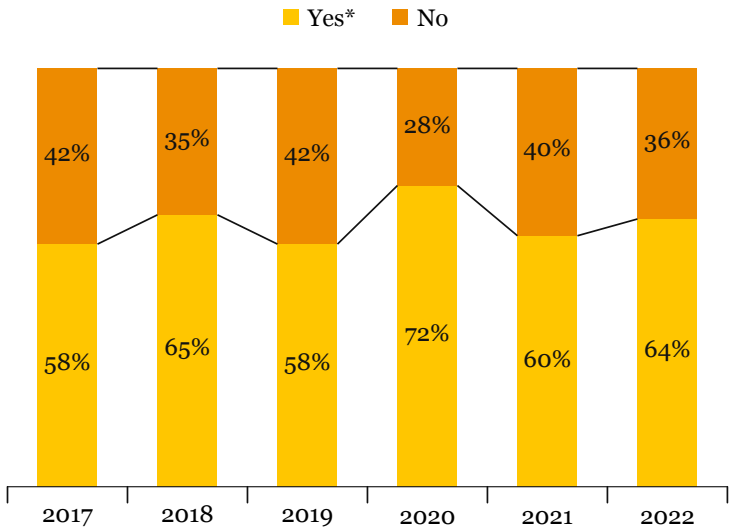
** Includes opinions delivered pursuant to both stand-alone and "closing deliverables" conditions.*
† Does not account for opinions that may have been required or delivered outside of the express terms of the agreement.

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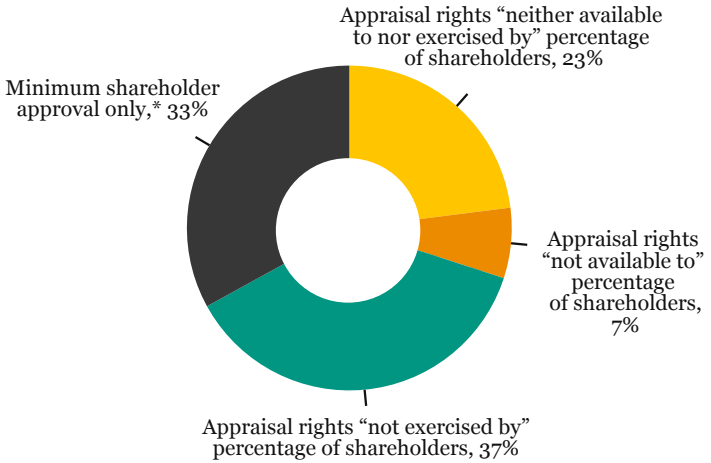
Appraisal Rights Condition

Subset: Mergers

Appraisal rights condition included



Drafting details (2022 deals including condition)



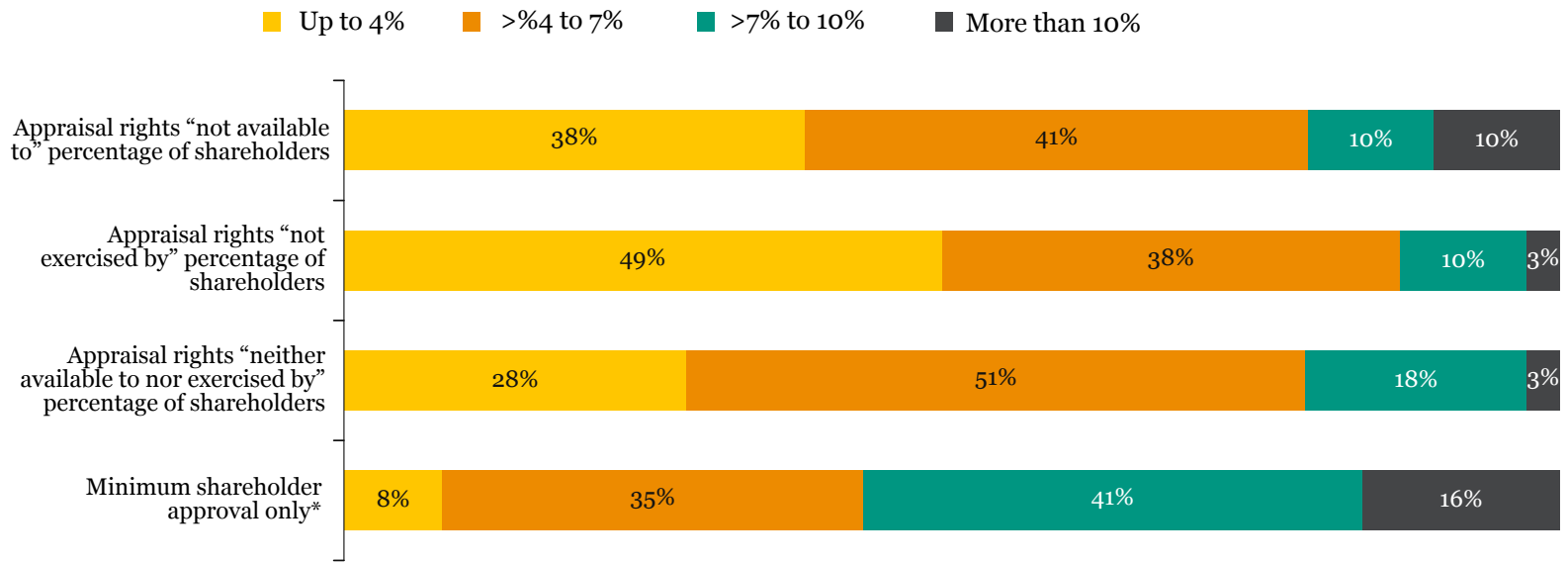
* *Includes deals without an express appraisal rights condition but with a condition specifying a minimum percentage of shareholder votes (on a fully diluted basis) approving the merger, effectively waiving appraisal rights.*

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Appraisal Rights Condition: Thresholds

Subset: Mergers since 2019 with an appraisal rights condition

Condition threshold details



* *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.*

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Indemnification

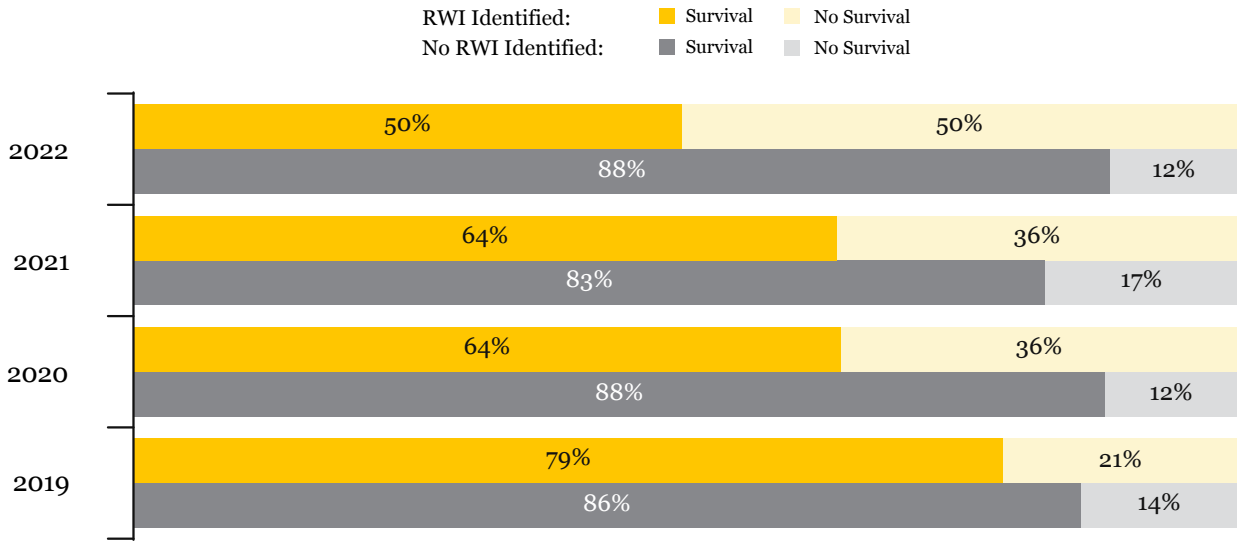
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General Survival of Sellers' Representations and Warranties

KEY FINDING

27% of 2022 deals were structured as "no survival."

Influence of Reps and Warranties Insurance (2019–2022)



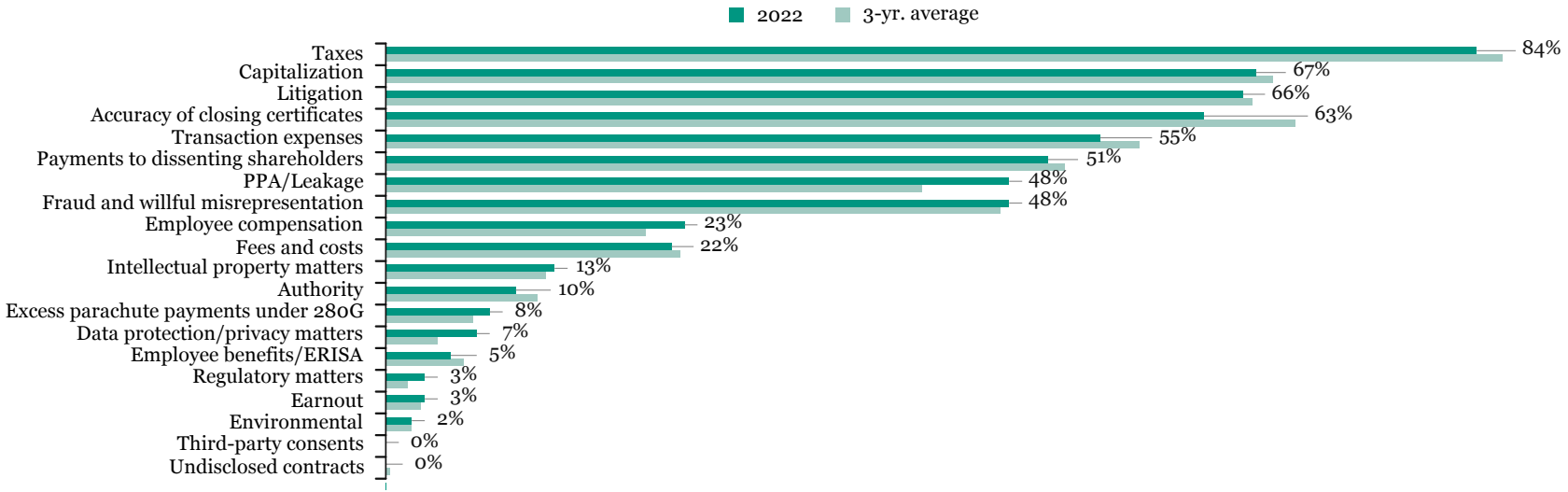
For more information, see the SRS Acquiom white paper:

Influence of Representations and Warranties Insurance on Private Negotiations, Deal Terms, and Claims Activity

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Stand-alone Indemnities*

Frequency: 2022 deals compared to the 3-year average (2020–2022)†



* *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 in the chart are for 2022 deals.*

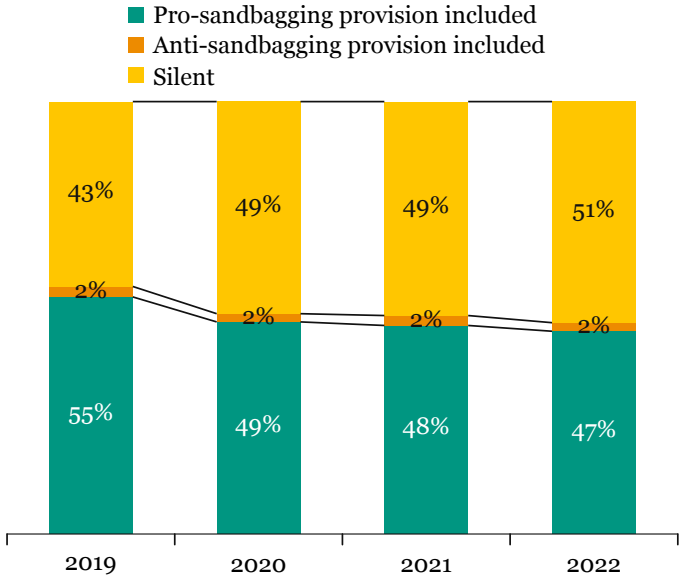
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“Sandbagging”

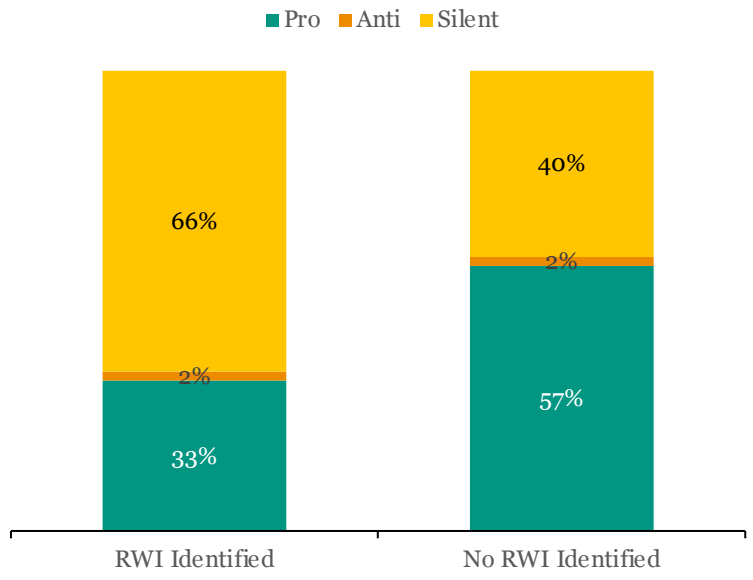
KEY FINDING

See example terms on slide 100

Year-over-year trend



Sandbagging provision, deal years 2019–2022



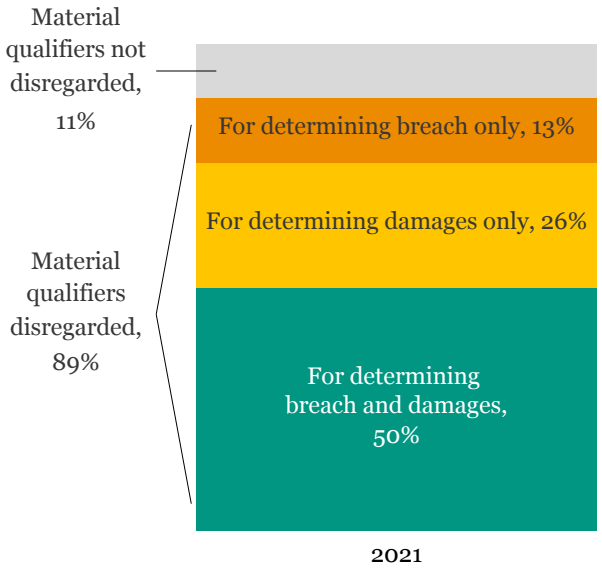
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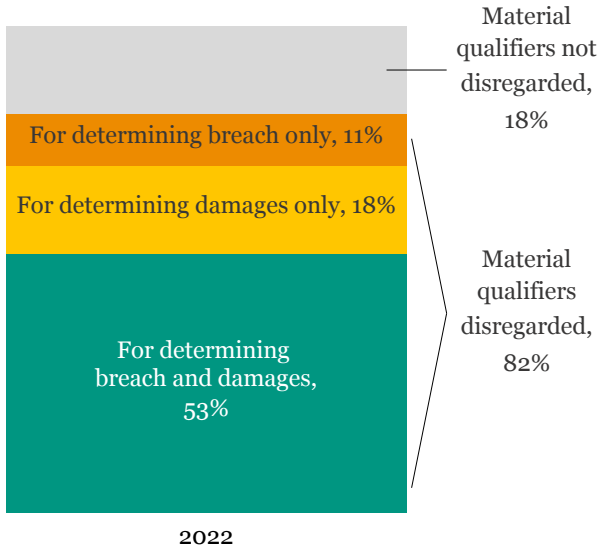
“Materiality Scrape” Inclusion

See example terms on slide 101

Subset: 2021 Deals



Subset: 2022 Deals

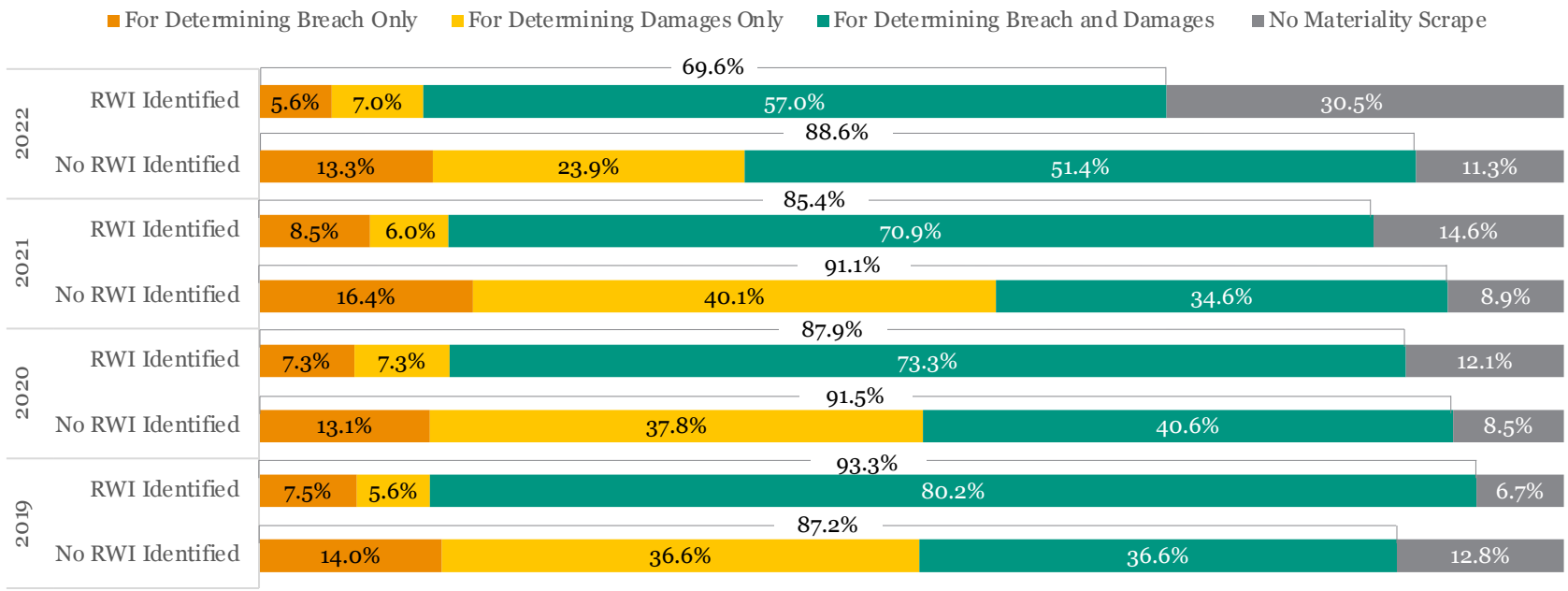


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“Materiality Scrape”: Influence of RWI

KEY FINDING

Materiality scrape included and details (2019–2022)



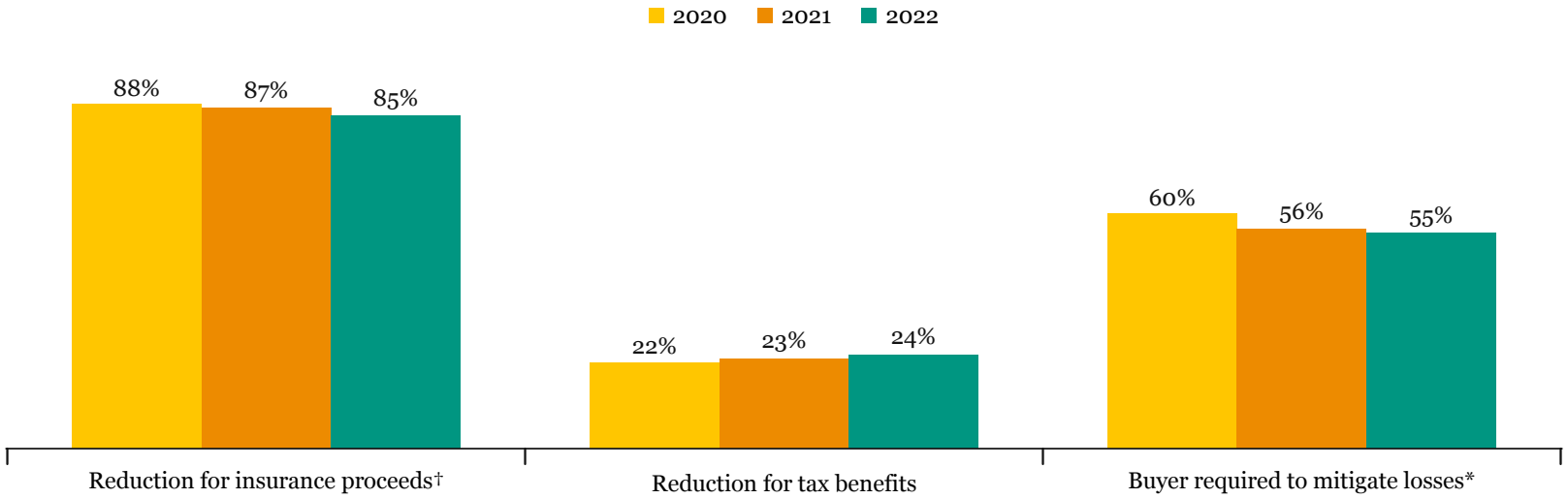
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Reductions Against Buyer's Indemnification Claims

See example terms on slide 102

Provision included



* *Includes agreements requiring the buyer to seek payments under applicable insurance policies.*
† *Insurance policies other than RWI*

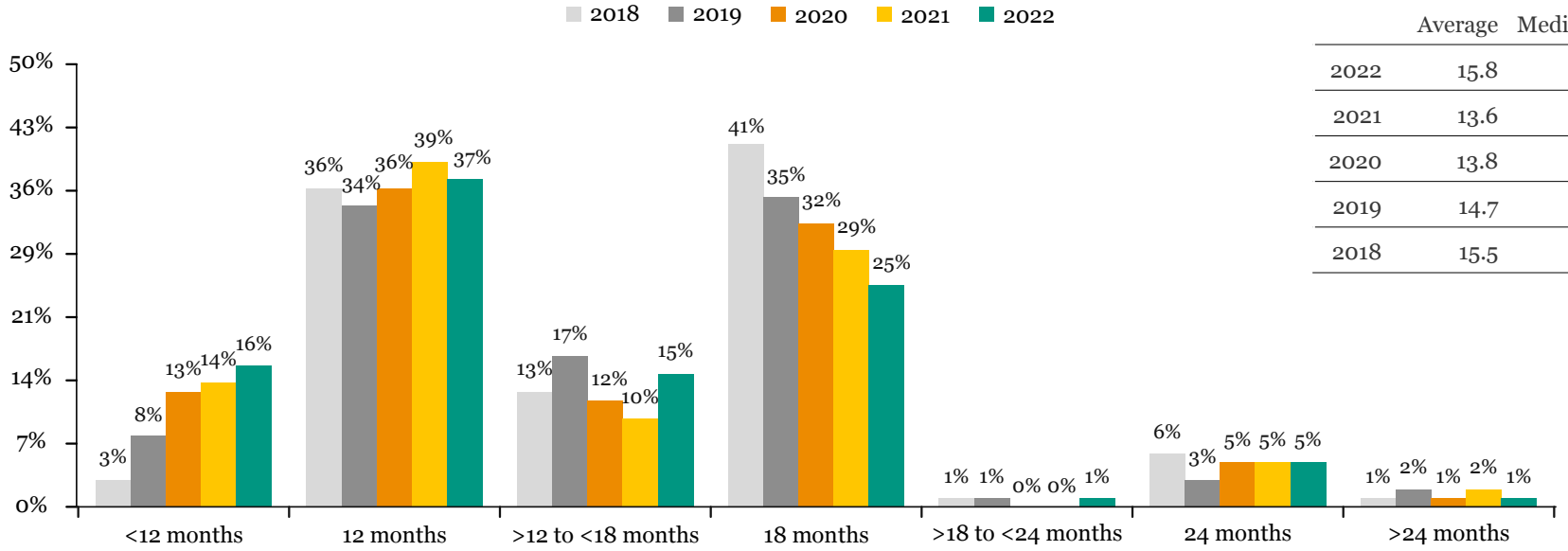
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General Survival Period/Time to Assert Claims

KEY FINDING

See example terms on slide 102

Survival period (2022 median: 15 months)

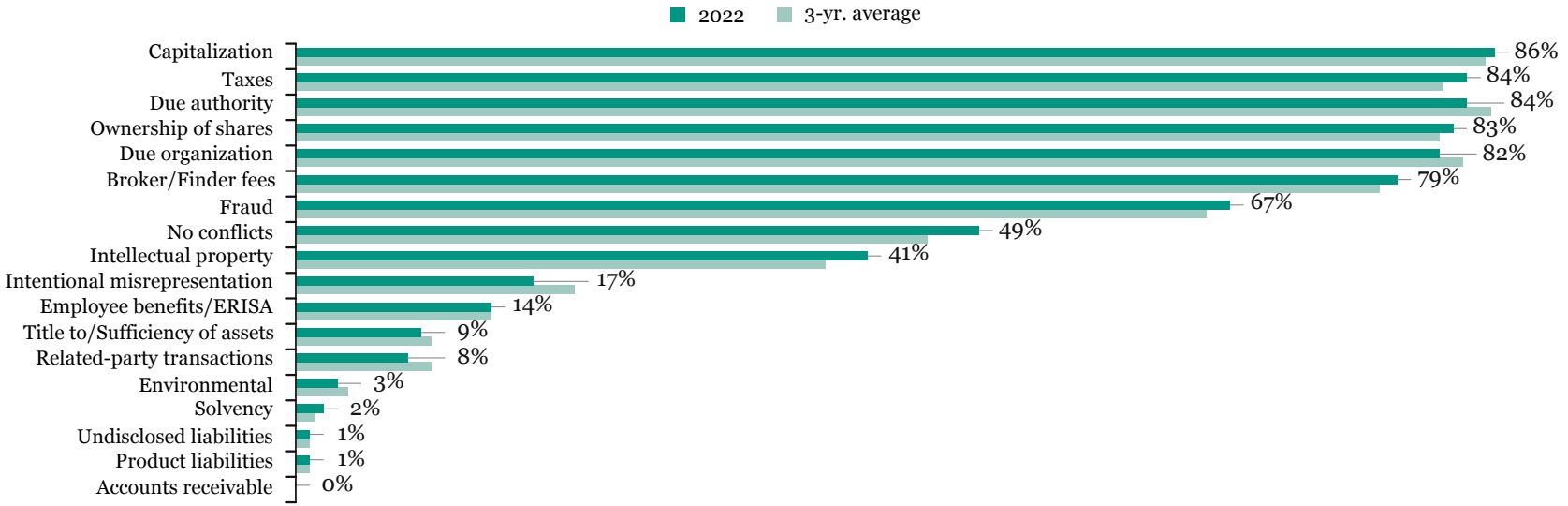


	Average	Median
2022	15.8	15
2021	13.6	12
2020	13.8	15
2019	14.7	15
2018	15.5	15

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

Carveout frequency: 2022 deals compared to the 3-year average (2020–2022)†



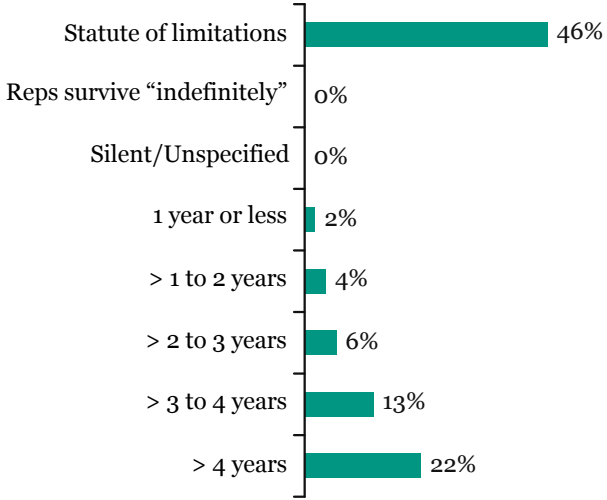
* *Matters subject to carveouts survive longer than the general survival period.*
† *Percentages in the chart are for 2022 deals.*

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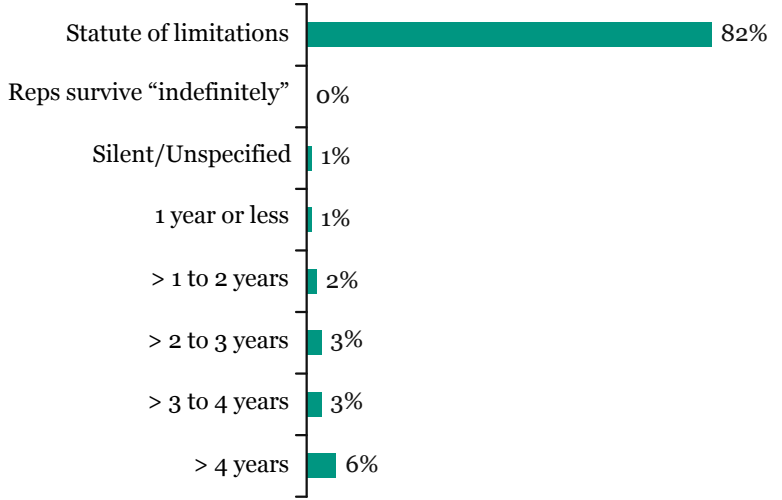
Second-Level Survival: "Fundamental" and Tax Representations

Subset: 2022 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

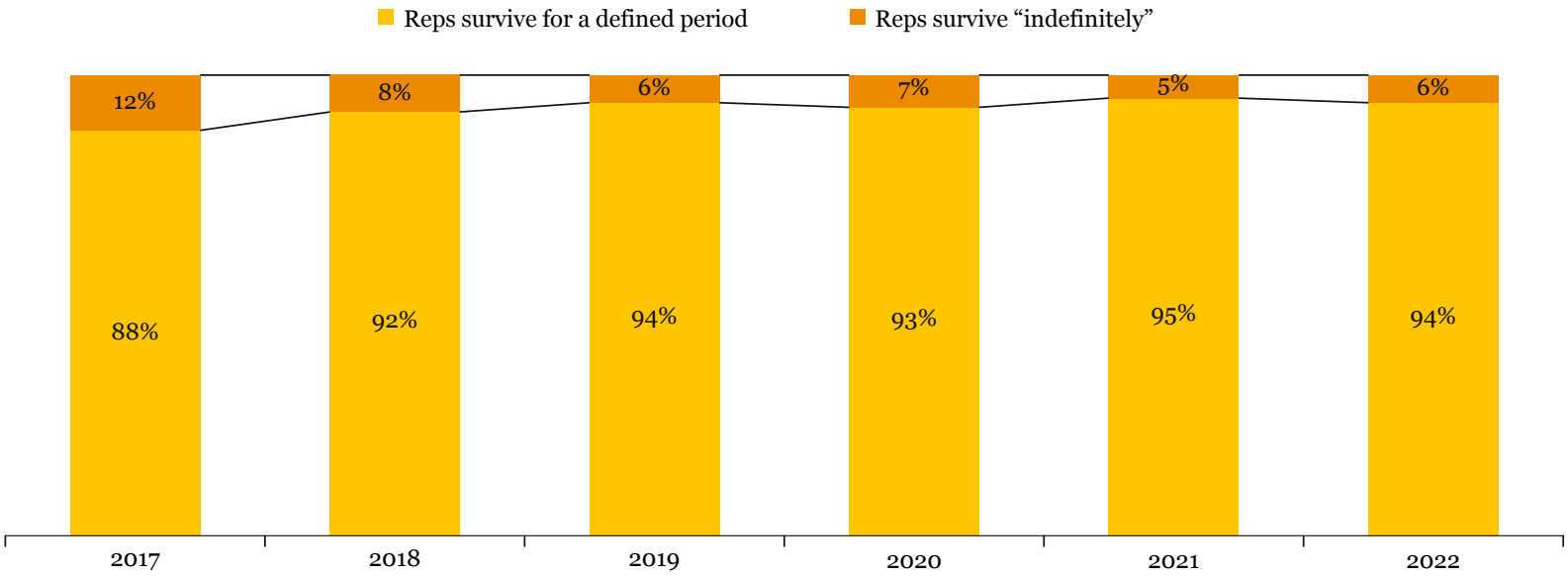


** For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property and fraud).*

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

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

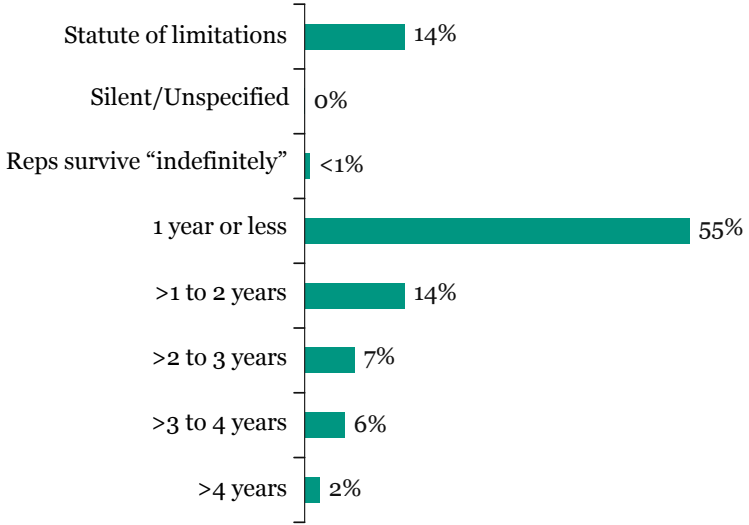


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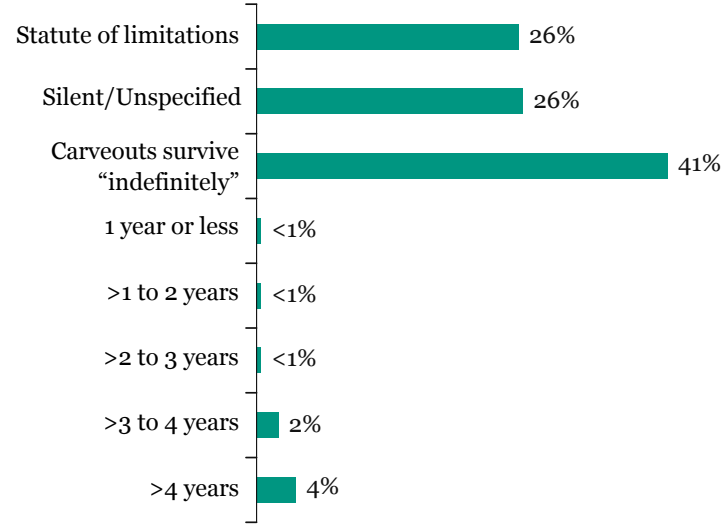
Second-Level Survival: IP Representations and Fraud

Subset: 2022 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

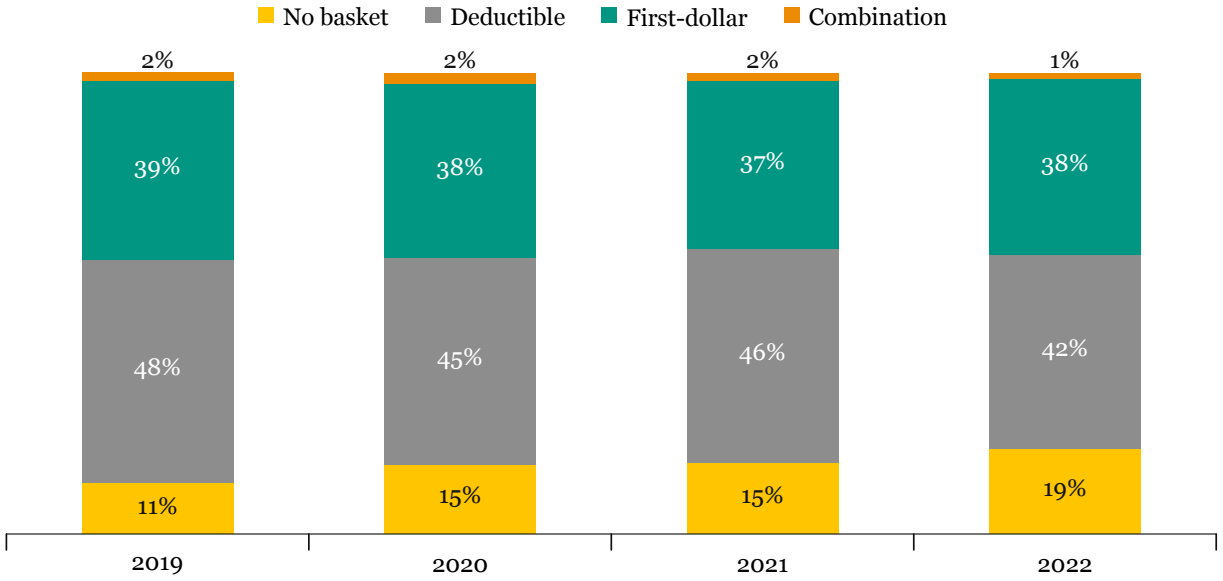


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Baskets: Definitions

See example terms on slides 103

Basket frequency



For more information, see the SRS Acquiom checklist:

M&A Seller Checklist: Post-Close Drafting Considerations

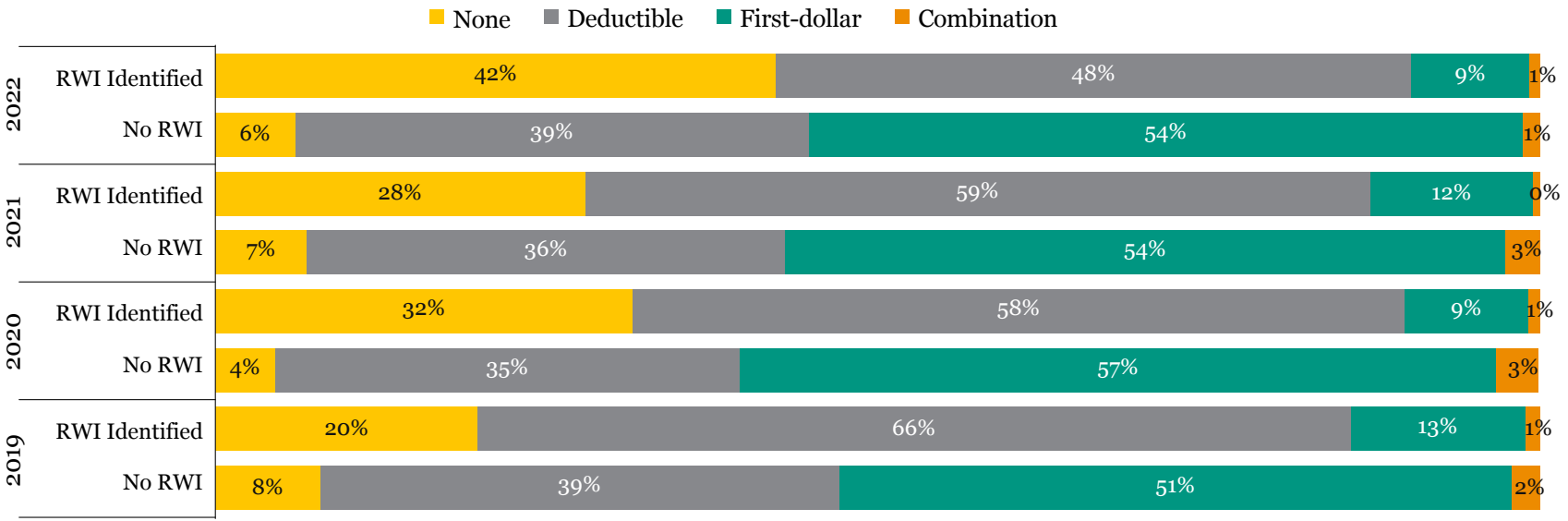
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Baskets: Influence of RWI

KEY FINDING

Basket type distribution, deals 2019–2022

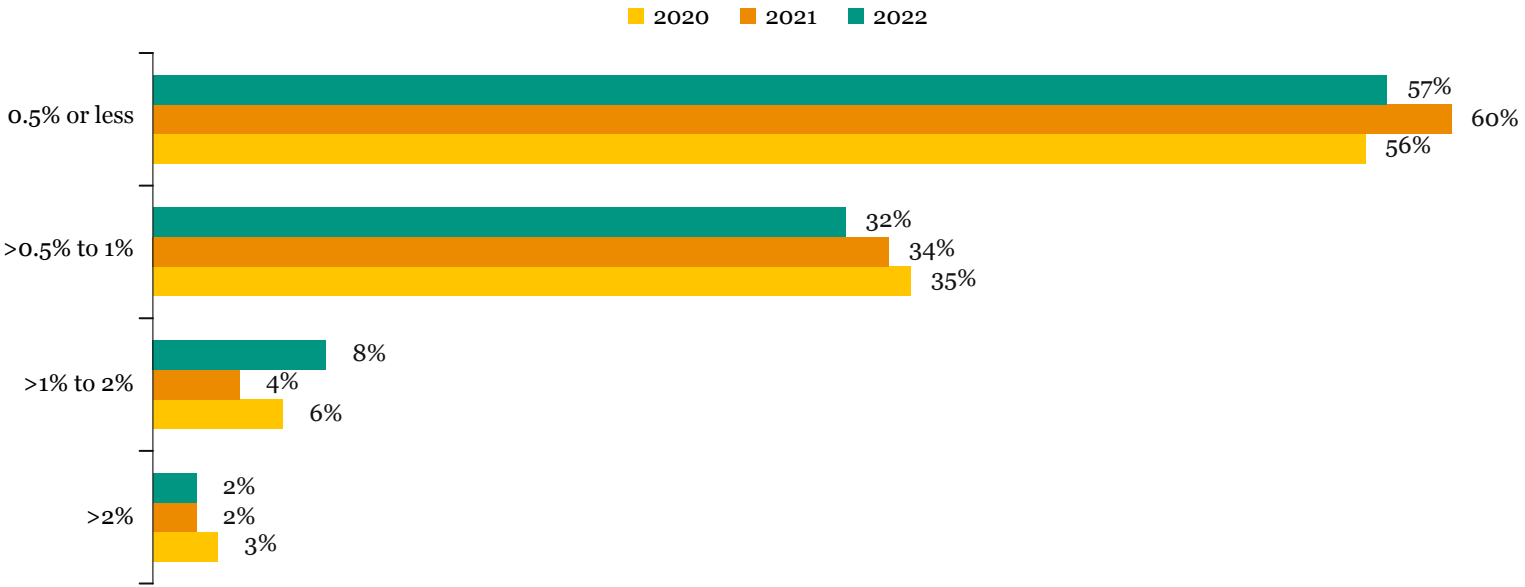


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Baskets as a Percentage of Transaction Value

Subset: Deals with deductible and first-dollar baskets

Basket sizes

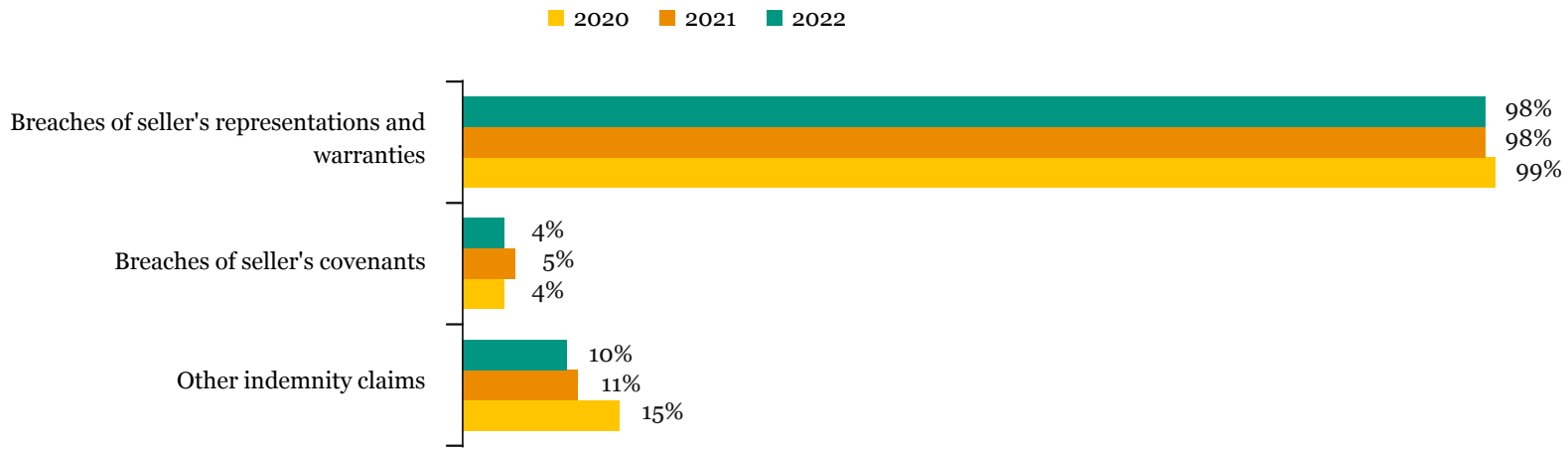


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Baskets: General Coverage*

Subset: Deals with baskets

Coverage details



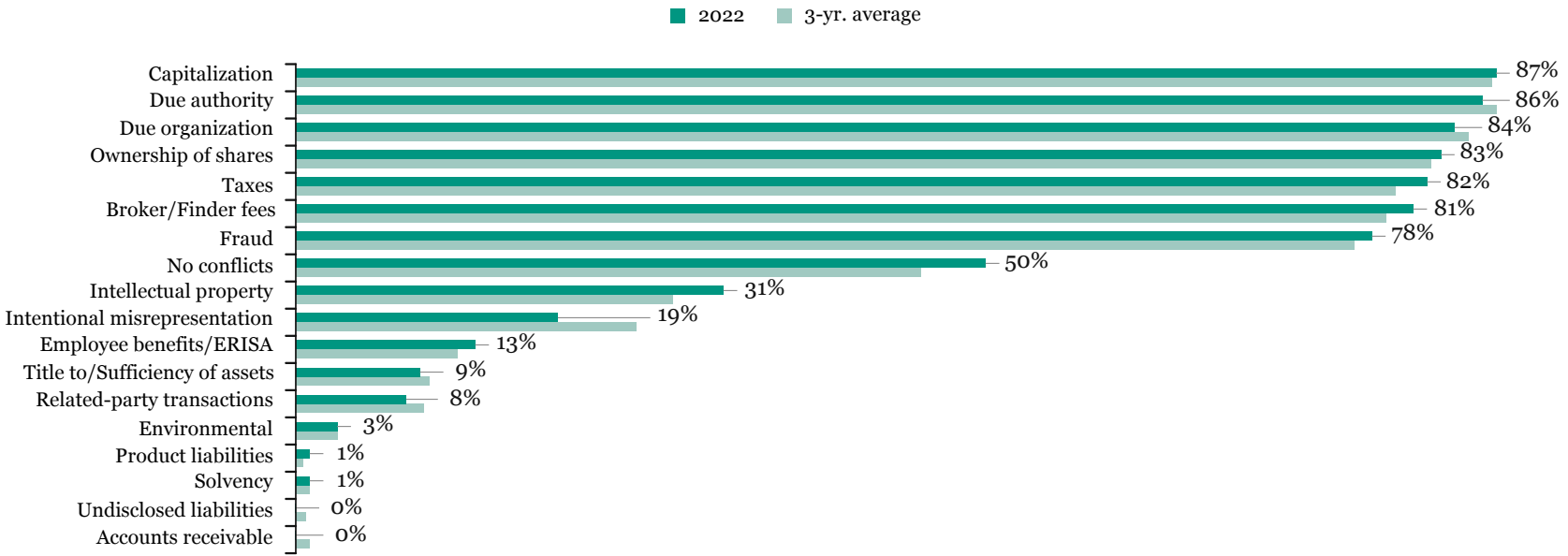
** Carveouts to general basket coverage are discussed on the next slide.*

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Baskets: Carveouts

Subset: 2022 deals with baskets

Carveout frequency: 2022 deals compared to the 3-year average (2020–2022)†



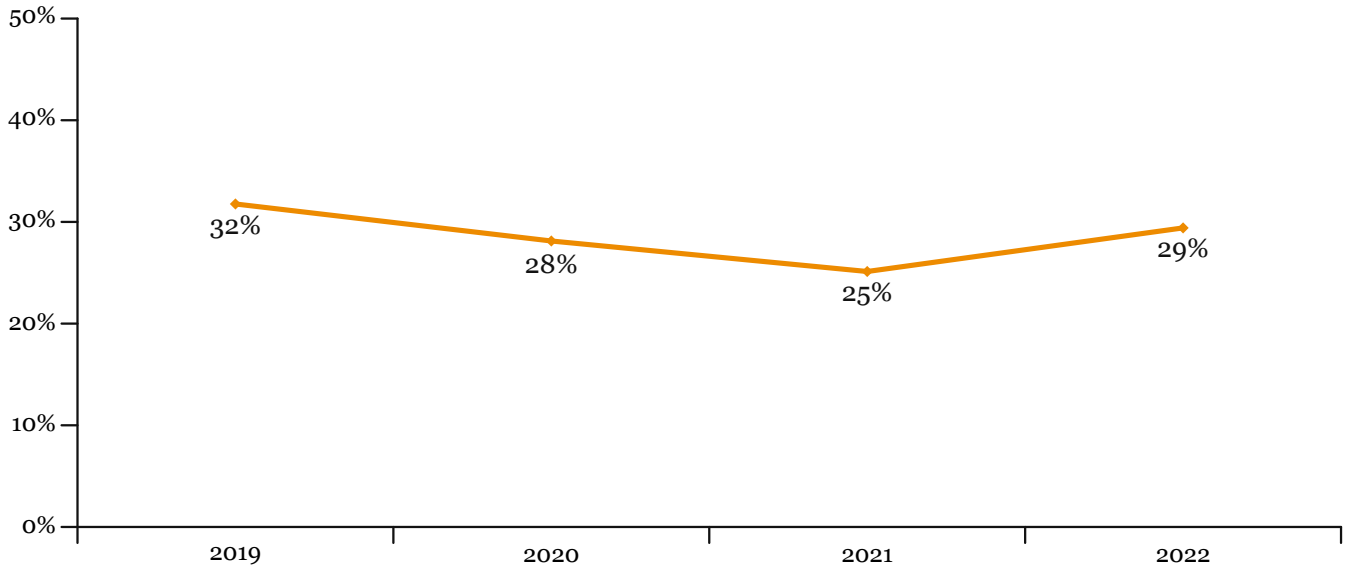
† *Percentages in the chart are for 2022 deals.*

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Baskets: Eligible Claim Threshold

See example terms on slide 103

Threshold included, year-over-year



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

Visit SRS Acquiom MarketStandard® to learn more.

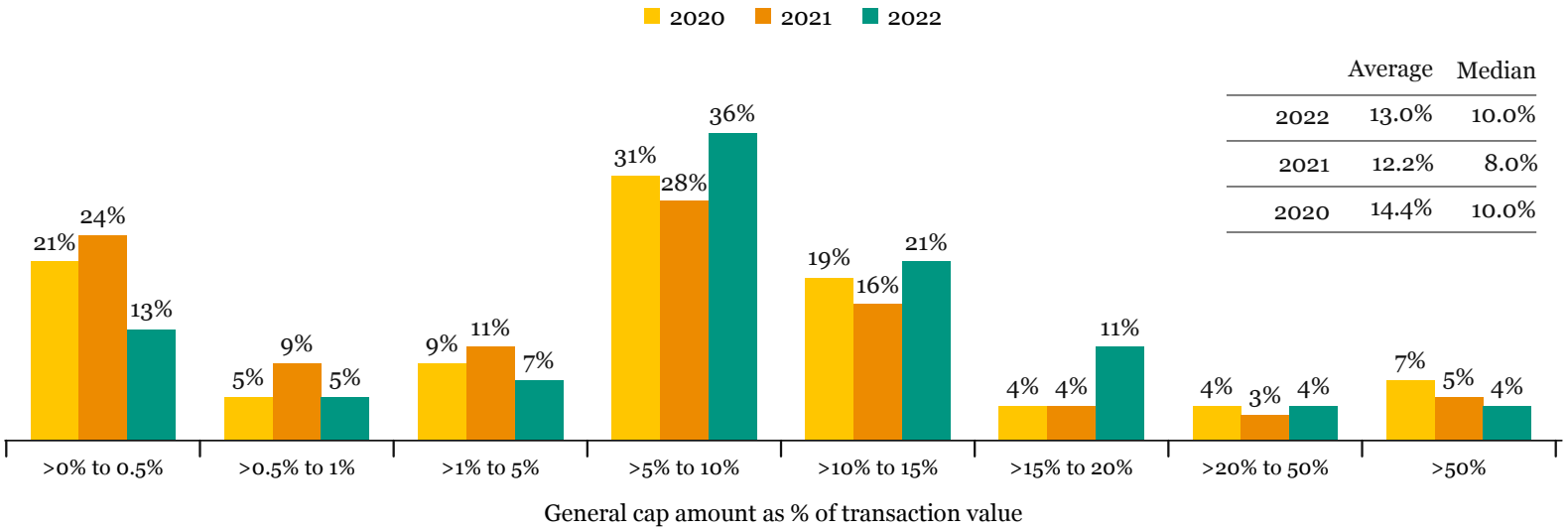
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Caps as a Percentage of Transaction Value*: All Deals

For 2022, the average cap was 13%; the median was 10%. 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, 2020–2022



	Average	Median
2022	13.0%	10.0%
2021	12.2%	8.0%
2020	14.4%	10.0%

** In 2022 deals with escrows/holdbacks, 61% of caps equaled the escrowed amount.*

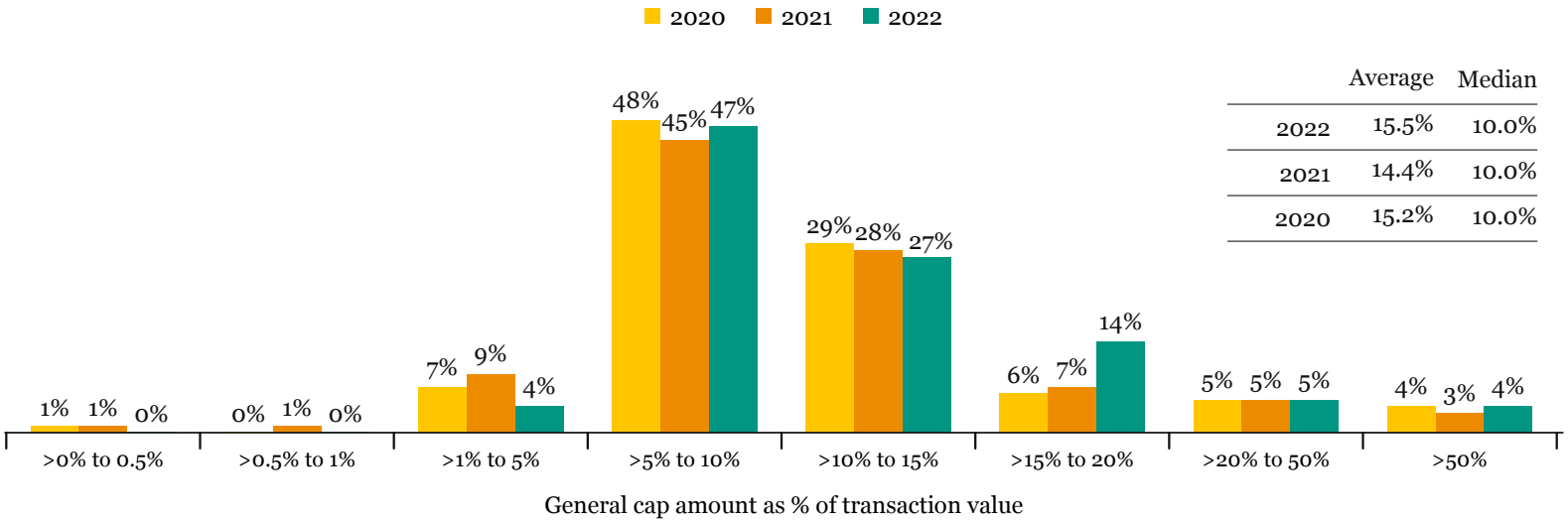
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Caps as a Percentage of Transaction Value: No RWI Identified

KEY FINDING

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 2022 was 15.5%; the median was 10%. 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, 2020–2022



	Average	Median
2022	15.5%	10.0%
2021	14.4%	10.0%
2020	15.2%	10.0%

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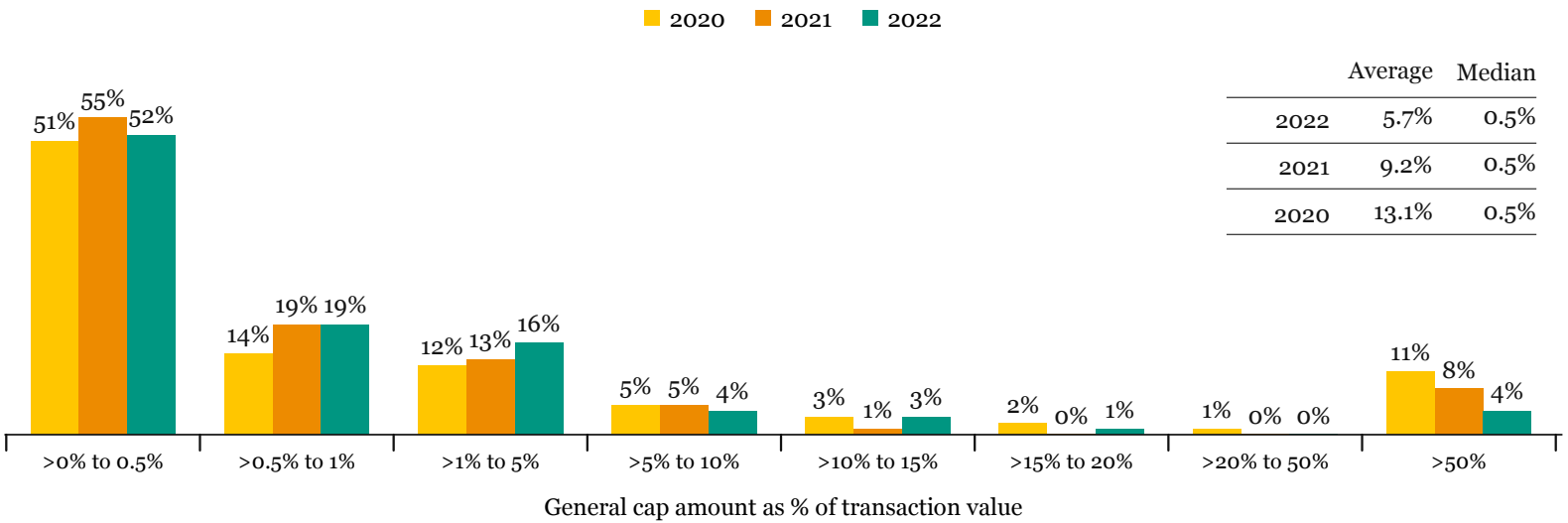
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Caps as a Percentage of Transaction Value: RWI Identified

KEY FINDING

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 2022 was 5.7%; 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 omits some deals with policies.

Details, 2020–2022



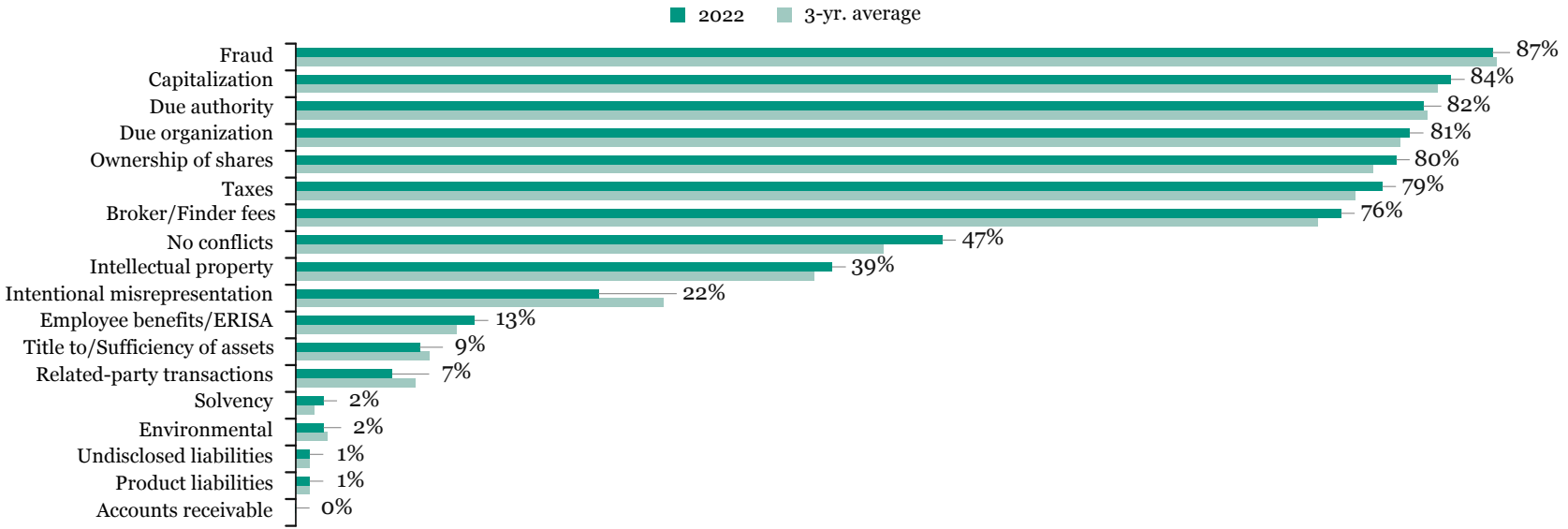
	Average	Median
2022	5.7%	0.5%
2021	9.2%	0.5%
2020	13.1%	0.5%

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Caps: Carveouts

Frequency: 2022 deals compared to the 3-year average (2020–2022)†



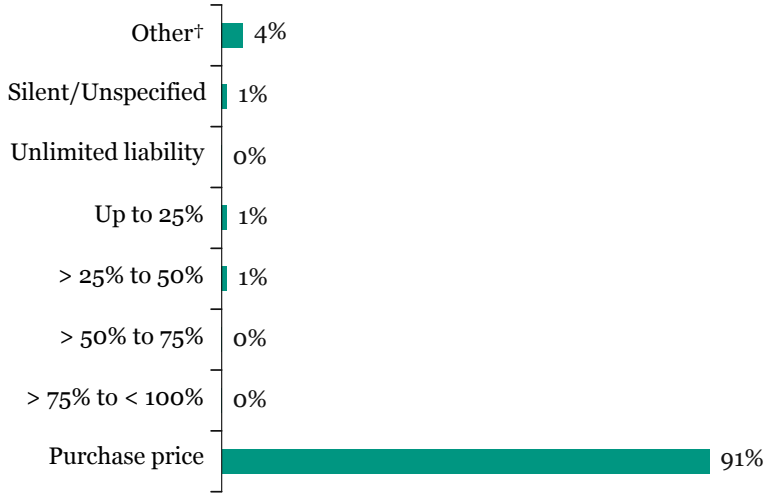
† *Percentages in the chart are for 2022 deals.*

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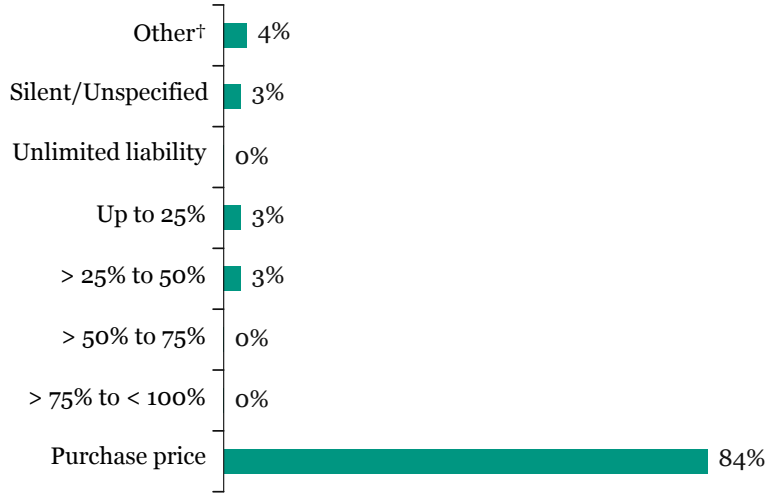
Second-Level Caps: "Fundamental" and Tax Representations

Subset: 2022 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



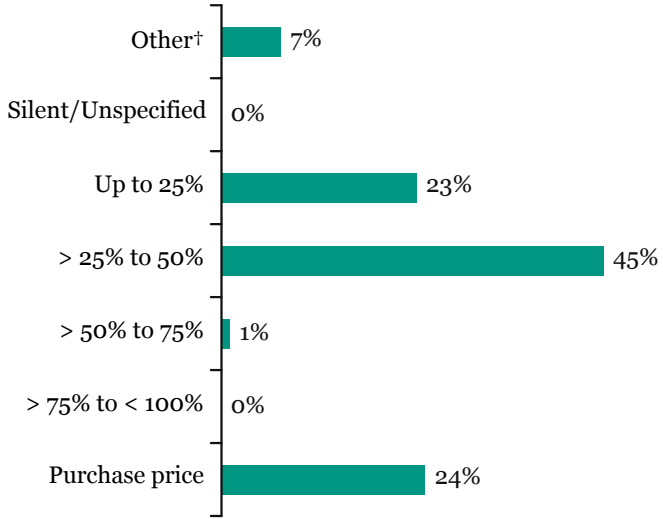
** For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property, and fraud).*
† "Other" includes, for example, offsets against future earnouts above the general cap.

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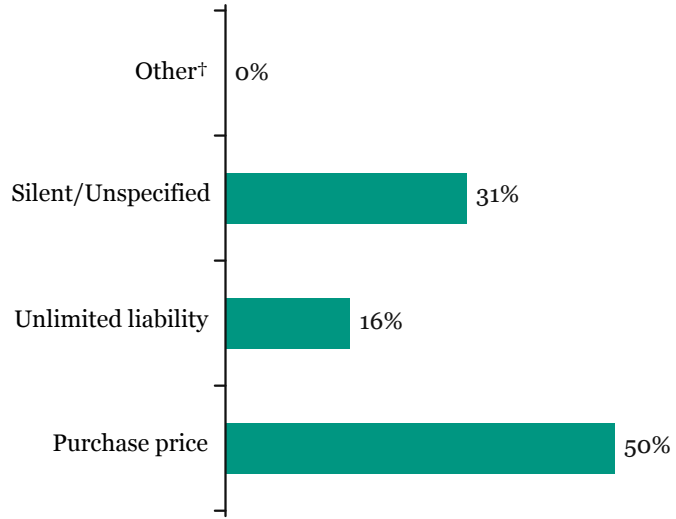
Second-Level Caps: IP Representations and Fraud

Subset: 2022 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.

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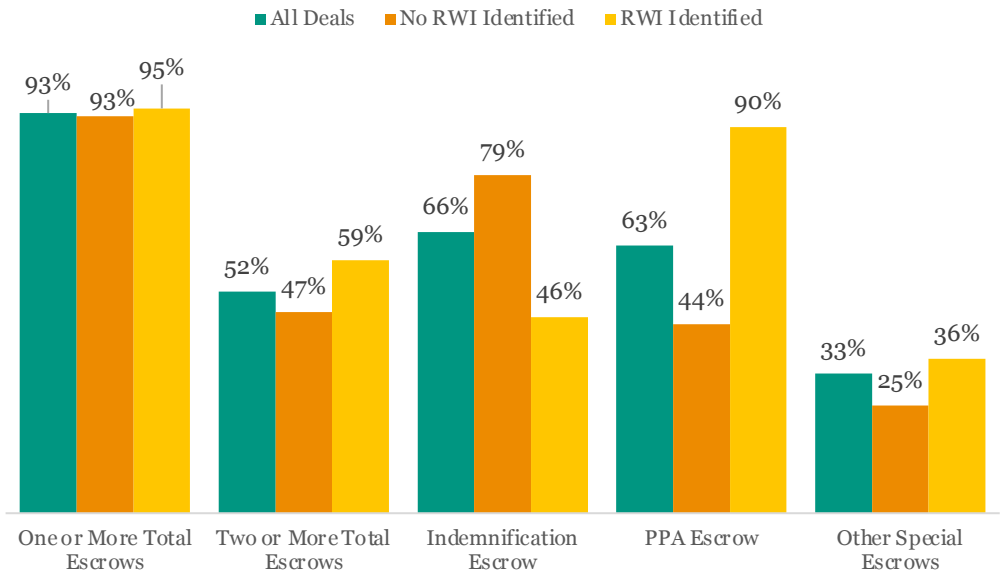
Deal Escrows:* Frequency by Category and Aggregate Medians/Averages

KEY FINDING

NEW DATA POINT

Subset: 2022 deals

Percentage of all deals that include an escrow, by category



* *Includes holdbacks*

Subset: 2022 deals with an indemnification escrow

Aggregate size of all escrows as a % of transaction value

	Average	Median
All deals	11.4%	10.0%
No RWI Identified	14.1%	11.3%
RWI Identified	4.5%	2.5%

Subset: 2022 deals with an indemnification escrow

Size of general indemnification escrows as a % of transaction value

	Average	Median
All deals	8.7%	10.0%
No RWI Identified	11.5%	10.0%
RWI Identified	1.2%	0.5%

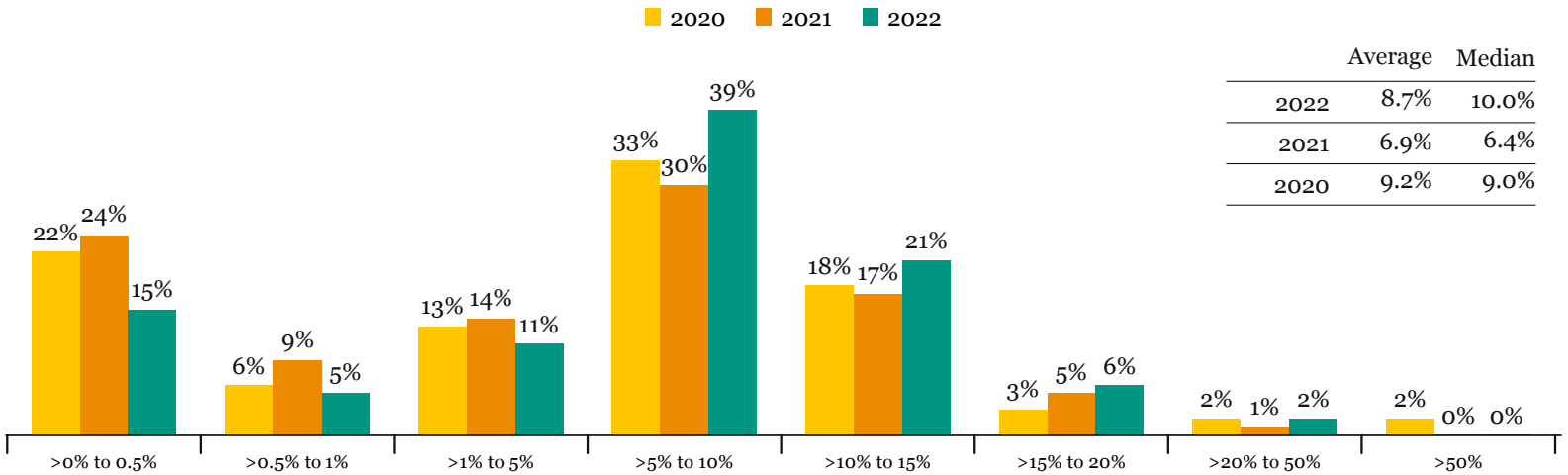
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General Indemnification Escrows/Holdbacks as a Percentage of Transaction Value: All Deals*

* Implied subset: This data (and the data on the next two slides) does not include deals without a general escrow/holdback, which constituted approximately 34% of all deals in 2022. That compares to 35% in 2021 and 32% in 2020.

Details, 2020–2022



	Average	Median
2022	8.7%	10.0%
2021	6.9%	6.4%
2020	9.2%	9.0%

General Indemnification Escrow Size as % of Transaction Value

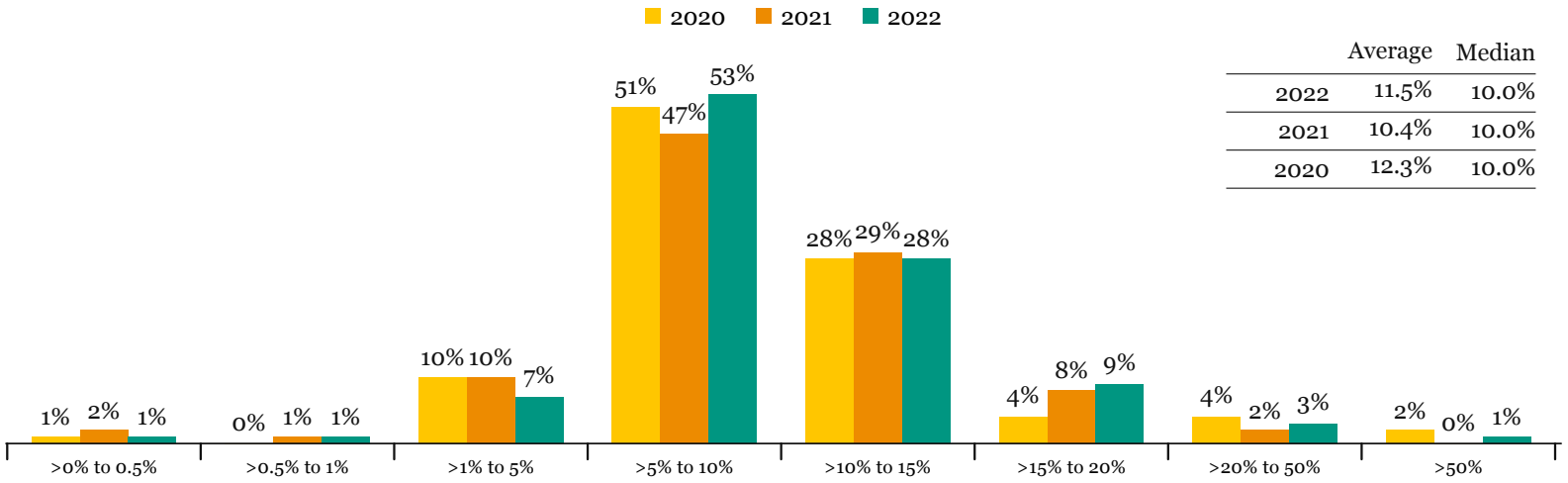
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General Indemnification Escrows/Holdbacks as a Percentage of Transaction Value: No RWI Identified

KEY FINDING

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 2022 was 11.5%; the median was 10%. 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, 2020–2022



	Average	Median
2022	11.5%	10.0%
2021	10.4%	10.0%
2020	12.3%	10.0%

General Indemnification Escrow Size as % of Transaction Value

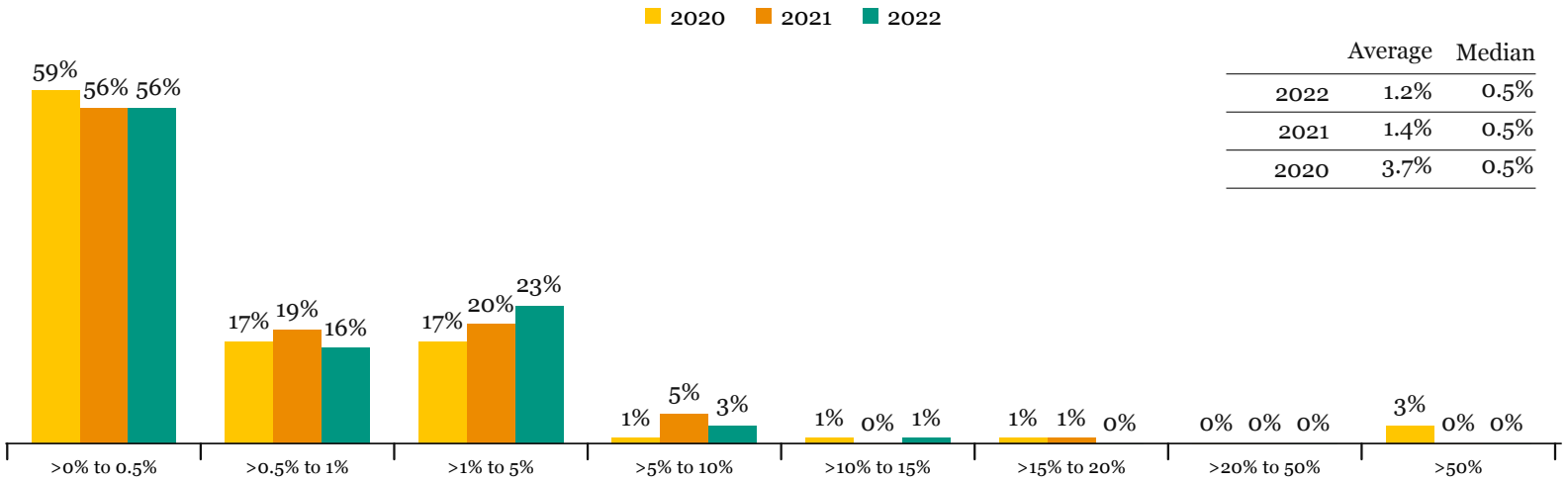
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General Indemnification **Escrows/Holdbacks as a Percentage of Transaction Value:** RWI Identified

KEY FINDING

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 2022 was 1.2%; 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, 2020–2022



General Indemnification Escrow Size as % of Transaction Value

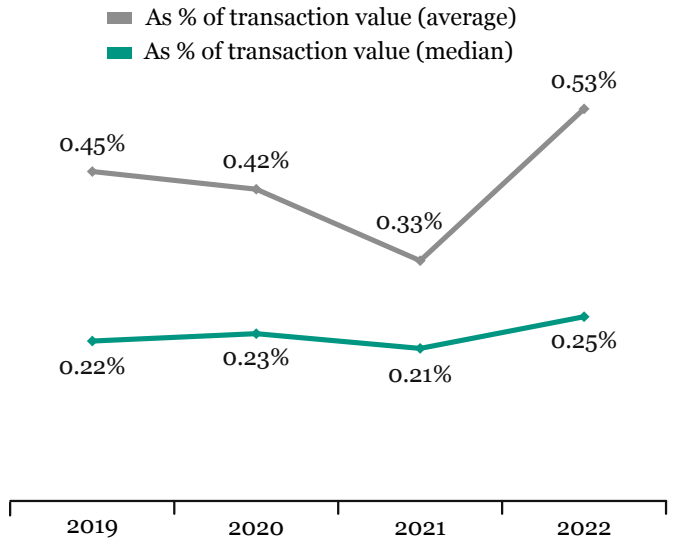
	Average	Median
2022	1.2%	0.5%
2021	1.4%	0.5%
2020	3.7%	0.5%

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Post-closing Expense Fund Sizes*

Subset: Deals with expense funds (99% of all 2022 deals).

Median/Average sizes by % of transaction value



Subset: 2022 deals with expense funds.

Average expense fund sizes by dollar amount

	Average
Deals without earnouts	$242,000
Deals with earnouts	$332,000

** 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

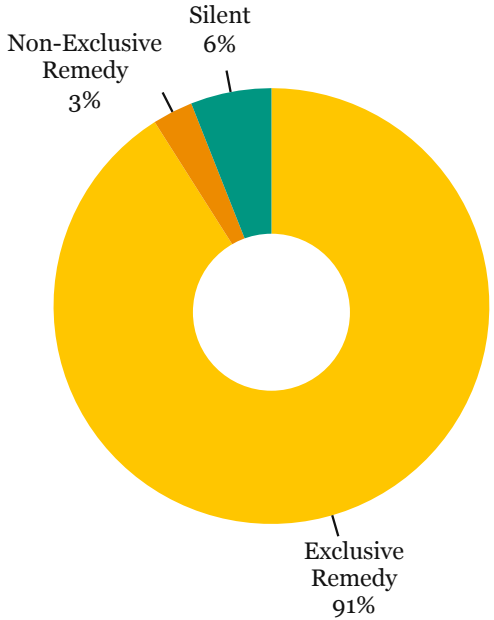
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Indemnification as Exclusive Remedy for Breach

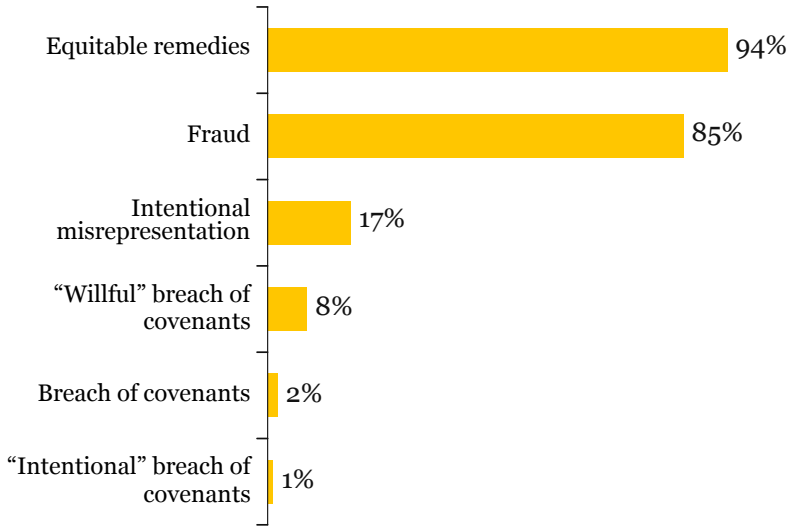
Subset: 2022 deals

See example terms on slide 103

Indemnification as exclusive remedy



Carveouts to exclusive remedy



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Definition of Fraud

KEY FINDING

NEW DATA POINT

For 2022 deals where fraud was carved out from the "indemnification as sole remedy" provision, the definition of fraud included one or more of the following:

2022 deals



* *Acquisition agreement language either expressly specified the laws of Delaware or included the elements of actual fraud and intent to deceive in the contractual definition of fraud.*

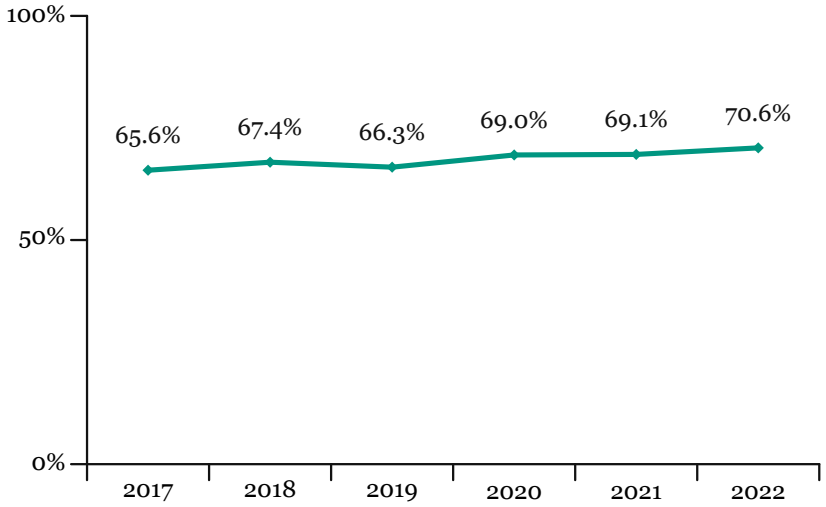
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Dispute Resolution

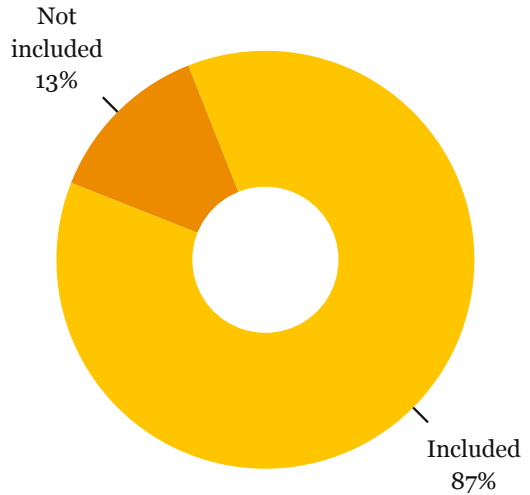
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Waivers

Legal representation conflict waiver* included



Waiver of jury trial (2022 deals)

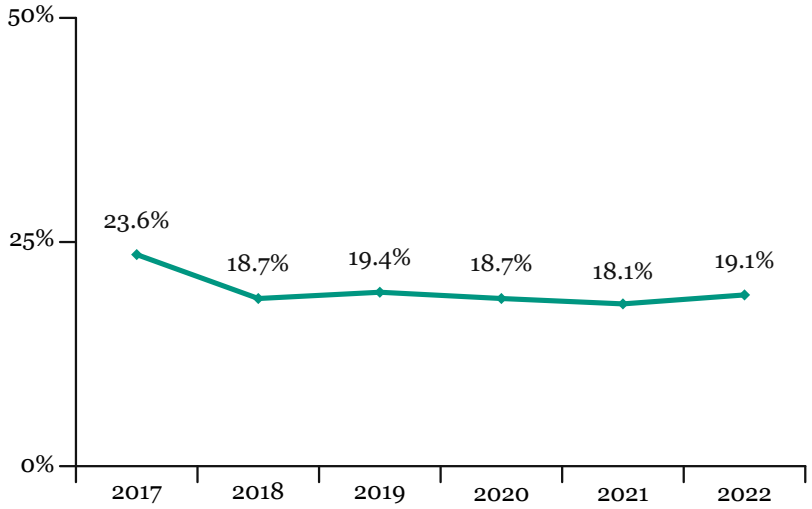


** A provision allowing seller's pre-closing counsel to represent the selling shareholders post-closing in matters relating to the acquisition.*

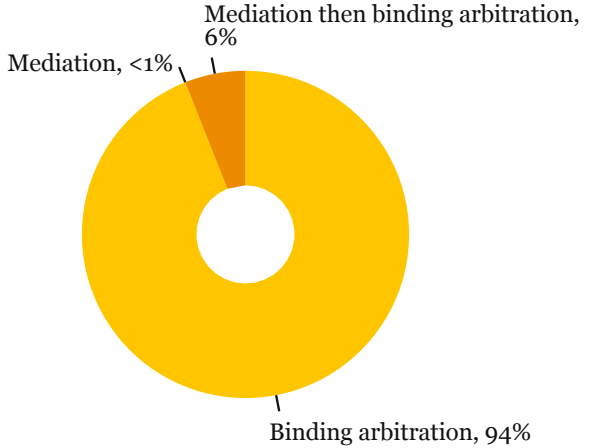
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Alternative Dispute Resolution (“ADR”)*

ADR inclusion



Type of ADR (subset: general ADR included, 2022)



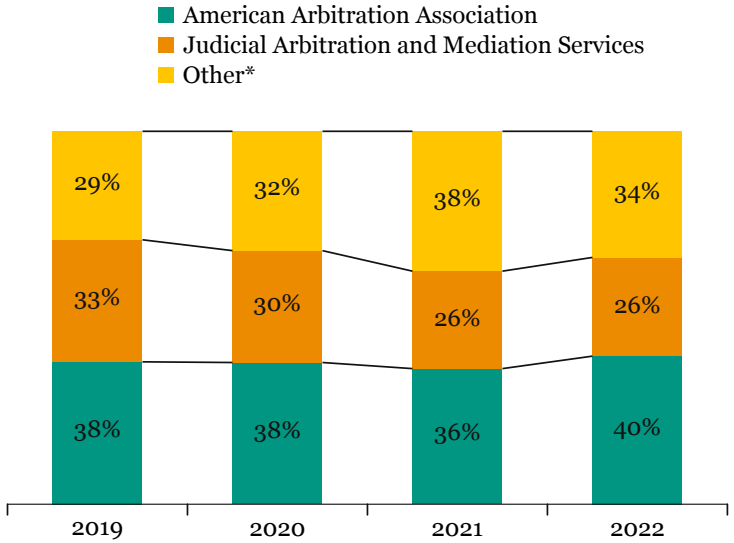
** Sample includes ADR provisions that apply to all disputes arising out of the agreement, and does not include ADR provisions limited to particular matters such as purchase price adjustments or earnouts.*

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Alternative Dispute Resolution

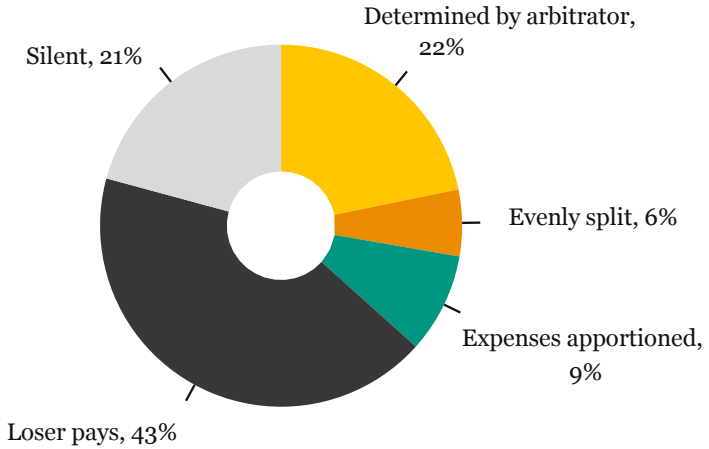
Subset: Deals with general ADR included

Institution/Rules governing arbitration



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

Who pays arbitration expenses? (2022 deals)



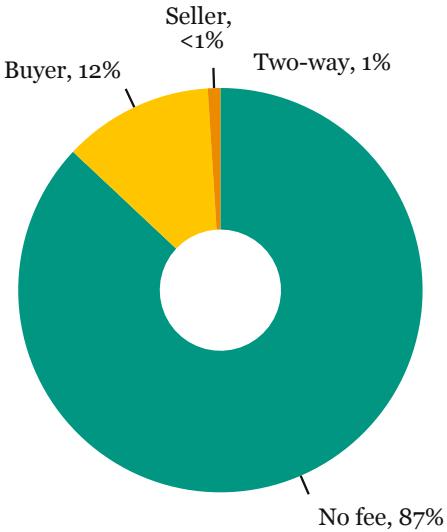
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Termination
Fees

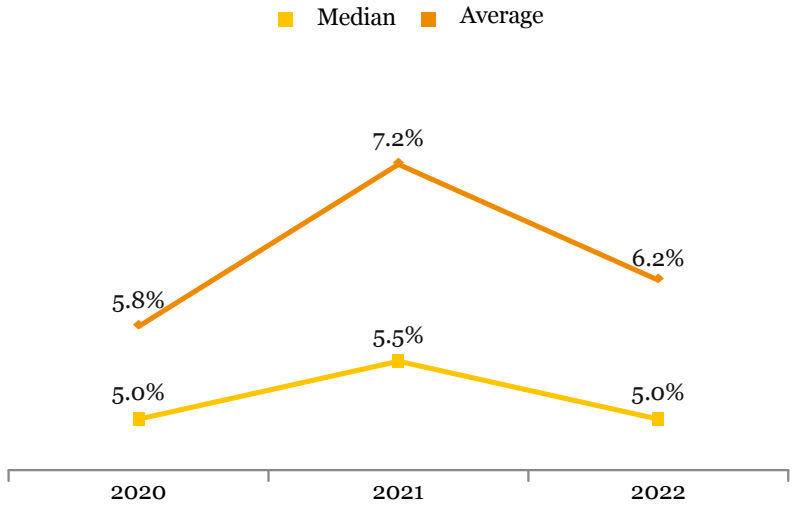
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Termination Fees

Fee paid by… (2022 deals)



Fees paid by buyer, as a % of transaction value



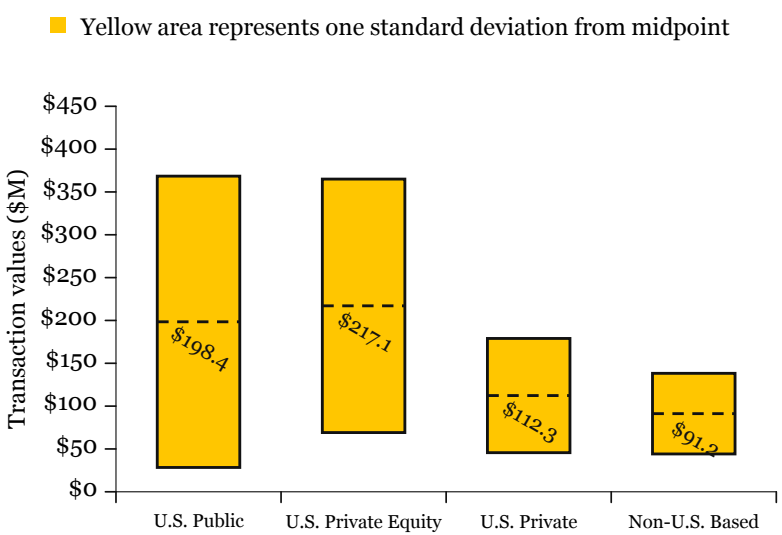
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Correlations

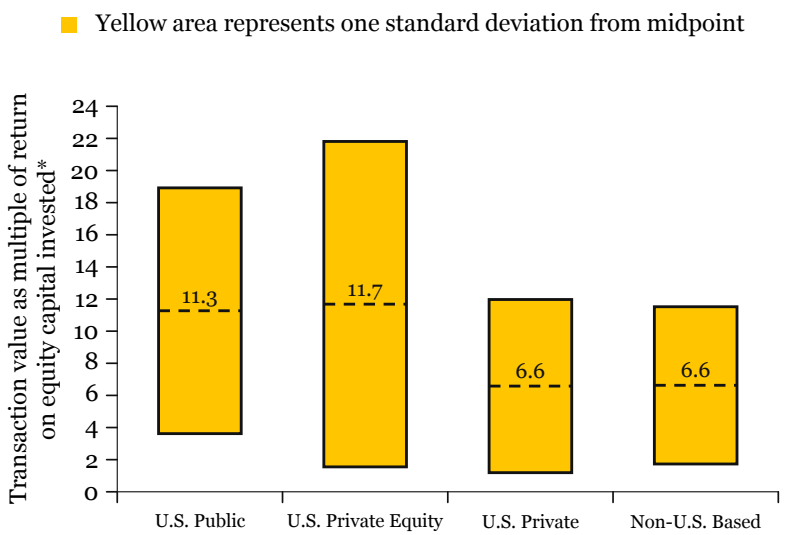
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Correlations: Transaction Value and Multiples, by Buyer Type

Transaction value vs. buyer type (2022 deals)



Multiple of return* vs. buyer type (2022 deals)



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

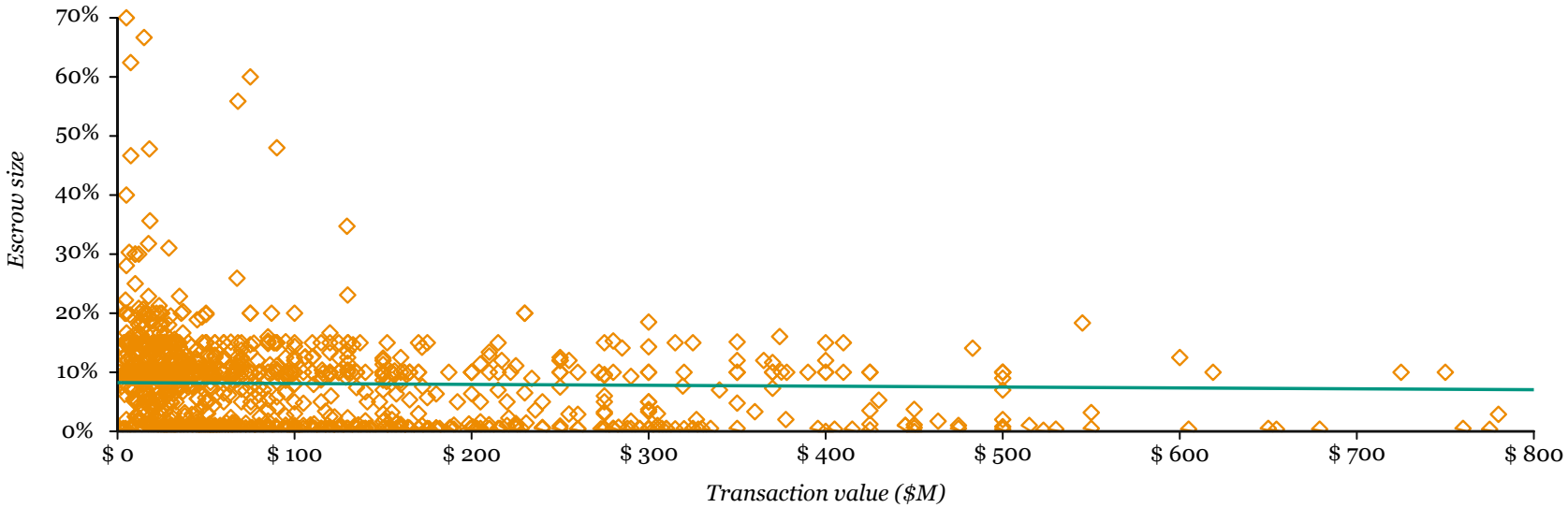
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Correlations: Transaction Value and Escrow Size

Data set: All deals closing in 2019–2022

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

Each point is a deal; linear fit line in teal

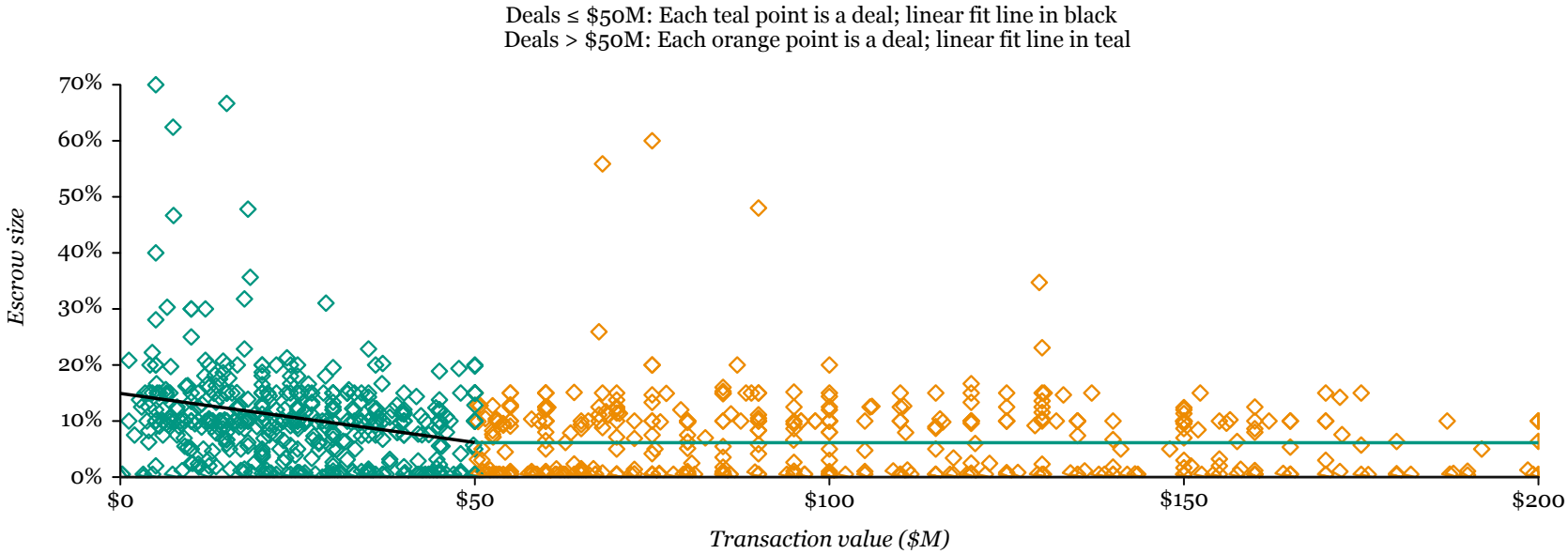


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Correlations: Transaction Value and Escrow Size (Detail)

Data set: All deals closing in 2019–2022

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



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Example Terms

Example terms included in this study are provided as a reference only and may not be applicable to certain deals.

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Example Terms (1 of 10)

Topic	Example Terms	See Data
Post-closing Purchase Price Adjustments: Working Capital Excludes Tax-Related Items	**Tax Exclusion Example** "Adjusted Working Capital" means (a) the sum of the Company's current assets, excluding any current or deferred tax assets, less (b) the sum of the Company's current liabilities, excluding any current or deferred tax liabilities, calculated in accordance with the Accounting Principles and the line items in the illustrative Net Working Capital calculation set forth on Exhibit 1.	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
Post-closing Purchase Price Adjustments: Thresholds and Caps	**Example Threshold and Cap Language:** If the Final Working Capital Difference Amount is a negative number, the absolute value of which exceeds the Adjustment Threshold Amount, the Closing Merger Consideration shall be decreased by the amount the absolute value of the Final Working Capital Difference Amount exceeds the Adjustment Threshold Amount not to exceed the Purchase Price Adjustment Cap.	Slide 22

Topic	Example Terms	See Data
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
Definition of Material Adverse Effect ("MAE"): "Prospects" Included	**Example Term** "Material Adverse Effect" means any result, fact, change, circumstance, occurrence, event or effect that, individually or in the aggregate, has a material adverse effect on the condition (financial or otherwise), assets (including intangible assets), liabilities, businesses, prospects, capitalization, operations or results of operations of the Seller, taken as a whole.	Slide 29
Definition of Material Adverse Effect ("MAE"): Forward-Looking Language	**Example Term:** "Material Adverse Effect" means any result, fact, change, circumstance, occurrence, event or effect that, individually or in the aggregate, has had, or could reasonably be expected to have, a material adverse effect on the condition (financial or otherwise), assets (including intangible assets), liabilities, businesses, prospects, capitalization, operations or results of operations of the Company, taken as a whole.	Slide 29

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Example Terms (2 of 10)

Topic	Example Terms	See Data
Definition of Material Adverse Effect ("MAE"): Carveouts	**Example Term:** … provided, however, Material Adverse Effect will not include the following, either alone or in combination, nor will any of the following be taken into account in determining whether there has been a Material Adverse Effect: (a) effects, changes, events, developments, circumstances or conditions that generally affect the industry in which the Company operates; (b) general business, financial or economic conditions; (c) national or international political or social conditions, including the engagement in hostilities, whether or not pursuant to the declaration of a national emergency or war, or the occurrence of any actual or threatened military or terrorist attack; (d) changes or developments resulting or caused by natural disasters; (e) changes or developments resulting from any epidemic, pandemic, disease outbreak, or other public health emergency; (f) changes in GAAP or in the interpretation or enforcement thereof; or (g) effects, changes, events, developments, circumstances or conditions arising out of or attributable to any action required by this Agreement or any action taken (or omitted to be taken) with the written consent of or at the written request of the Buyer.	Slide 30

Topic	Example Terms	See Data
Definition of Material Adverse Effect: Carveouts Qualified by Disproportionate Effect	**Example Term:** … provided, however, Material Adverse Effect will not include the following, either alone or in combination, nor will any of the following be taken into account in determining whether there has been a Material Adverse Effect: (a)... (b)... ... (g)...; provided, however, that the foregoing clauses (a) through (g) will not apply and may be taken into account if such effect, change, event, development or circumstance disproportionately adversely affects the Seller, taken as a whole, compared to other Persons that operate in the industry in which the Seller operates.	Slide 31
Knowledge Standards	**Actual Knowledge** "Knowledge" means, with respect to (a) the Seller, the actual knowledge of the officers and directors of the Company, or (b) with respect to any other Party, ... **Constructive Knowledge** "Knowledge" means, with respect to (a) the Seller, the actual knowledge of the officers and directors of the Seller and the knowledge of which any such individual should have been aware, in their capacity as an officer or director of the Seller, after reasonable inquiry, or (b) with respect to any other Person, ...	Slide 32

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Example Terms (3 of 10)

Topic	Example Terms	See Data
"No Undisclosed Liabilities" Representation Examples	**Buyer-favorable Formulation** The Seller has no liabilities of any type whatsoever except for: (a) liabilities reflected or reserved against in the Balance Sheet; (b) those Liabilities set forth in the Disclosure Schedule; and (c) current liabilities incurred in the ordinary course of business during the Interim Period. **Seller-Favorable Formulation** The Seller has no liabilities of any type that are required to be disclosed in a balance sheet prepared in accordance with GAAP except for (a) liabilities reflected or reserved against in the Latest Balance Sheet; (b) those Liabilities set forth in the Disclosure Schedule; and (c) current liabilities incurred in the ordinary course of business during the Interim Period.	Slide 34
"Compliance with Laws" Representation	**Example Representation** The Seller is, and has been, to Seller's knowledge, in compliance in all material respects, with all applicable Laws.	Slide 35

Topic	Example Terms	See Data
"10b–5" and "Full Disclosure" Representations Examples	**"10b–5" Representation** No representation or warranty by the Seller in this Agreement and no statement contained herein, in the Disclosure Schedules, or any certificate or other document furnished or to be furnished to Buyer, pursuant to this Agreement, contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they are made, not misleading in any material respect. **"Full Disclosure" Representation** The Seller has no Knowledge of any information or other fact that is, or reasonably likely to become, materially adverse to the condition (financial or otherwise), assets, business, capitalization, liabilities, operations, prospects, results of operations or financial performance of the Company that has not been set forth in this Agreement or in the Disclosure Schedules.	Slide 36

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Example Terms (4 of 10)

Topic	Example Terms	See Data
"No Other Representations" and "Non-Reliance" Clause Examples	**No Other Representations** Buyer hereby expressly acknowledges that the Seller has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties contained in this Article (as modified by the Disclosure Schedule). **Non-Reliance** Buyer hereby expressly acknowledges that it 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 contained in this Article (as modified by the Disclosure Schedule).	Slide 39
"No Other Representations" and "Non-Reliance" Clause Fraud Carveout	**Example Fraud Carveout Clause** …except that nothing in this Agreement will limit or exclude any liability of a Party for Fraud.	Slide 39

Topic	Example Terms	See Data
Privacy Representation Example	**Example Privacy Representation** The Seller has complied in all material respects with all applicable Privacy Laws and has in place adequate written policies relating to privacy, data protection, and the collection and use of Personal Data and other sensitive data collected, used, or held for use by the Seller, to comply with its obligations under all applicable Privacy Laws (collectively the "Seller Privacy Policies"). The Seller has not received any written notice, order, inquiry, investigation, complaint or other communication alleging non-compliance with any Privacy Laws or Seller Privacy Policies. To the Seller's Knowledge, there has been no material loss, theft, misuse of, or unauthorized access to, or acquisition, use, modification or disclosure of, any Personal Information processed, collected, stored, transferred or otherwise used by or on behalf of the Seller. The Transaction will not result in any material liabilities in connection with any applicable Privacy Laws.	Slide 41

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Example Terms (5 of 10)

Topic	Example Terms	See Data
Accuracy of Seller's Representations (Timing): When Must They Be Accurate?	**At Signing Only** Each of the representations and warranties set forth in this Article will be true and correct in all material respects as of the date hereof, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all material respects as of such specified date. **At Closing Only** Each of the representations and warranties set forth in this Article will be true and correct in all material respects as of the Closing Date as though made on and as of the Closing Date, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all material respects as of such specified date. **At Signing and Closing** Each of the representations and warranties set forth in this Article will be true and correct in all material respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all material respects as of such specified date.	Slide 45

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 set forth in this Article will be true and correct in all respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all respects as of such specified date. **Accurate "in all material respects"** Each of the representations and warranties set forth in this Article will be true and correct in all material respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all material respects as of such specified date. **MAE qualification** Each of the representations and warranties set forth in this Article will be true and correct in all respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date (or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all respects as of such specified date), except where failure to be so true and correct do not and could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.	Slide 45

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Example Terms (6 of 10)

Topic	Example Terms	See Data
Accuracy of Seller's Representations (Materiality): MAE Qualifier with Capitalization Representation Carveout	**Example Capitalization Carveout** Each of the Seller's representations and warranties set forth in this Article, other than Section 3.2 (the Capitalization Representations), will be true and correct in all respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date (or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all respects as of such specified date), except where failure to be so true and correct do not and could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect; and each of the Capitalization Representations will be true and correct in all respects as of the Closing Date as though made on and as of the Closing Date.	Slide 46

Topic	Example Terms	See Data
Accuracy of Seller's Representations (Materiality): Materiality Scrape	**Example Materiality Scrape** Each of the representations and warranties set forth in this Article will be true and correct in all material respects as of the date hereof and as of the Closing Date as though made on and as of the Closing Date, or for representations and warranties that refer specifically to an earlier date, will have been true and correct in all material respects as of such specified date; provided, however, that for purposes of determining the accuracy of such representations and warranties, all qualifications limiting the scope of such representations and warranties, including by the words "Material Adverse Effect," "in all material respects," "in any material respect," "material," or "materiality," will be disregarded.	Slide 46

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Example Terms (7 of 10)

Topic	Example Terms	See Data
"Material Adverse Change" Condition ("MAC")	**"Stand-alone" MAC** No Company Material Adverse Effect will have occurred between the date of this Agreement and the Closing Date that is continuing. **"Back-door" MAC** The acquisition agreement includes an "Absence of Changes" representation and a bring down condition regarding the accuracy of the Seller's representations and warranties at Closing, which collectively create the "Back-door" MAE condition, as per below: *Absence of Changes. (i) Since the Balance Sheet Date, there has not been, except as set forth in the Disclosure Schedules, any Seller Material Adverse Change.* *Conditions to Obligations of the Buyer. … (a) The representations and warranties set forth in Article III shall be true and correct in all respects when made and at the Closing Date as if made on the Closing Date, except, where the failure of any such representations or warranties to be true and correct do not and could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.*	Slide 47

Topic	Example Terms	See Data
"No Legal Proceedings" Condition	**Example Formulation** There will not be any (a) [threatened or] pending legal action, suit or similar legal proceeding brought by any Person or Government Authority with respect to the Transaction, or (b) any injunction, restraining order, or Law, whether temporary, preliminary, or permanent, issued by any Government Authority, directing the Transaction to not be consummated.	Slide 48
"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... **Anti-sandbagging** No Party will be liable under this Article for any Losses arising from or relating to the inaccuracy of, breach of, non-performance of, or non-compliance with any representation, warranty, or obligation in this Agreement if the Party bringing a claim for such Losses had Knowledge of such inaccuracy, breach, non-performance, or non-compliance prior to the Closing.	Slide 55

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Example Terms (8 of 10)

Topic	Example Terms	See Data
“Materiality Scrape” Example Definitions	**Materiality qualifications in representations and warranties disregarded for all indemnification purposes (determining breaches and calculating losses)** Notwithstanding anything to the contrary in this Agreement, for purposes of the indemnification provisions in this Article, the determination of (a) whether any representation warranty or covenant has been breached and (b) the amount of any Losses will be made without giving effect to any "Material Adverse Effect" qualification or any materiality or similar qualification contained in the representations, warranties, covenants or agreements herein. **Materiality qualifications in representations and warranties disregarded for calculation of losses only** Notwithstanding anything to the contrary in this Agreement, for purposes of the indemnification provisions in this Article, the determination of the amount of any Losses will be made without giving effect to any "Material Adverse Effect" qualification or any materiality or similar qualification contained in the representations, warranties, covenants or agreements herein. (Continued in next column)	Slide 56

Topic	Example Terms	See Data
“Materiality Scrape” Example Definitions (continued)	**Materiality qualifications in representations and warranties disregarded for determining breaches only** Notwithstanding anything to the contrary in this Agreement, for purposes of the indemnification provisions in this Article, the determination of whether any representation warranty or covenant has been breached and will be made without giving effect to any "Material Adverse Effect" qualification or any materiality or similar qualification contained in the representations, warranties, covenants or agreements herein.	Slide 56

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Example Terms (9 of 10)

Topic	Example Terms	See Data
Reductions Against Buyer's Indemnification Claims	**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. **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. **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.	Slide 58

Topic	Example Terms	See Data
General Survival Period/Time to Assert Claims	**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 15 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 15-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.	Slide 59

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Example Terms (10 of 10)

Topic	Example Terms	See Data
Baskets: Definitions	**Deductible** With respect to indemnification by the Sellers for any Losses arising under this Article, the Sellers will not be liable unless and until the aggregate amount of all Losses for which the Sellers would be liable exceeds an amount equal to $[500,000] (the “Deductible”), in which case the Sellers will only be liable for such Losses in excess of the Deductible. **First-Dollar** With respect to indemnification by the Sellers for any Losses arising under this Article, the Sellers will not be liable unless and until the aggregate amount of all Losses for which the Sellers would be liable exceeds an amount equal to $[500,000] (such amount, the "Sellers Basket"). If indemnification claims exceed the Sellers Basket, the Sellers will be liable for all indemnification claims properly asserted against them, including those claims comprising the Sellers Basket. **Combination** With respect to indemnification by the Sellers for any Losses arising under this Article, the Sellers will not be liable unless and until the aggregate amount of all Losses for which the Sellers would be liable exceeds an amount equal to $[1,000,000] (the "Threshold"), at which time Sellers will be liable only to the extent that such cumulative Losses exceed $[500,000] (the "Deductible").”	Slide 64

Topic	Example Terms	See Data
Baskets: Eligible Claim Threshold	**Claim Threshold Formulation** No claim for Losses may be made for indemnification hereunder if the amount of such claim, or series of related claims, individually or in the aggregate, does not exceed $20,000 (the "De Minimis Amount"), it being understood that a claim for Losses that does not exceed the De Minimis Amount will not count toward satisfaction of the Deductible.	Slide 69
Indemnification as Exclusive Remedy for Breach	**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.	Slide 81

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Glossary

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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.
Cap (Purchase Price Adjustments)	A limitation on the post-closing purchase price adjustment (aka working capital adjustment) payable to Buyer or Seller. The PPA Cap is frequently equivalent to the general liability cap or the PPA escrow amount or may be set forth as another fixed dollar amount or tied to another provision in the acquisition agreement.
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.

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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, tax liability, or pending litigation. After a pre-determined period of time has passed, 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.
Fraud	Acquisition agreements may include an express definition for "Fraud" tied to a jurisdiction, such as defined under Delaware law, or using one or more elements such as actual fraud, intent to deceive, intentional fraud, intentional misrepresentation, and constructive or negligent fraud. Alternatively, an acquisition agreement may use "fraud" without including an express definition.
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.

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Glossary (M–N)

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.
No Survival	For purposes of this study, no survival or a "walk-away" deal means the Seller's general representations and warranties do not survive closing, however, Sellers may still be liable for carved out matters, such as fundamental reps and warranties, special indemnities, etc.

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Glossary (O–S)

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.
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 (i.e., P.E-backed).
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.
Special Escrows	For purposes of this study, special escrows are deal escrows or holdbacks other than the general indemnification escrow such as a separate escrow for the PPA, specific indemnities, known litigation liabilities, intellectual property liabilities, tax liabilities, key employee retention issues, earnouts, regulatory liabilities, and data privacy liabilities.
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.

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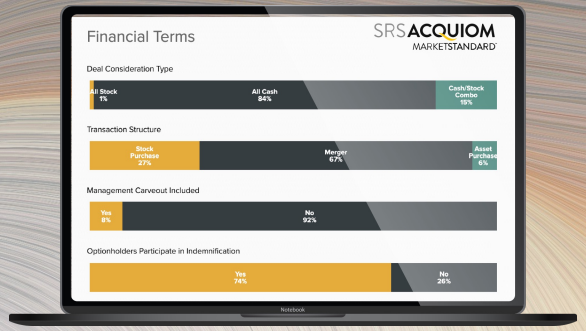
Glossary (T–U)

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

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