



May 2020

2020 M&A Deal Terms Study



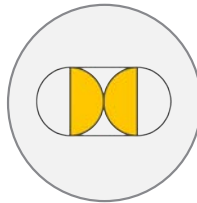
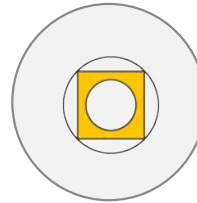
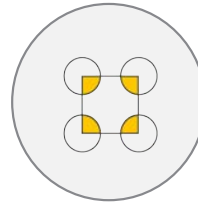
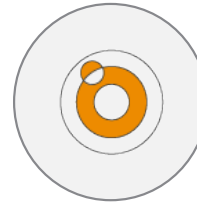
Discussing

An analysis of deal terms in private-target
M&A transactions that closed between 2015-2019

Please direct inquiries to: dts@srsacquiom.com

Comprehensive Platform

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

Mergers & Acquisitions					Loan Agency
					
Pre-Closing Solicitation	Payments	Escrows	Reps & Warranties Insurance Brokerage	Shareholder Representation	Loan Agency
Secure, flexible, online document distribution to securityholders for review or action, plus tabulation and reporting back to deal parties.	Our online payments process enables fast and efficient payment of parties to an M&A transaction, including parties receiving compensation-based payments. Most shareholders are paid in one day.	A better M&A escrow experience, period. Simple, fast engagement, online Deal Dashboard, and a dedicated team.	Get help selecting an insurer that's right for your deal, and gain expert guidance negotiating coverage and policy wording—all with a single-source RWI broker and escrow provider.	Protect shareholder interests with professional representation.	Unbiased, independent, third-party loan agency services for syndicated and bilateral loans.

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An Experienced Partner to Reduce Deal Complexity

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

3,300+

deals engaged
on to date

\$445

BILLION+
aggregate deal value

265K+

shareholders represented
in over 120 countries

\$210

BILLION+
in payments

99%

of shareholders are
paid within 24 hours*

200K+

total shareholders
paid to date

** Consideration given to those that have completed a LoT.*

About This Study and the Data

The 2020 Deal Terms Study is powered by SRS Acquiom MarketStandard®, a tool to analyze our proprietary database of more than 2,300 private-target M&A deals with customizable searches best suited to your specific transaction.

- This study analyzes 1,200+ private-target acquisitions (\$239 billion) that closed from 2015 through 2019
- SRS Acquiom provided professional and financial services on these deals; the vast majority of these are not publicly reported
- Data is presented on a calendar-year basis and is tied to the deal closing date
- Medians are presented in addition to averages to counterbalance the effect of outliers
- Sample sizes are larger in more recent years as a result of our growth

SRS Acquiom recognizes that M&A deal terms have been and will continue to be impacted by the COVID-19 global pandemic. This study is a snapshot of deal terms from 2019 and prior years. We are collecting deal-term data daily and analyzing it to spot trends and relevant data points that may be emerging as the situation unfolds. MarketStandard® is an excellent tool to help deal parties and practitioners stay informed and up to date on the latest trends in deal terms.

SRS Acquiom updated our databases for reporting deal-term data for 2014 through 2019. Therefore, results for prior years' data that is included in prior-year studies may in some cases differ in immaterial amounts from the 2019 SRS Acquiom Deal Term Study. The 2020 SRS Acquiom Deal Term Study includes the most comprehensive and updated data available for all years. Some charts do not sum to 100% due to rounding.



Designed to help deal parties determine “what’s market,” MarketStandard allows you to filter data and access market terms for the specific deal you’re negotiating by drawing information from more than 2,300 deals—with more added every day.

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The Most Comprehensive View of Deal-Term Outcomes

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

Customize Your View of the Data

- ✓ Dynamically filter, sort and explore more than 150 attributes with five different filters, including Buyer Power Ratio™
- ✓ You determine what is relevant to your deal to negotiate with real-time knowledge

Utilize Buyer Power Ratio

- ✓ An interactive filter developed by SRS Acquiom and the American Bar Association Mergers & Acquisitions Committee
- ✓ This filter may be the most accurate predictor of expected results for a particular transaction

Understanding Buyer Power Ratio

One of the five filters in SRS Acquiom MarketStandard is the **Buyer Power Ratio**. This metric was developed in conjunction with the American Bar Association Mergers & Acquisitions Committee. Buyer Power Ratio has two components:

1. The **market capitalization** (market cap) of the buyer; and
2. The **purchase price** paid by the buyer in the acquisition (including escrowed amounts, but not including potential earnouts).

The Buyer Power Ratio for a particular acquisition is determined by dividing the buyer's market cap by the applicable purchase price.

$$\text{Buyer Power Ratio} = \frac{\text{Buyer Market Cap}}{\text{Purchase Price}}$$

Buyer Power Ratio generally correlates with the merger parties' relative negotiating strengths and their ability to obtain favorable deal terms.

Of course, Buyer Power Ratio is not the only factor that can affect a party's negotiating leverage. Among the other factors that may come into play: the price the buyer is willing and able to pay, the relative importance of the transaction to the buyer and the seller, and the presence of competing bidders for the target company.

Buyer Power Ratio is only calculated for transactions in which the buyer was publicly traded on a U.S. Stock Exchange on the date of the signing of the acquisition agreement.

Representative Deals



acquired by



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acquired by



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acquired by



acquired by



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Key Findings (1 of 3)

Financial terms:

- The median **time from first investment round* to exit** appears to have peaked in 2018 at seven years, as 2019 deals took a median of six years, identical to 2017, and the average **number of equity financing rounds** at exit dropped back to three rounds from four in 2018 (slide 15).
- The median **amount of equity capital invested** dipped back to \$27 million (from \$31 million in 2018, see slide 15). The **median multiple return on investment** has declined to 3.4x in 2019, versus 3.8x in 2018 and 4x in 2017 (slide 14).
- The median size of **management carveouts**, while still rarely used, grew to 11.1% of merger consideration (slide 16). Meanwhile, **full acceleration of options vesting** continued to decline in 2019 to 27%—a drop of 20% from 2016-2017 (slide 18).
- **Post-Closing Purchase Price Adjustments (PPAs): separate PPA escrows** continue to grow in popularity. In the past this has been strongly correlated with RWI, but it is gaining popularity even in deals without RWI policies (slide 23). **GAAP consistent with past practices** is again the prevalent standard for PPA measurement, though GAAP alone is losing ground to other measures (such as non-US accounting standards) (slide 22).
- **Earnouts** have waxed and waned in popularity the last few years, increasing to 22% of non-life science deals in 2019 (compare 13% in 2018 and 23% in 2017, see slide 24). In addition, the **median earnout potential** as a percentage of the closing payment returned to 41%, after a recent low of 30% in 2018 (slide 25). Finally, **offsets to earnouts** for indemnity claims fell 8% to 68% of deals (slide 26).

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

Key Findings (2 of 3)

Pervasive qualifiers:

- In **knowledge qualifiers**, the definition of knowledge as the reasonable or due inquiry of the company as a whole (as opposed to of knowledgeable persons) appears to be regaining prevalence (slide 34).

Seller's representations, warranties and covenants:

- In 2019, parties were less likely to include an express duty to notify the buyer of a **pre-closing breach** of representations and warranties (61% compared to 70% in 2018, see slide 41).

Closing conditions:

- For **accuracy of seller's representations**, while “in all material respects” remains the standard in a bare majority of agreements, a “Material Adverse Effects” formulation continued to gain ground in 2019, increasing in “at signing” clauses from 31% in 2018 to 44% and remaining high at 48% of “at closing” clauses (slide 46).
- Inclusion of both standalone and back-door “**Material Adverse Change**” **conditions** in a single agreement increased 10% from 47% in 2018 (slide 49).
- “**No Legal Proceedings**” closing conditions continue to appear in 94% of deals. Moreover, in 77% of agreements, the definition of legal proceeding in this condition includes **any legal proceeding**, not only governmental proceedings (slide 50).

Termination fees:

- After declining from 2017 to 2018, in 2019 even fewer deals (12%) included **termination fees**, and the median termination fees paid by both buyer and seller went down about half a percent each compared with 2019 (slide 84).

Key Findings (3 of 3)

Indemnification terms:

- The **median general survival period** for indemnity escrows remains 15 months, but there is more variability in lengths than last year (slide 60). **Median escrow size** for the year was 9.9% of transaction value, with an average of 8.9%, compared to 9.3% in 2018 (slide 75). The average and median escrow/holdback size for non-RWI deals ticked up, from an average of 11.2% and a median of 10.0% in 2018 to 12.5% and 10.5%, respectively, in 2019 (slide 76).
- **Carveouts** to the general survival period for fraud and broker/finder fees increased 9 and 8 percent over 2018, respectively (slide 61).
- Deals without **baskets** increased to 10% in 2019, from a low of 4% in 2017 (Slide 65). In addition, the **size of baskets** as a percentage of transaction value is decreasing rapidly—now almost 60% are 0.5% or less (slide 66). **Carveouts** to baskets increased for several topics, including taxes, fraud, broker fees, and intellectual property (slide 68).
- **Standalone indemnities** for employee compensation and purchase price adjustments are rising in popularity, while standalone indemnity for payments to dissenting shareholders fell by 5% (slide 55).
- Parties included **materiality scrapes** for the purpose of determining **both breach and damages** 60% of the time in 2019, versus 48% in 2018 (slide 58).
- Indemnification remains an **exclusive remedy** in 96% of deals, with equitable remedies and fraud remaining by far the most common carveouts. In addition, in 2019 willful breach was carved out only 9% of the time (vs. 14% in 2018) (slide 78).

Dispute resolution:

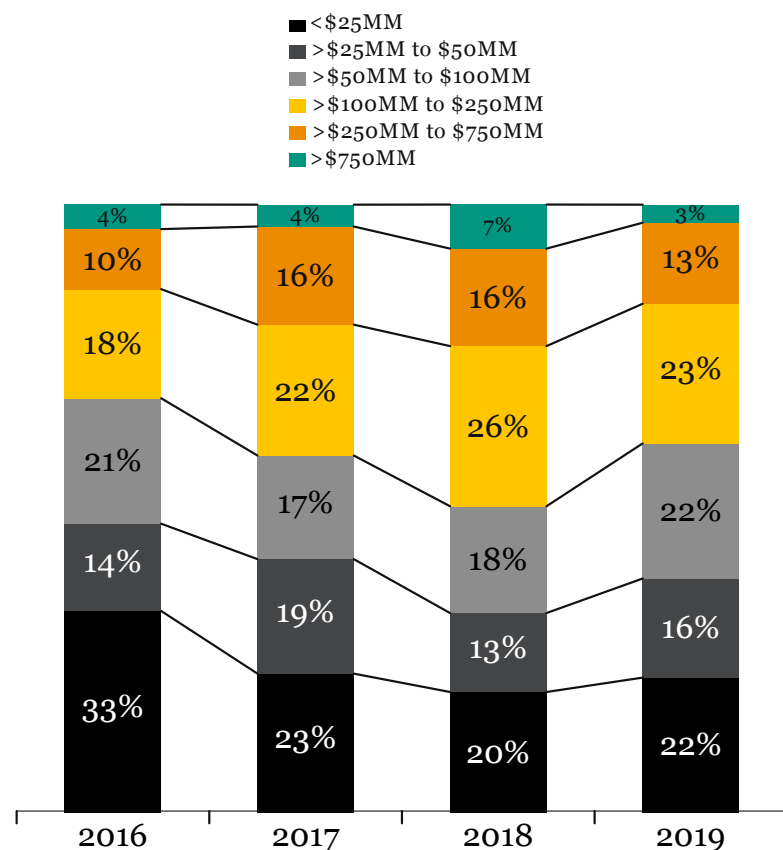
- The number of deals that included **Alternative Dispute Resolution** provisions continued to decline, to 18.1% in 2019 from a high of 28% several years ago (slide 81). There was a marked increase in agreements that provide that the loser pays arbitration expenses, with 38% of deals having that provision in 2019 as compared to 11% in 2018 and 24% in 2017 (slide 82).

Financial Terms and Provisions

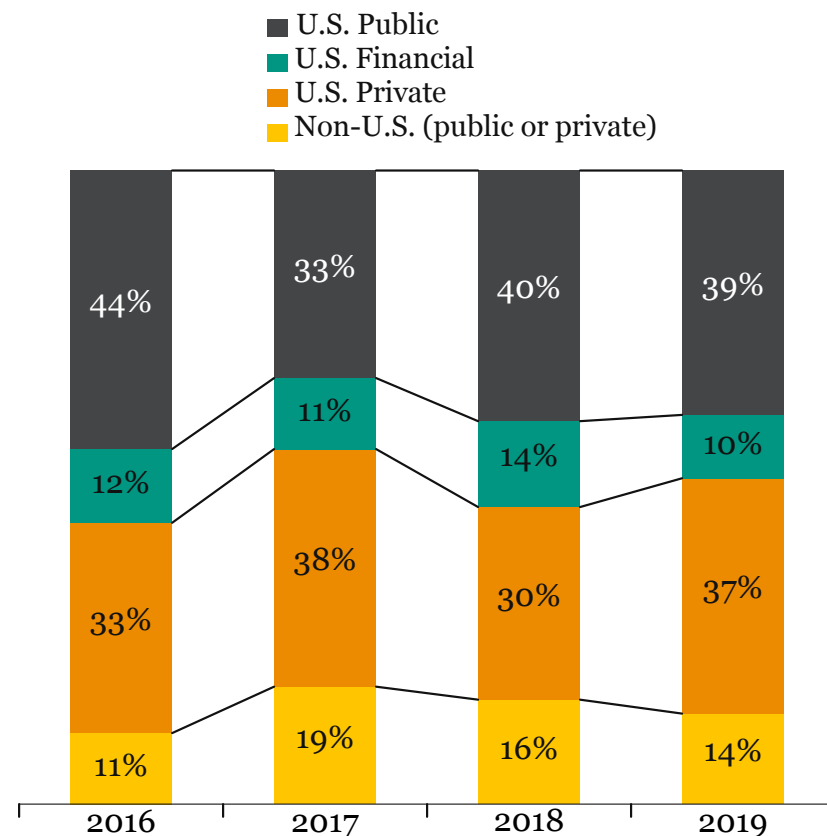
Transaction Values* and Buyer Types

Subset: 2016–2019 deals

Transaction values



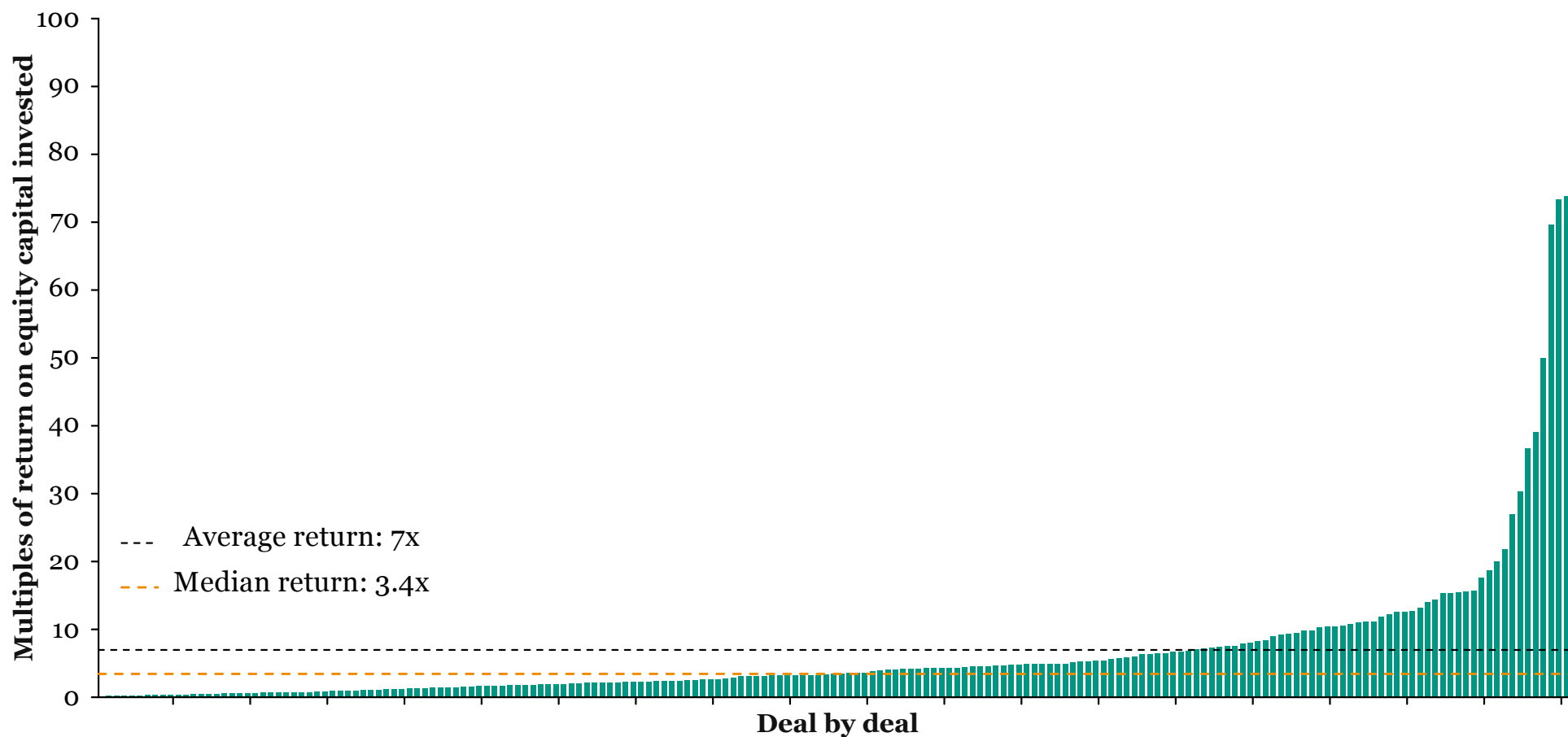
Buyer types



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

Transaction Values* as Multiples of Equity Capital Invested†

2019 Deals

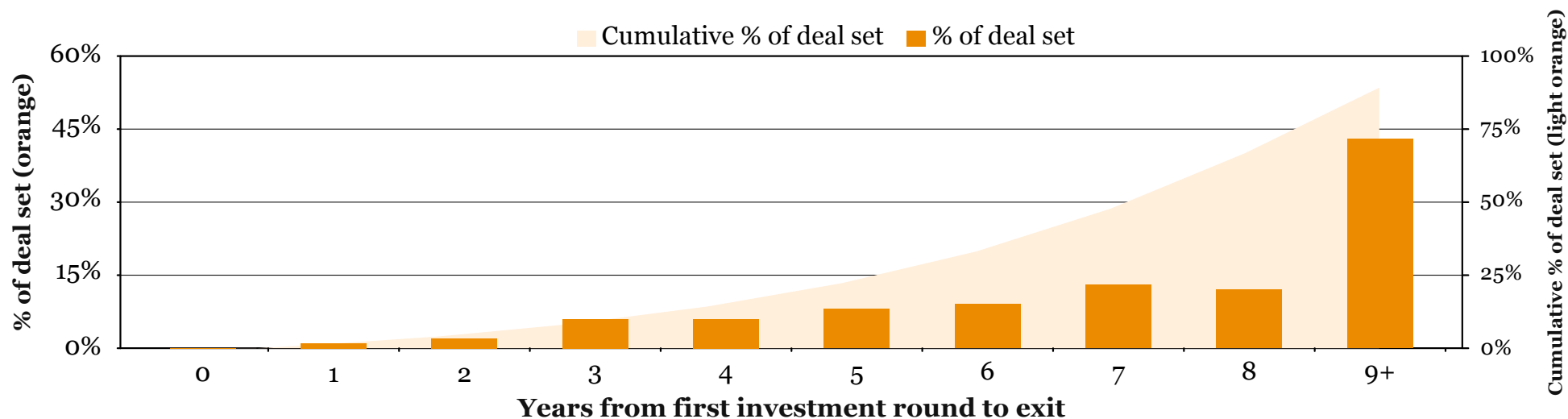


* The term "transaction values" includes escrowed amounts but does not include potential earnout consideration.

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

Investment Exit Timing

2019 Deals



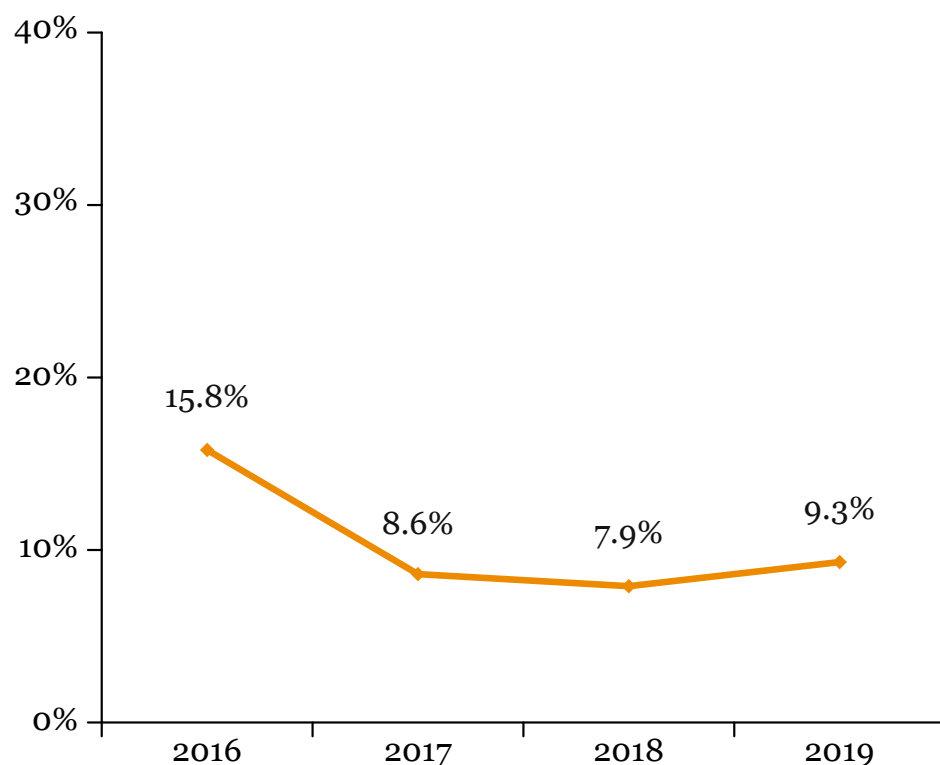
Years to exit (from date of first investment*)	Equity financing rounds at exit	Equity capital invested*
Median: 6	Median: 3	Median: \$27MM
Average: 7	Average: 3.7	Average: \$44MM

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

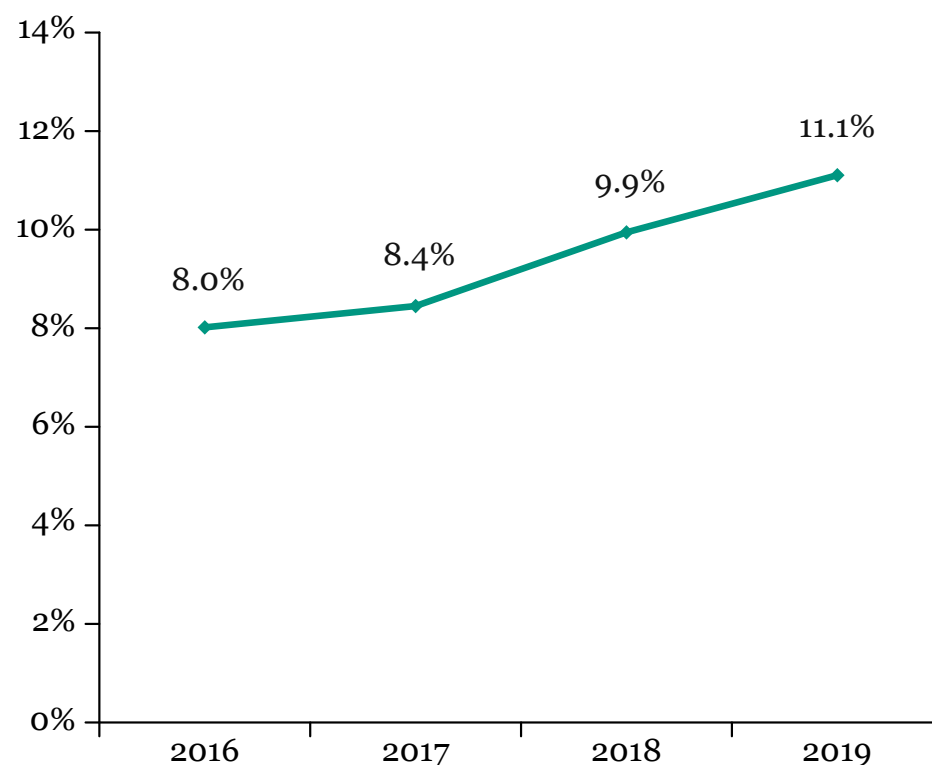
Management Carveouts: Frequency and Size

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

Deals including a management carveout



Median size as a percentage of transaction value*



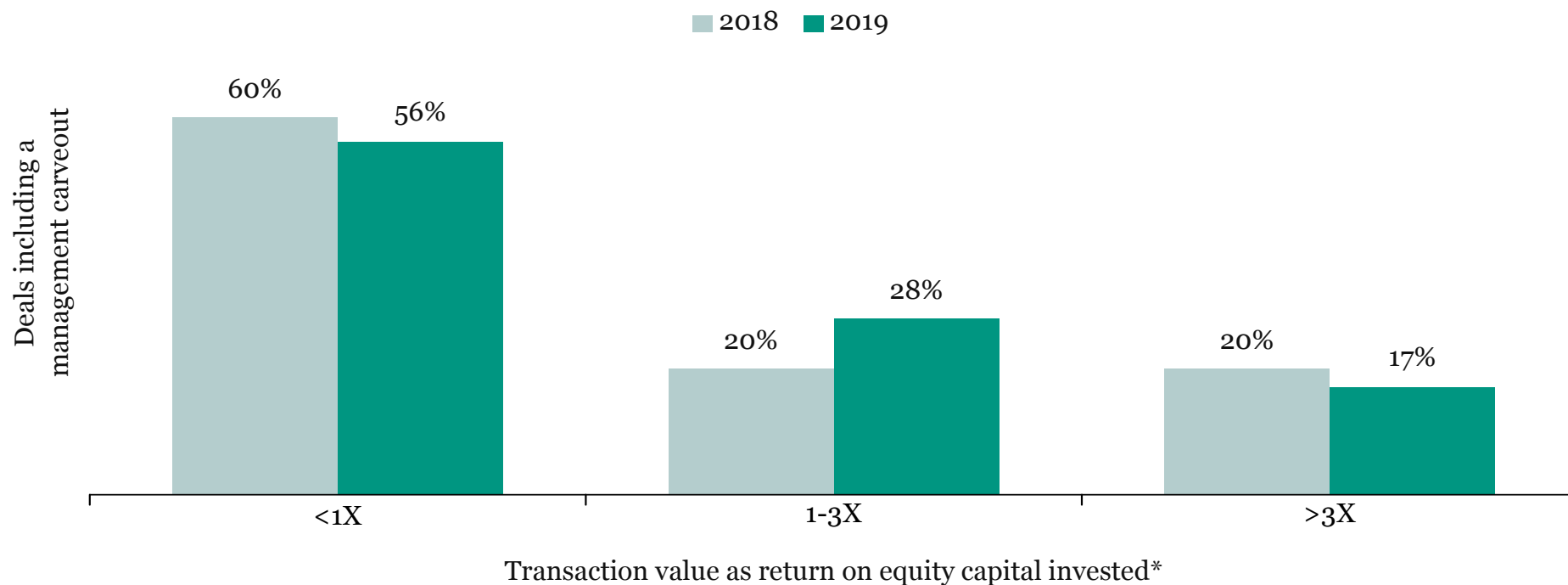
* Measures size of carveout only, disregarding consideration received by Seller management in respect to equity ownership (if any).

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

Management Carveouts: Frequency and Size

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

Deals including a management carveout

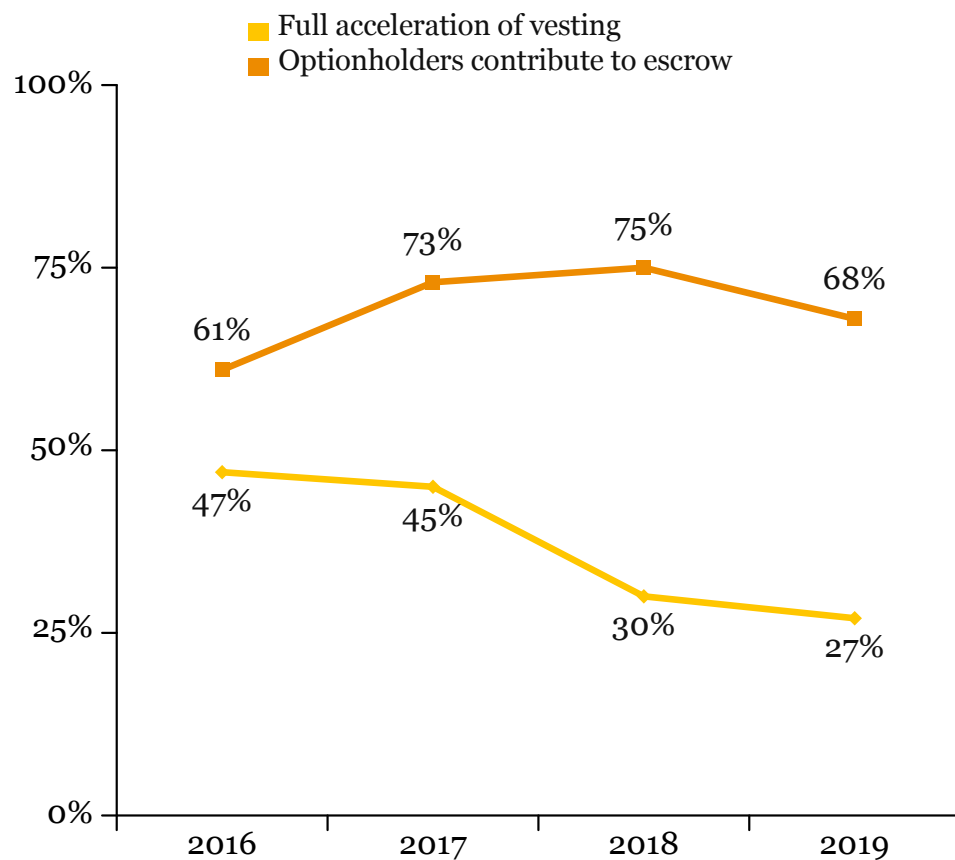


* Equity capital data provided by S&P Capital IQ™ and other databases.

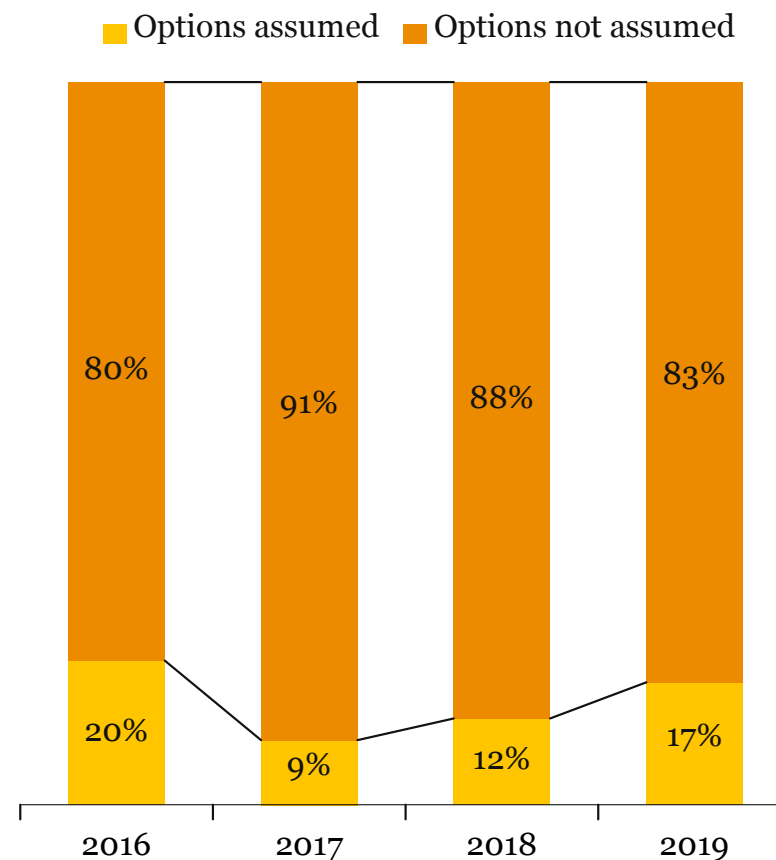
Treatment of Options: Contribution, Acceleration, and Assumption

Subset: Non-life sciences deals*

Contribution and acceleration†



Assumption of options by Buyer



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

† Excludes deals where optionholders received no consideration.

Post-Closing Purchase Price Adjustments

Example adjustment provision

Adjustment Mechanism

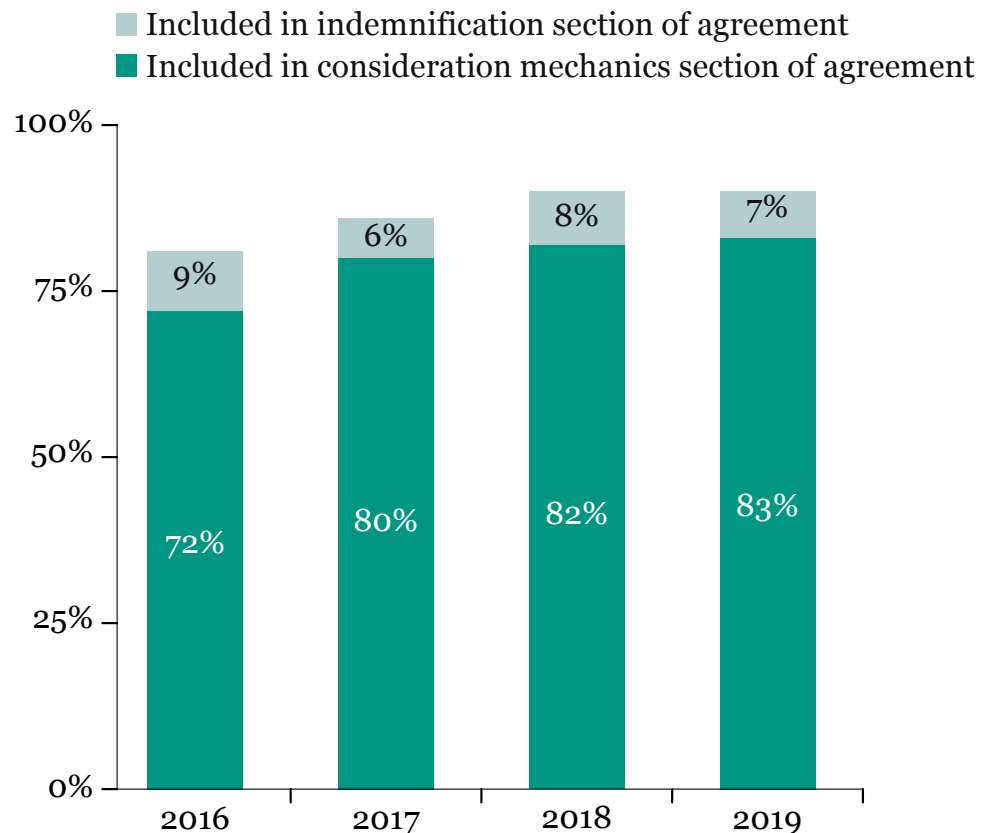
“The ‘Adjustment Amount’ (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account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

Definition of Working Capital

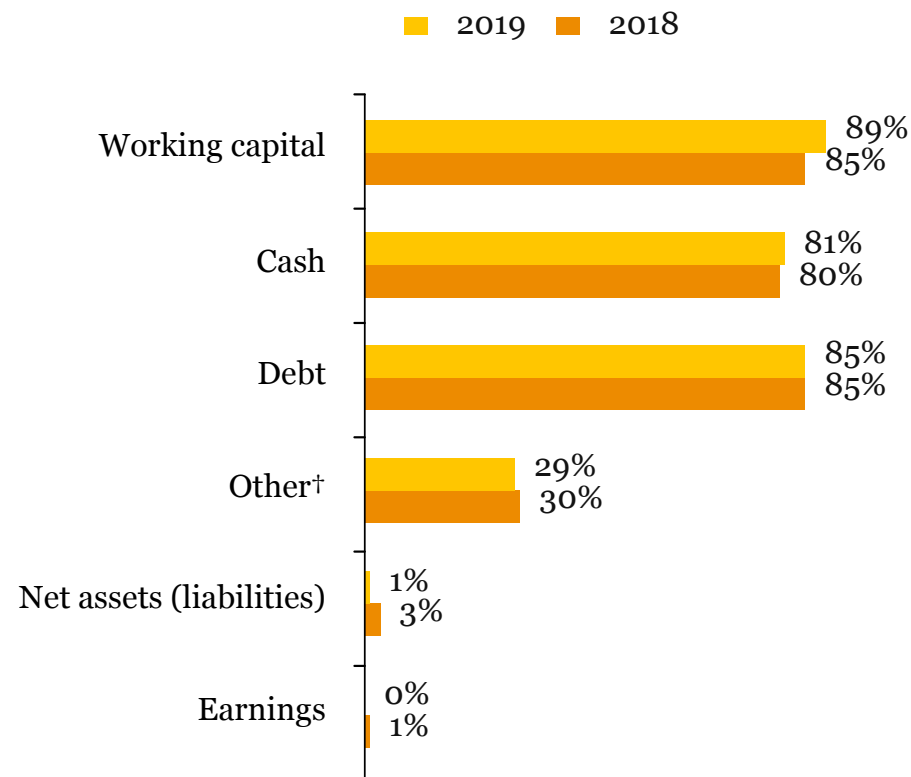
“‘Working Capital’ as of a given date shall mean the amount calculated by subtracting the current liabilities of Seller as of that date from the current assets of Seller as of that date. The Working Capital of Seller as of the date of the Balance Sheet (the ‘Initial Working Capital’) shall be deemed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

Post-Closing Purchase Price Adjustments

Adjustment provision included



Adjustment metrics*



* 88% of post-closing purchase price adjustments in 2019 deals were based on more than one metric.

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

► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.
Explore MarketStandard at srsacquiom.com/marketstandard/

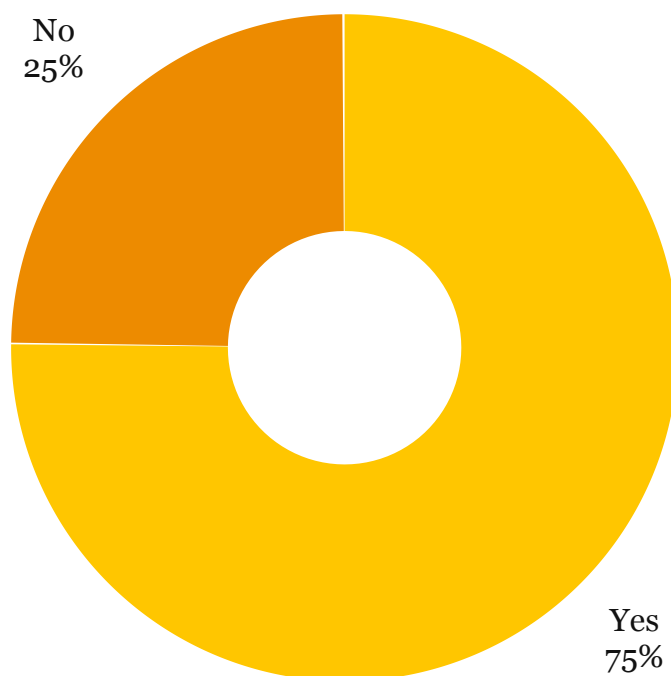
Post-Closing Purchase Price Adjustments: Working Capital Excludes Tax-Related Items

Subset: 2019 deals with a Working Capital adjustment

Tax exclusion example

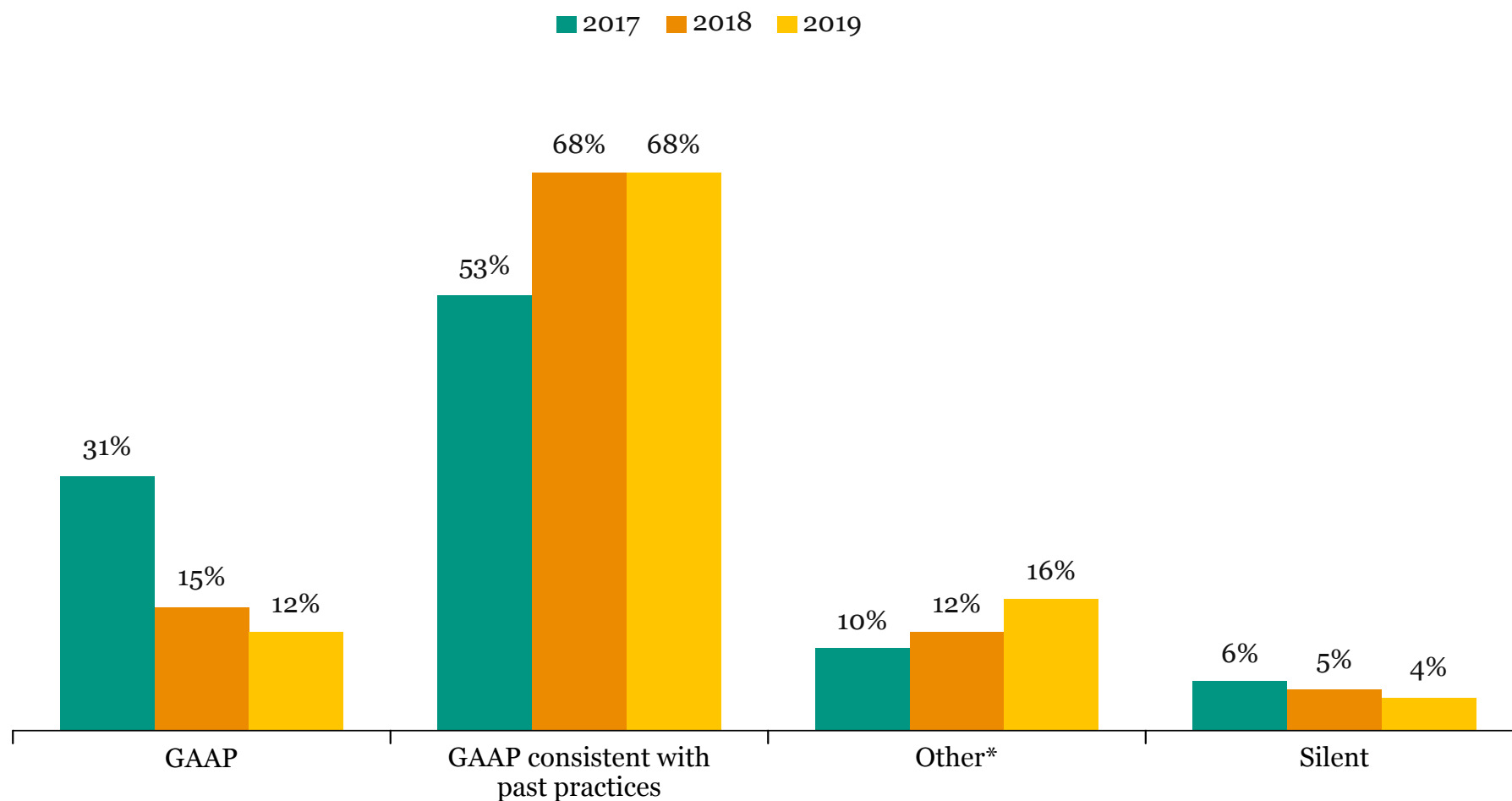
“Adjusted Working Capital’ means current assets minus current liabilities; provided, however, that ‘Adjusted Working Capital’ excludes from current assets all [deferred] tax assets and excludes from current liabilities all [deferred] tax liabilities.”

Adjustment excludes tax-related items



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

Subset: Deals with post-closing purchase price adjustments

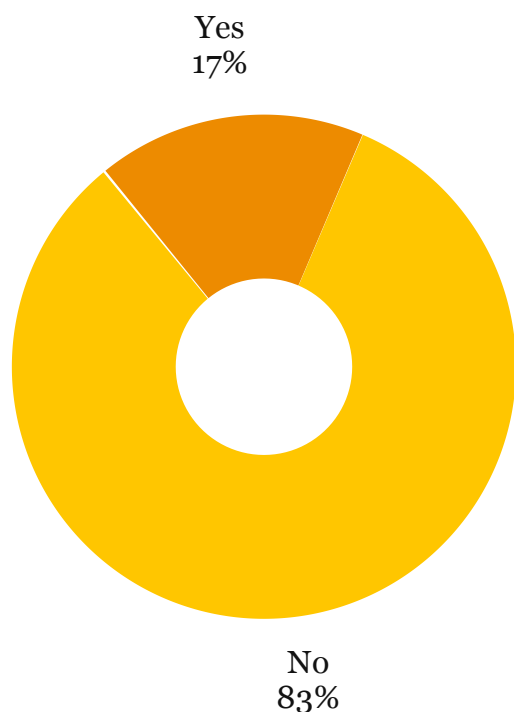


* "Other" methodology most commonly used was GAAP as modified by the principles and changes set forth on a schedule.

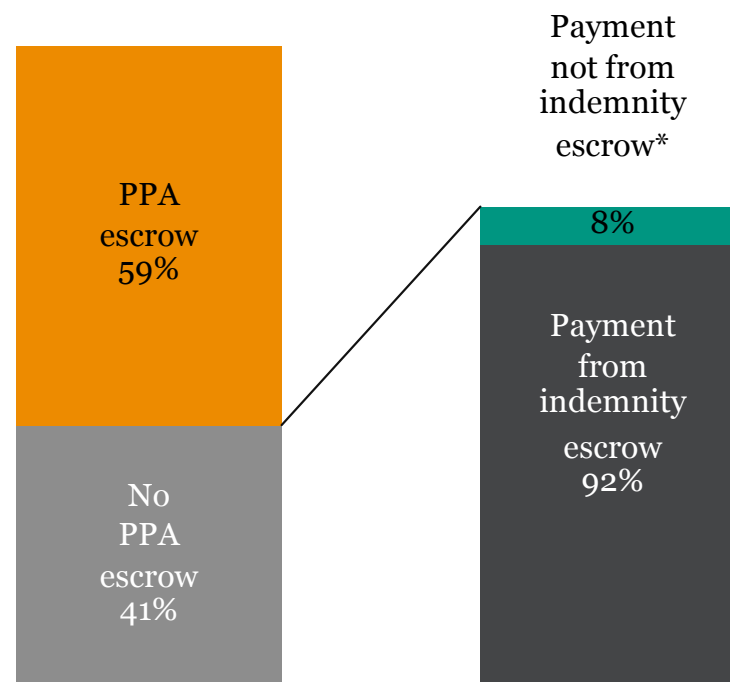
Post-Closing Purchase Price Adjustments (“PPA”): Thresholds and Separate Escrows

Subset: 2019 deals with post-closing purchase price adjustments in the consideration mechanics section of the acquisition agreement (as opposed to the indemnification section only)

Adjustment only if threshold exceeded



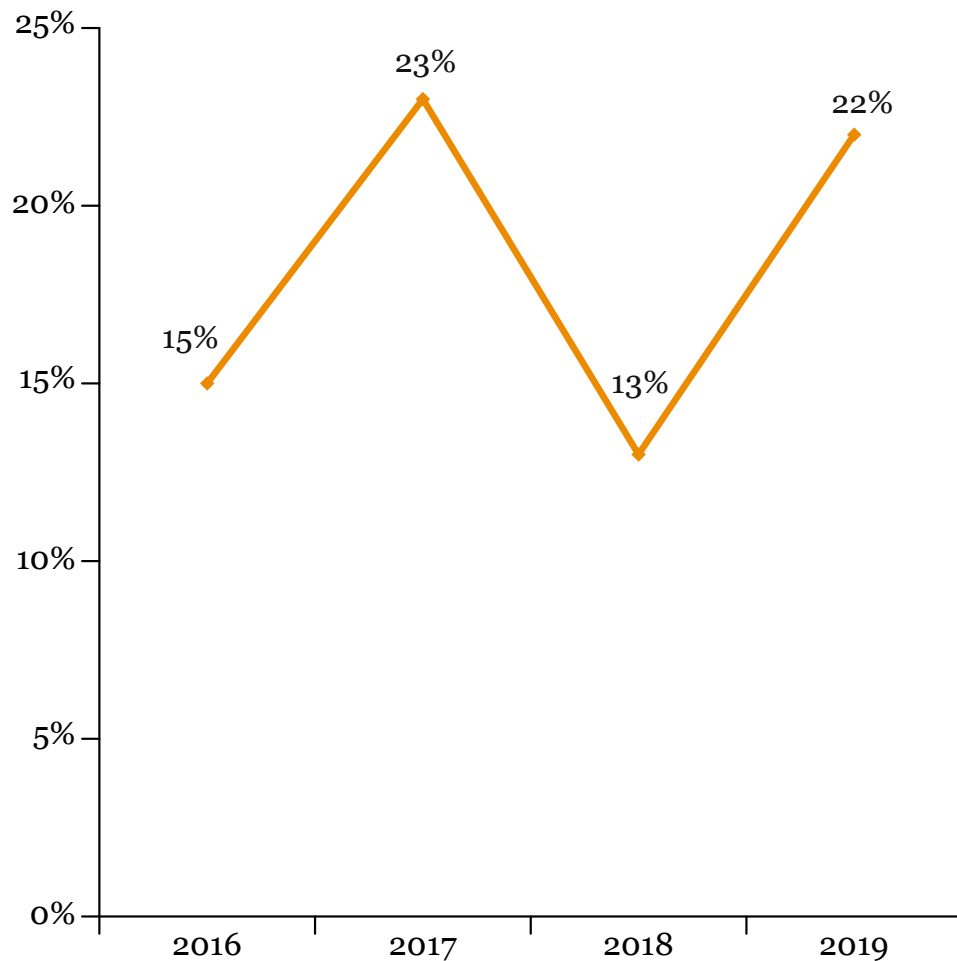
Source of payment if buyer-favorable adjustment



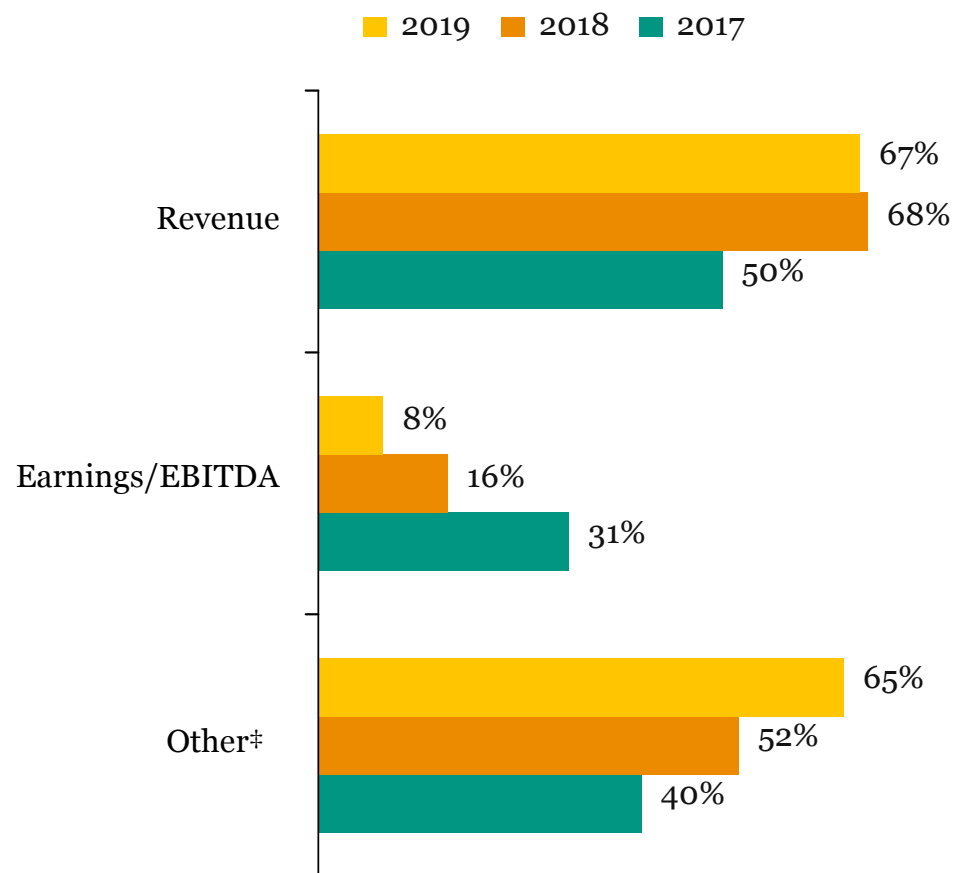
* Generally, payment out-of-pocket from securityholders.

Earnouts (Non-Life Sciences Deals*)

Earnout included



Earnout metrics†



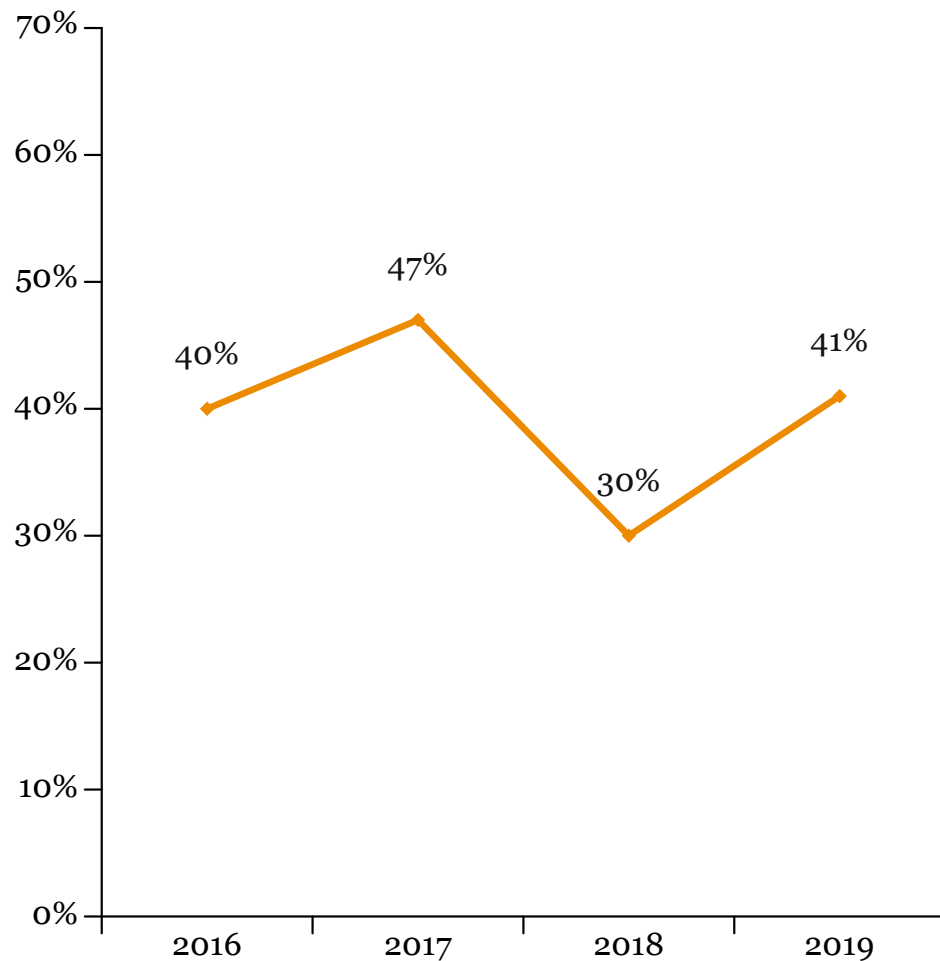
* For a more detailed analysis of SRS Acquiom's life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

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

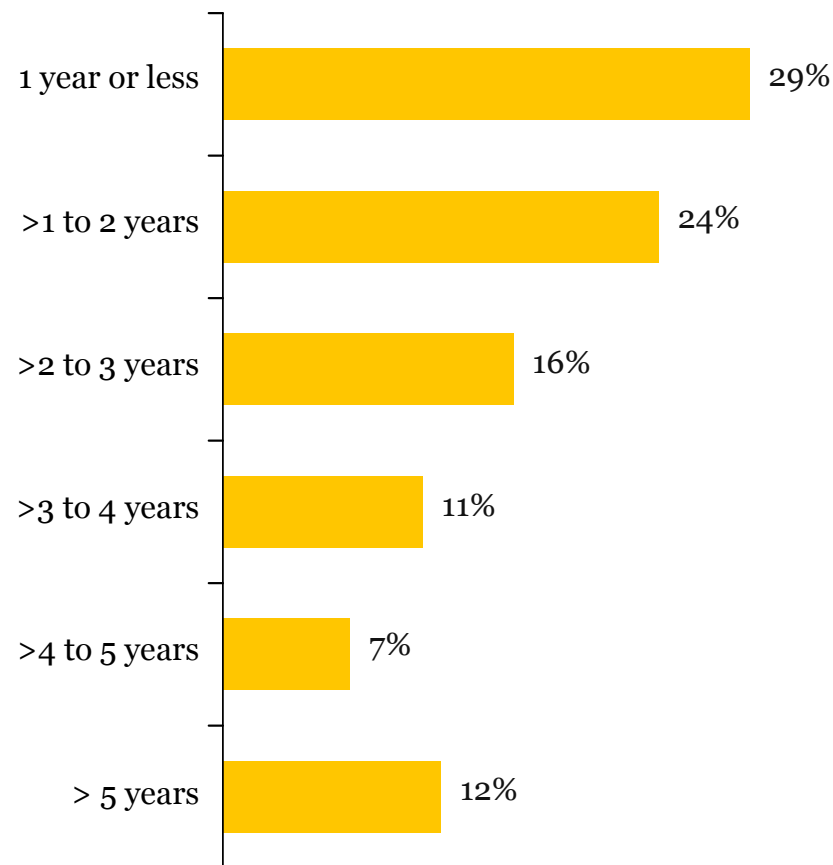
‡ Examples: unit sales, product launches, divestiture of assets.

Earnouts (Non-Life Sciences Deals*)

Median earnout potential as % of closing payment†



Earnout length‡ (2019 median: 24 months)



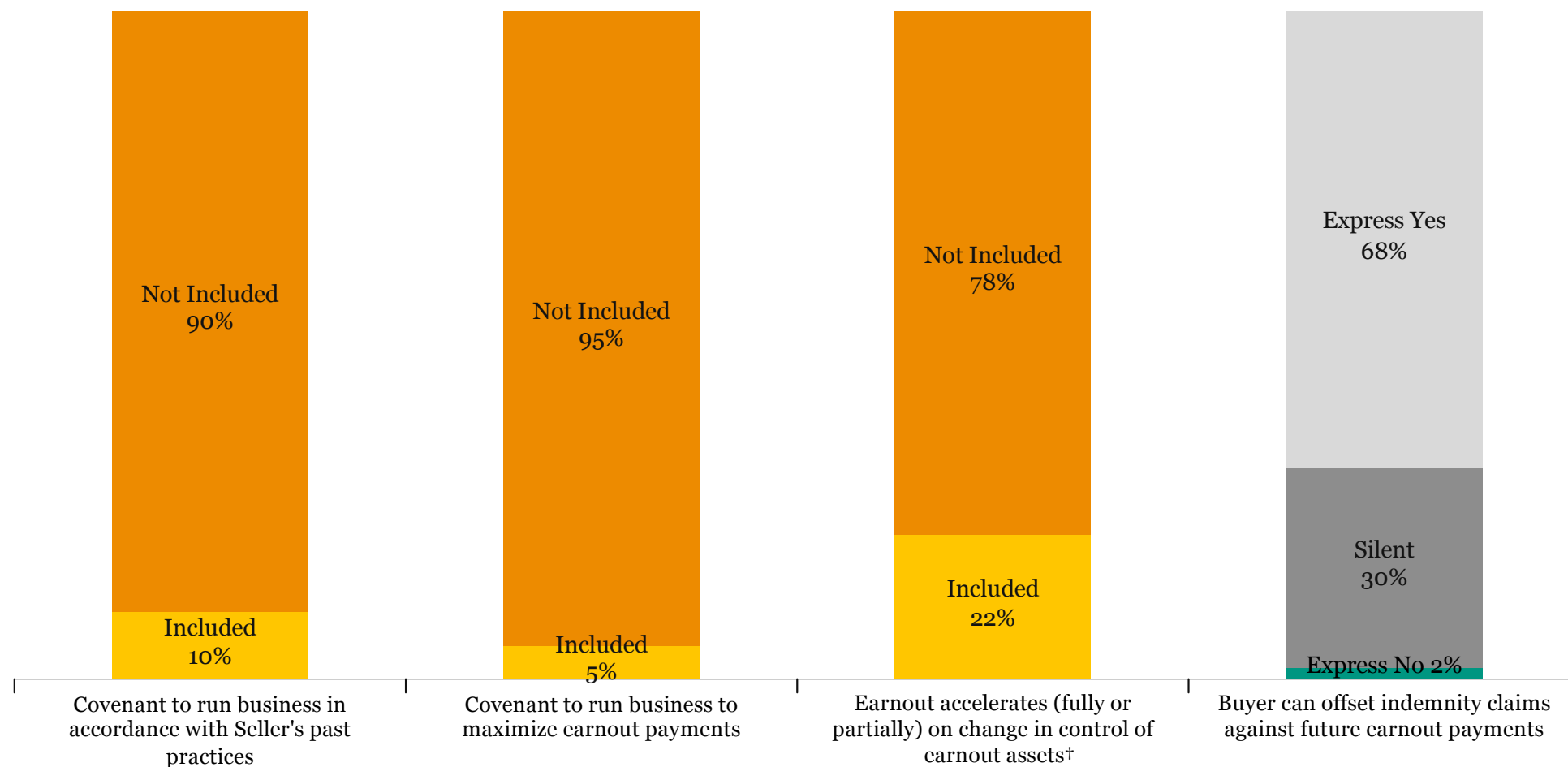
* For a more detailed analysis of SRS Acquiom's life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

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

‡ Measured by the date the latest earnout period ends.

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

Subset: 2019 deals with earnouts, excluding life sciences deals

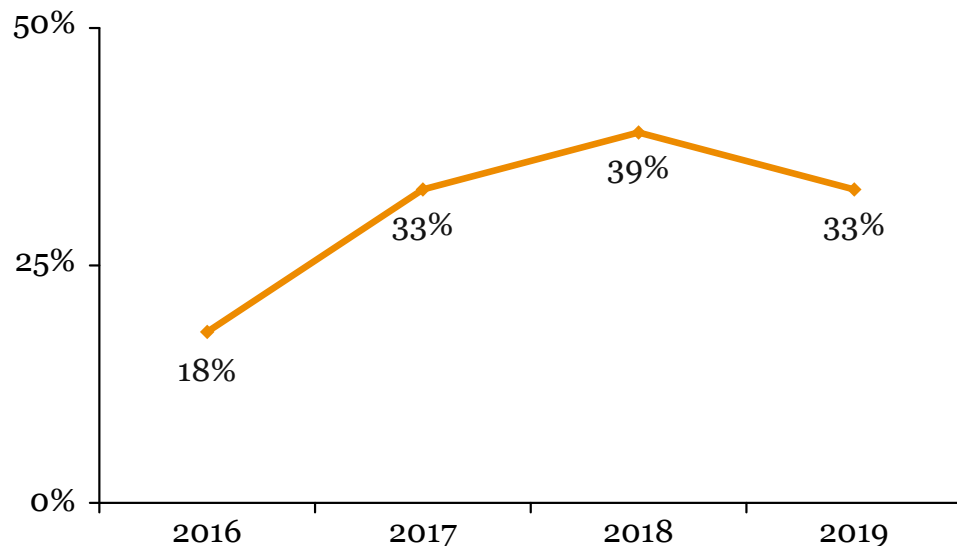


* For a more detailed analysis of SRS Acquiom's life sciences deals, please see the 2019 SRS Acquiom Life Sciences M&A Study.

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

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

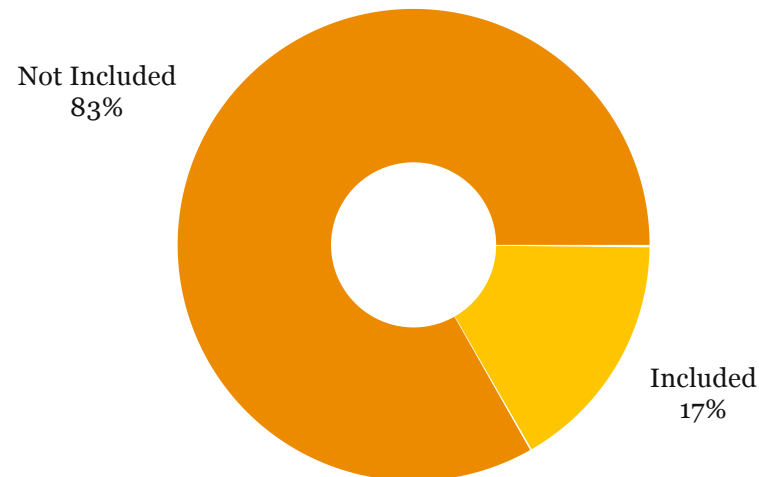
“Earnout is not a security” provision included



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.”

Disclaimer of fiduciary relationship (2019 deals)



Example disclaimer of fiduciary relationship:

“Nothing in this Agreement creates a fiduciary duty on the part of Buyer to Seller in respect of the Earnout.”

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

Pervasive Qualifiers

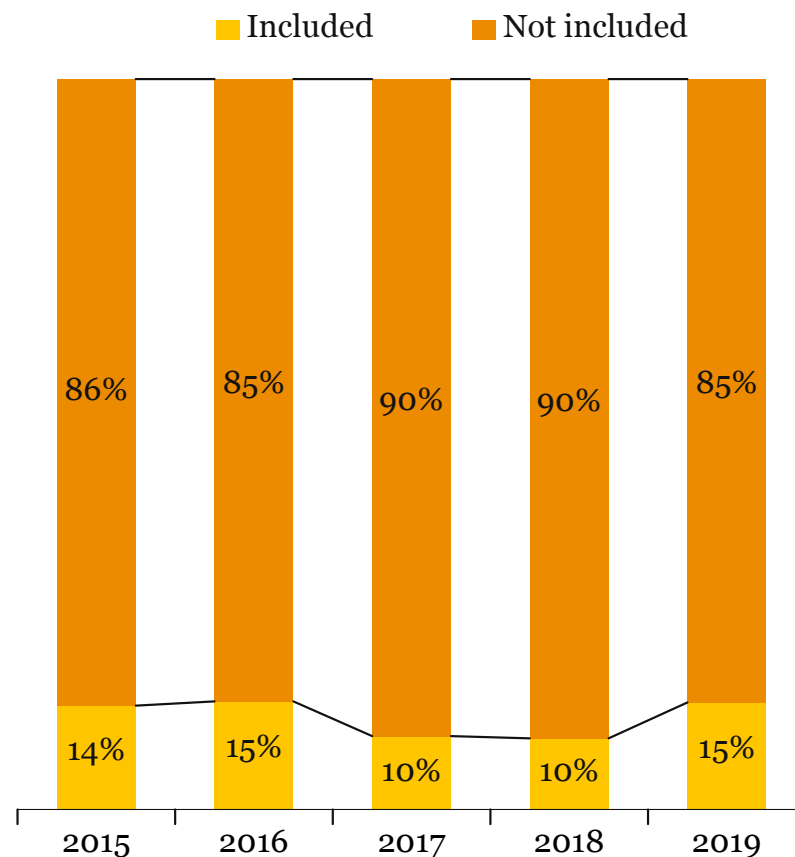
Definition of Material Adverse Effect ("MAE"): "Prospects" Included

Subset: Deals with MAE defined*

Example term

"'Material Adverse Effect' means any result, occurrence, fact, change, event, or effect that has a materially adverse effect on the business, assets, liabilities, prospects, capitalization, condition (financial or other), or results of operations of Seller."

Use of "prospects"



* Material Adverse Effect or Material Adverse Change was defined in 97% of deals for 2019.

Definition of Material Adverse Effect: Forward-Looking Language

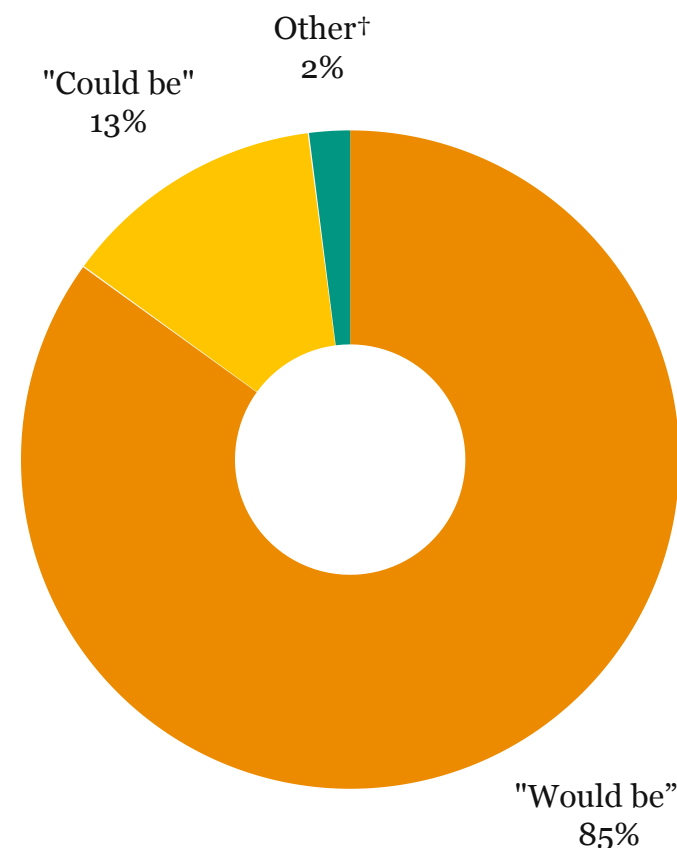
Subset: 2019 deals with an MAE definition that included forward-looking language

Example term

“‘Material Adverse Effect’ means any result, occurrence, fact, change, event, or effect that has, or could reasonably be expected to have, a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), results of operations or prospects of Seller.”

96% of 2019 deals with an MAE definition had forward-looking language.*

Forward-looking MAE details



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

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

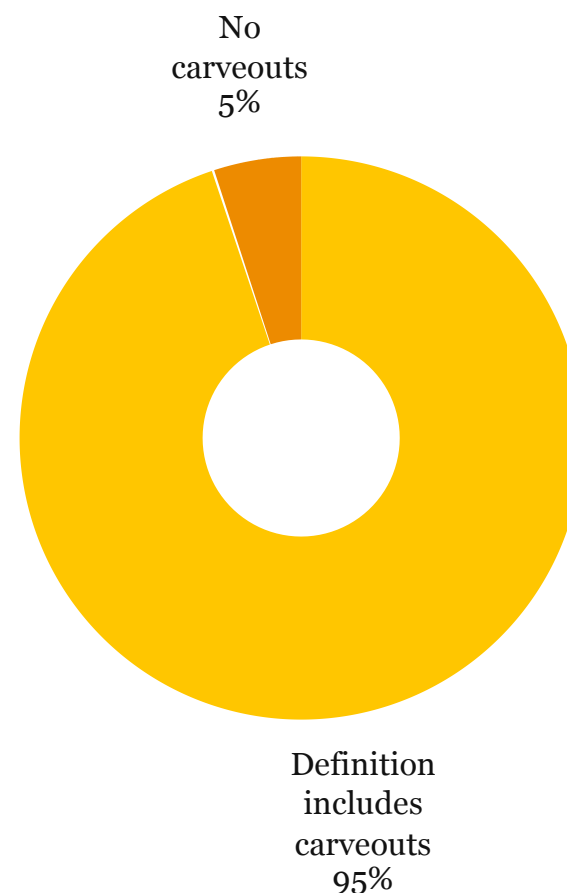
Definition of Material Adverse Effect: Carveouts

Subset: 2019 deals with MAE defined

Example term

“Material Adverse Effect’ means any change... except to the extent resulting from (A) changes in general local, domestic, non U.S., or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions.”

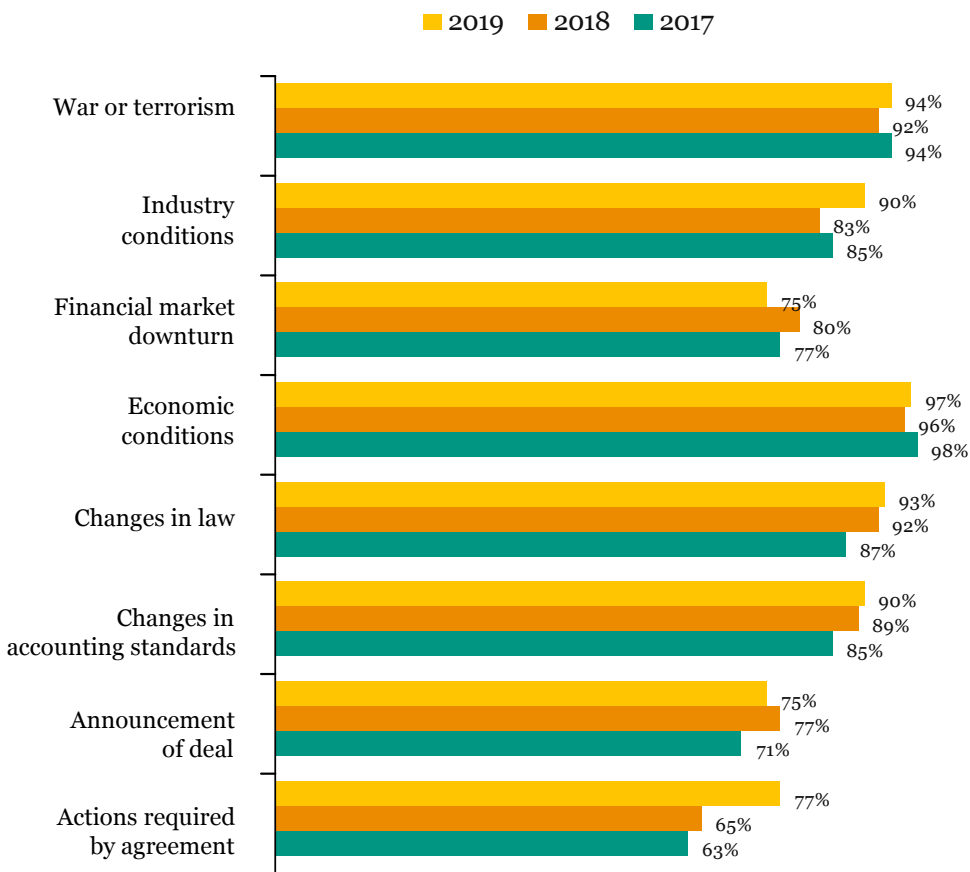
Deals with carveouts



Definition of Material Adverse Effect: Carveouts

Subset: MAE definition has carveouts

Carveout frequency



Comments

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

Visit MarketStandard to manipulate those variables and see the full effect srsacquiom.com/marketstandard/

Definition of Material Adverse Effect: Carveouts Qualified by Disproportionate Effect

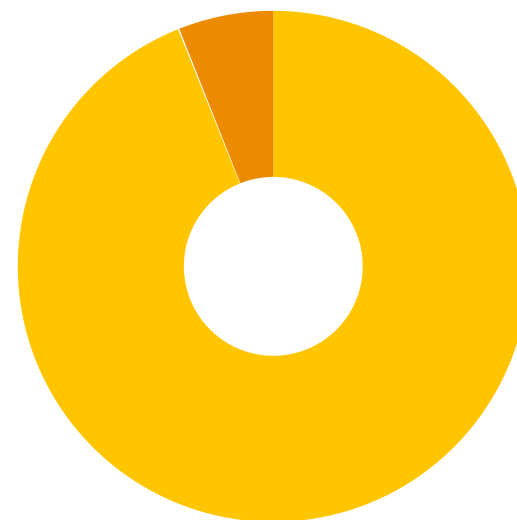
Subset: 2019 deals with an MAE definition with carveouts

Example term

“‘Material Adverse Effect’ means any change... except to the extent resulting from (A) changes in general local, domestic, non U.S., or international economic conditions, (B) changes affecting generally the industries or markets in which Company operates, (C) acts of war, sabotage or terrorism, military actions or the escalation thereof, (D) any changes in applicable laws or accounting rules or principles, including changes in GAAP, (E) any other action required by this Agreement, or (F) the announcement of the Transactions (provided that such event, change, or action does not affect Seller in a substantially disproportionate manner).”

Disproportionate effect details

No carveouts qualified by disproportionate effect
6%



At least one carveout qualified by disproportionate effect
94%

Knowledge Standards

Formulations

Actual knowledge

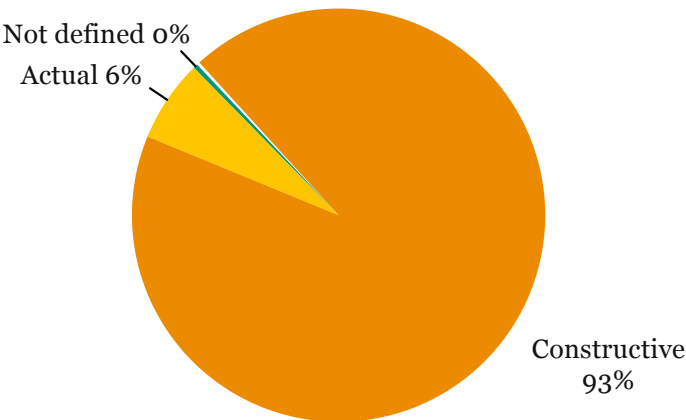
“‘Knowledge’ means the actual knowledge of the directors and officers of Seller.”

Constructive knowledge

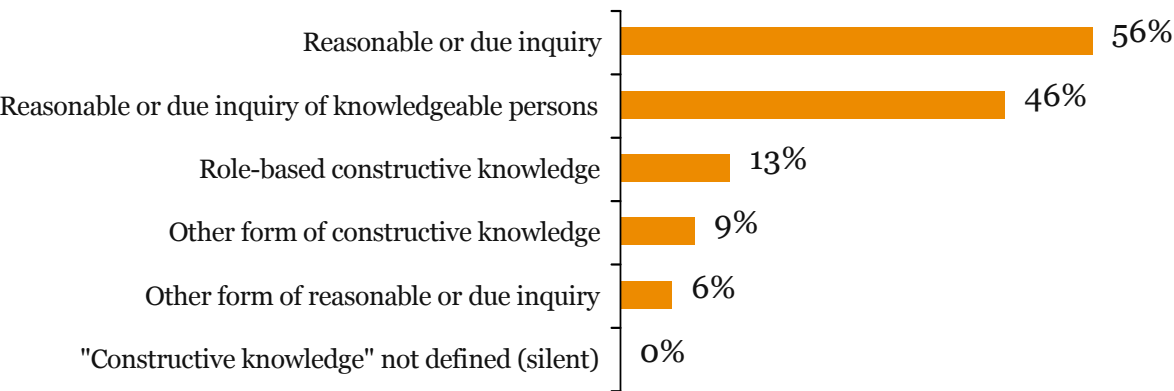
“‘Knowledge’ means the actual knowledge of the directors and officers of Seller and the knowledge that such directors and officers would have after reasonable or due inquiry.”

** 23% of 2019 deals include more than one constructive knowledge element, e.g., a due inquiry requirement as well as role-based deemed knowledge.*

Knowledge definition details (2019 deals)



Subset: Constructive*



Seller's Representations, Warranties, and Covenants

“No Undisclosed Liabilities” Representation*

Examples

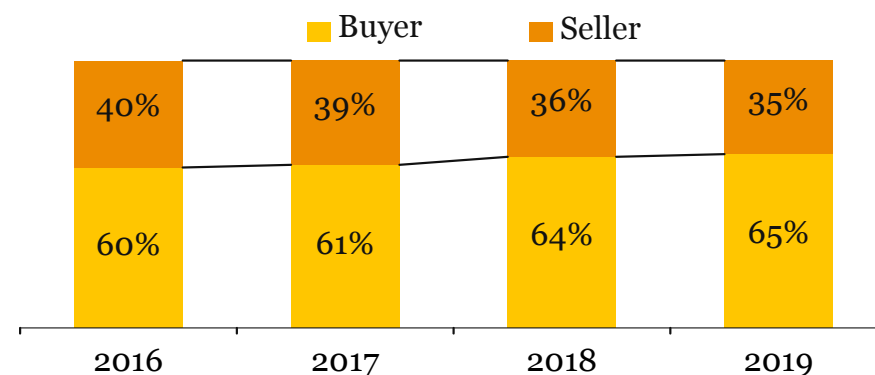
Buyer-favorable formulation

“Seller has no liability except for liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in Seller’s ordinary course of business since the date of the Interim Balance Sheet.”

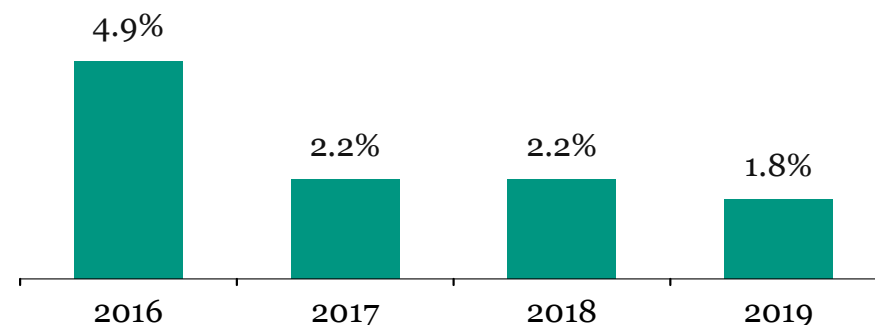
Seller-favorable formulation

“Seller has no liability *of the nature required to be disclosed in a balance sheet prepared in accordance with GAAP [or which could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect]*, except for liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet and current liabilities incurred in Seller’s ordinary course of business since the date of the Interim Balance Sheet.”

Party favored by definition



Representation is knowledge-qualified



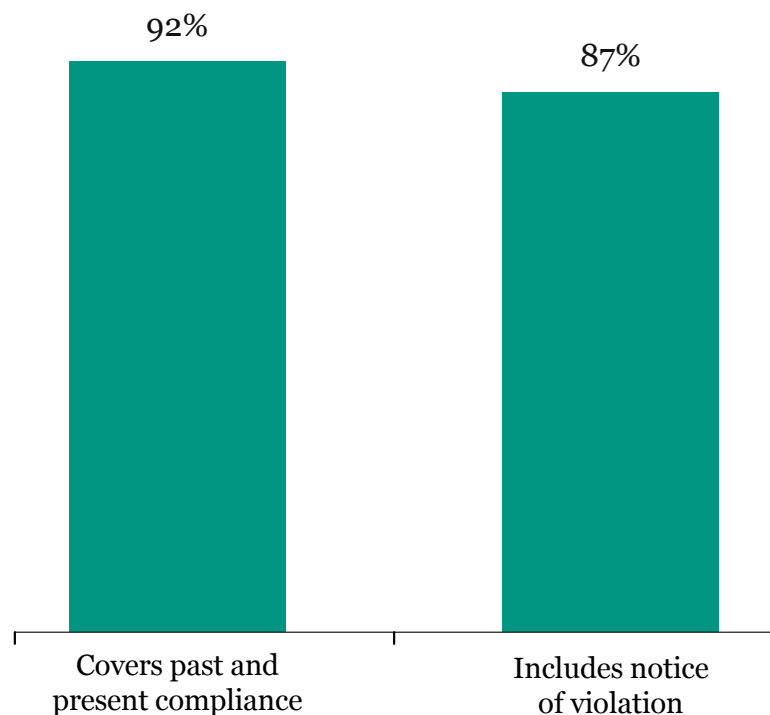
* 99% of 2019 deals included this representation.

► **Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.**
Explore MarketStandard at srsacquiom.com/marketstandard/

“Compliance with Laws” Representation*

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

“Compliance with Laws” representation details, 2019



Comments

Buyer Power Ratio, Industry, and Transaction Value may affect whether notice of violation is required.

Go to MarketStandard to view these differences.
srsacquiom.com/marketstandard/

** 99% of 2019 deals included this representation.*

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

Examples

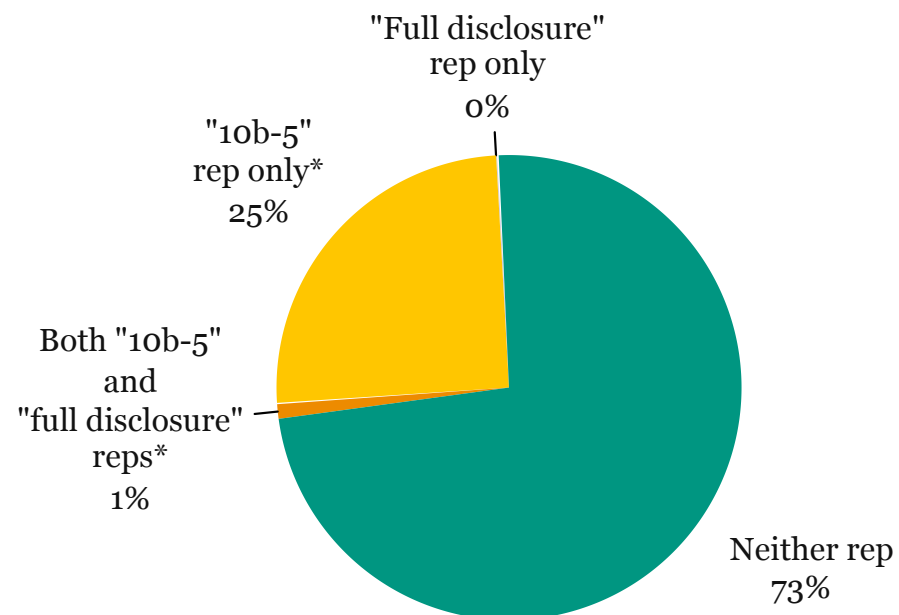
“10b–5” representation

“No representation or warranty or other statement made by Seller in this Agreement, the Disclosure Letter, any supplement to the Disclosure Letter, the certificates delivered pursuant to Section 2.7(a) or otherwise in connection with the Contemplated Transactions contains any untrue statement or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading.”

“Full disclosure” representation

“Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this Agreement or the Disclosure Letter.”

Inclusion of representations (2019 deals)

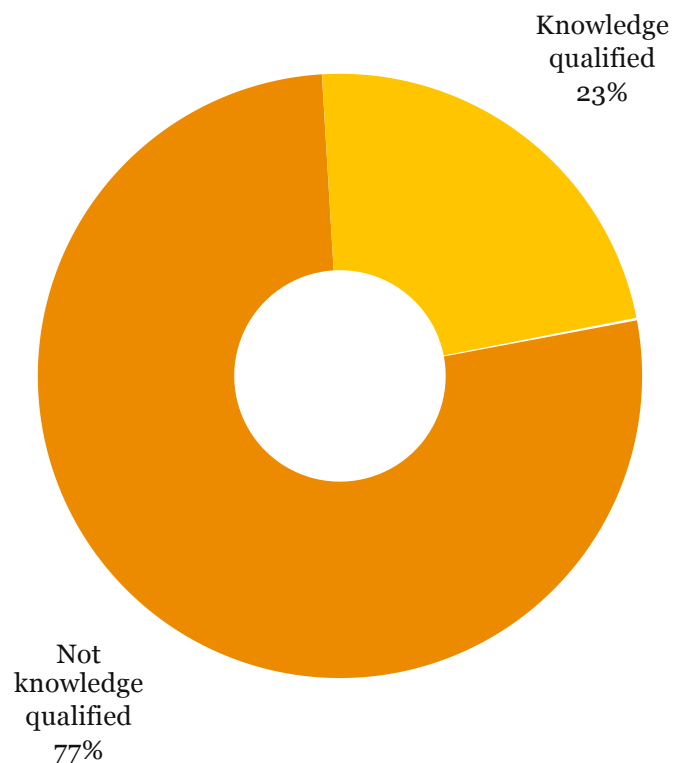


** Does not include representations that apply only to the shareholder information statement (and not the acquisition agreement).*

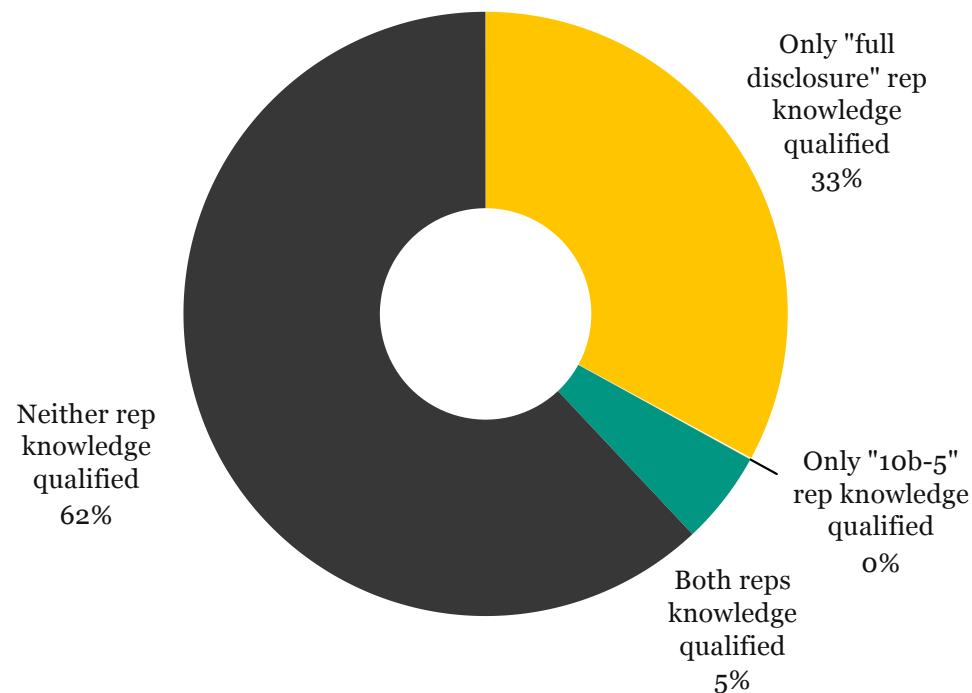
“10b-5” and “Full Disclosure” Representations: Knowledge Qualifiers

Subset: 2016–2019 deals

Subset: “10b-5” rep only



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



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

Examples

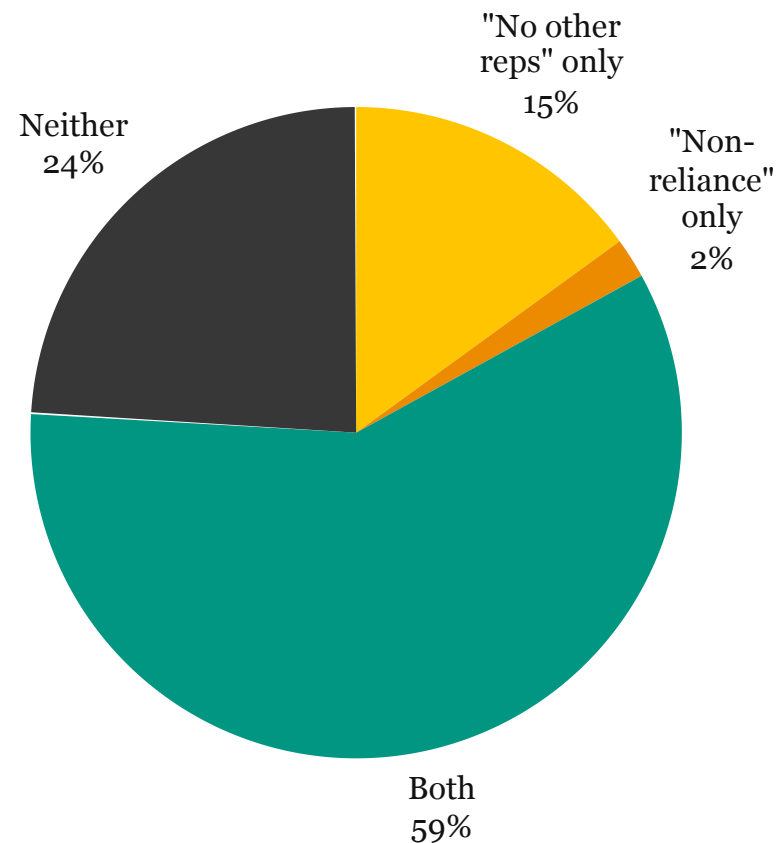
No other representations

“Buyer acknowledges that Seller has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in this Article III.”

Non-reliance

“Buyer is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties provided in this Article III.”

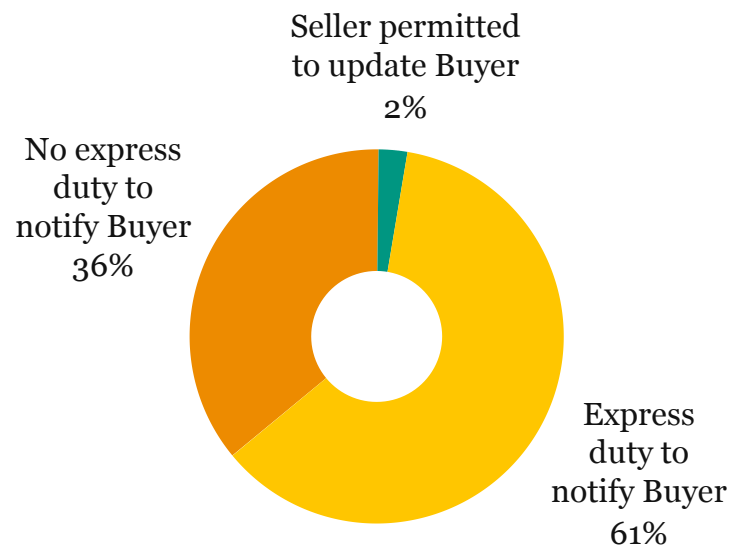
Inclusion of representations (2019 deals)



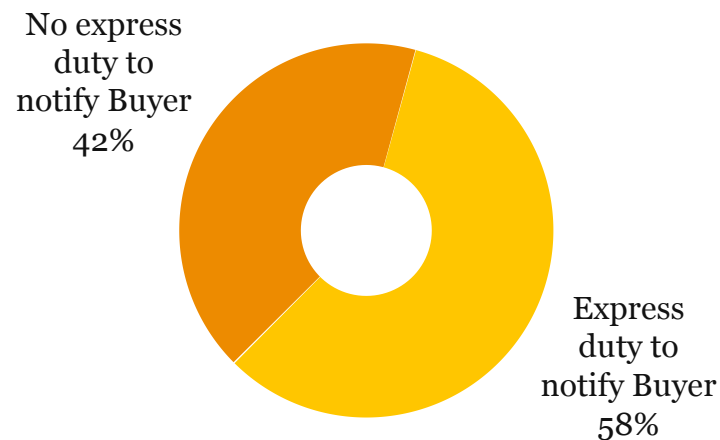
Covenants: Seller's Duty to Notify Buyer of Pre-Closing Breaches*

Subset: 2019 deals

Breaches of representations and warranties



Breaches of covenants



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

► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point. Visit MarketStandard to explore more than 150 attributes with five different filters at srsacquiom.com/marketstandard/

Covenants: No-Shop/No-Talk

Example No-Shop/No-Talk covenant

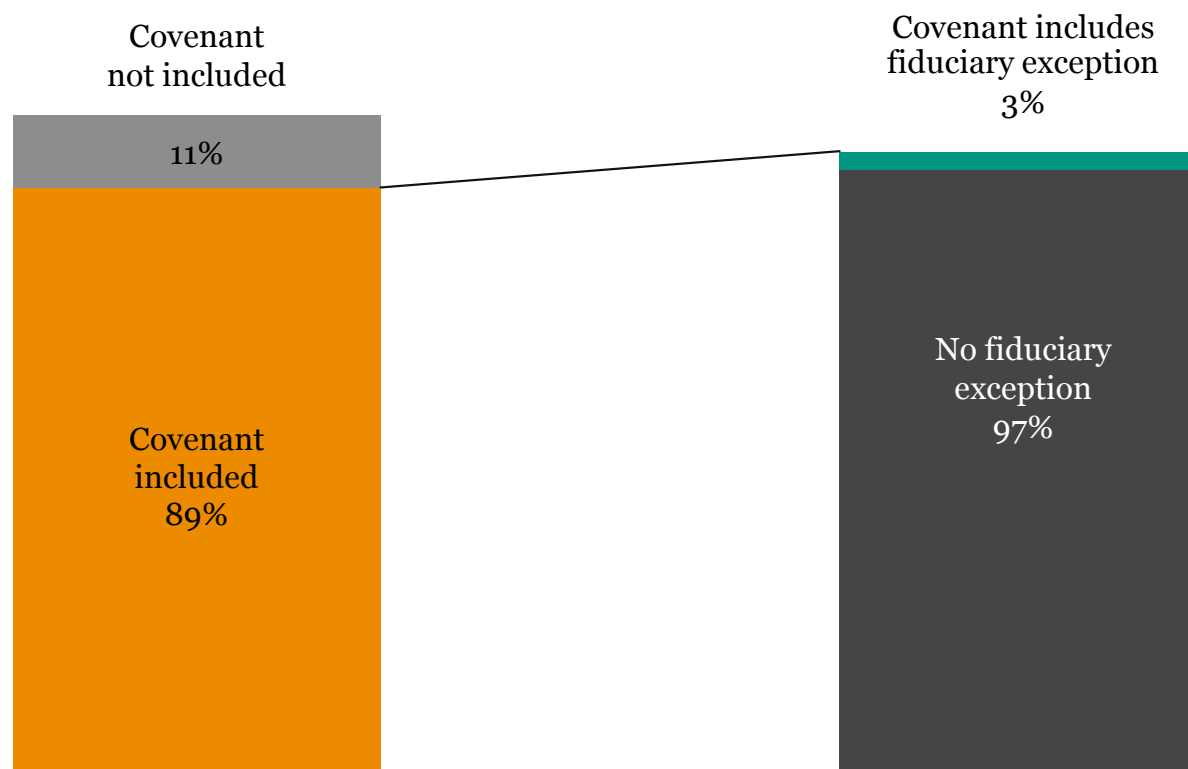
“Between the date of this Agreement and the Closing Date, Seller shall not... (i) solicit, initiate, consider, encourage, or accept any proposal or offer that constitutes an Acquisition Proposal or (ii) participate in any discussion, conversation, negotiation, or other communication regarding, or furnish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

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

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

Covenants: No-Shop/No-Talk*

No-Shop/No-Talk covenant inclusion† (2019 deals)



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

† Fiduciary exception subset excludes stock-purchase deals.

Closing Conditions*

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

Accuracy of Seller's Representations (Timing): When Must They Be Accurate?

Timing formulations

At signing only

“Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the date made.”

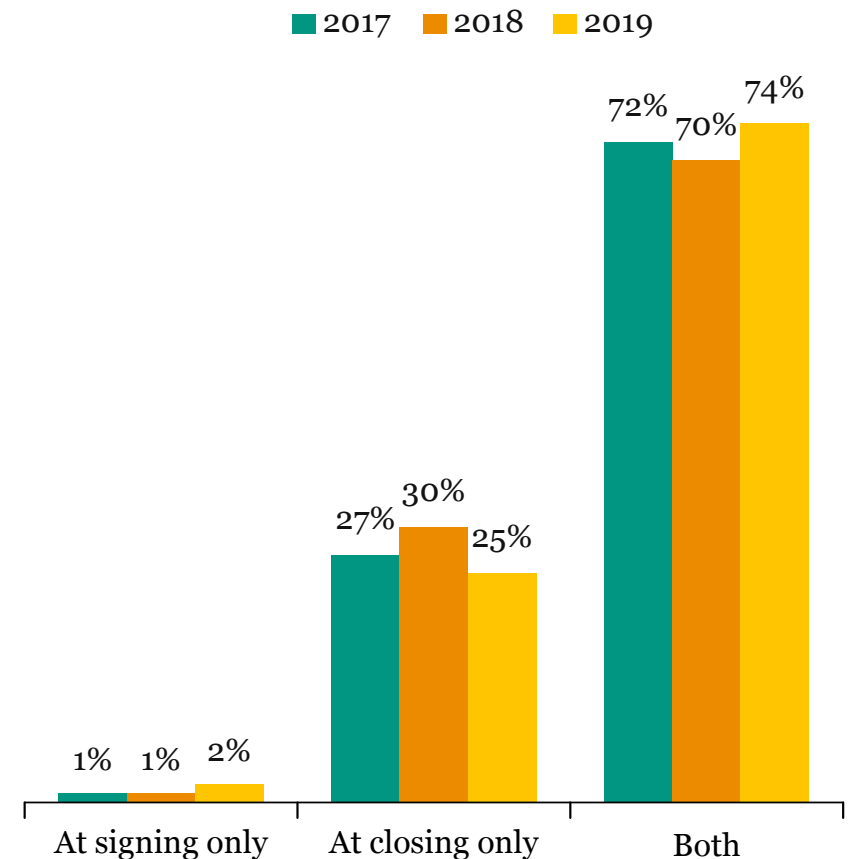
At closing only

“Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the Closing Date as if made on the Closing Date.”

At signing and closing

“Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the date made and as of the Closing Date as if made on the Closing Date.”

Accuracy: Timing



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

Accuracy formulations

Accurate “in all respects”

“Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all respects as of the Closing Date as if made on the Closing Date.”

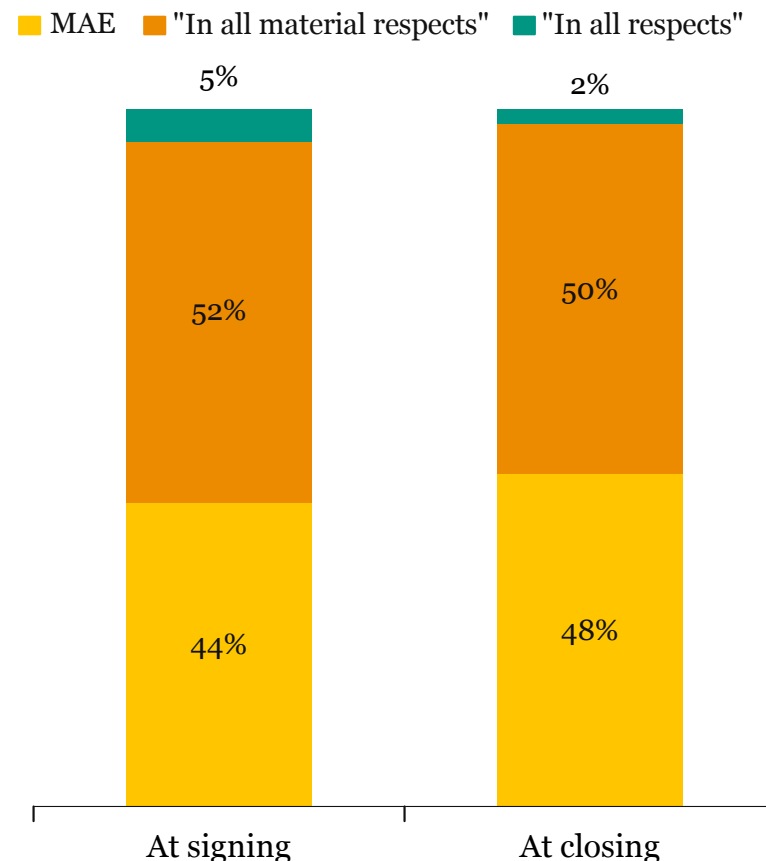
Accurate “in all material respects”

“Each of the representations and warranties made by Seller in this Agreement shall have been accurate in all material respects as of the Closing Date as if made on the Closing Date.”

MAE qualification

“Each of the representations and warranties made by Seller in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not have and could not reasonably be expected to have a Material Adverse Effect.”

Accuracy: Materiality (2019 deals)



► **Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.**
Explore MarketStandard at srsacquiom.com/marketstandard/

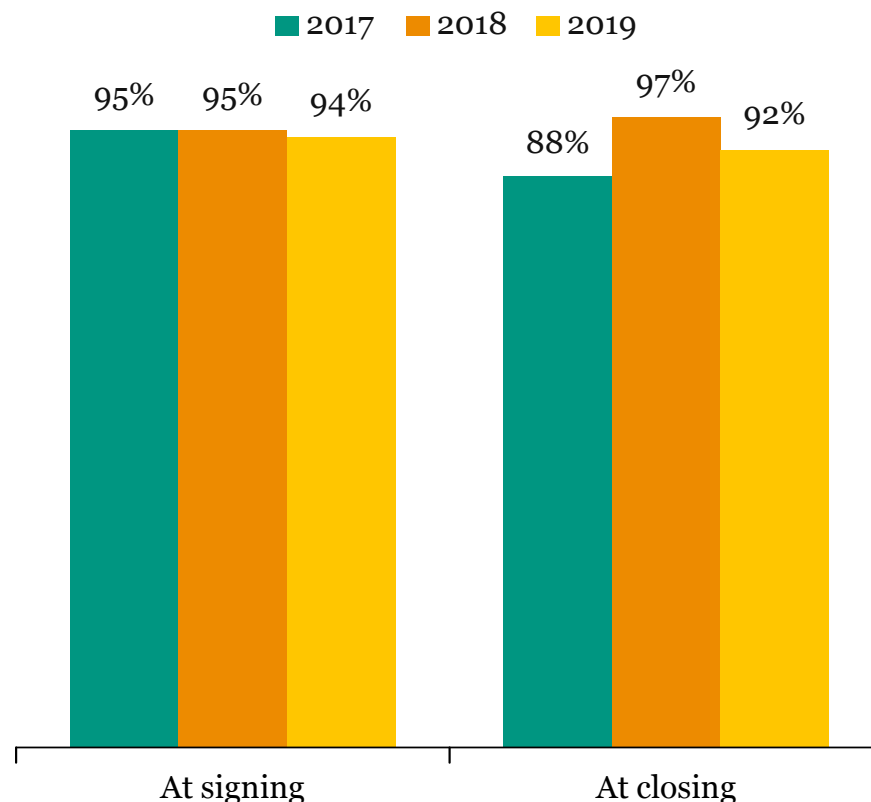
Accuracy of Seller's Representations (Materiality): MAE Qualifier with Capitalization Representation Carveout

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

Example capitalization carveout

“The representations and warranties set forth in Section 3.3 (Capitalization) shall be accurate in all respects as of the Closing Date as if made on the Closing Date. Each of the other representations and warranties made by Seller in this Agreement shall be accurate as of the Closing Date as if made on the Closing Date, except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not have and could not reasonably be expected to have a Material Adverse Effect.”

Carveout applies



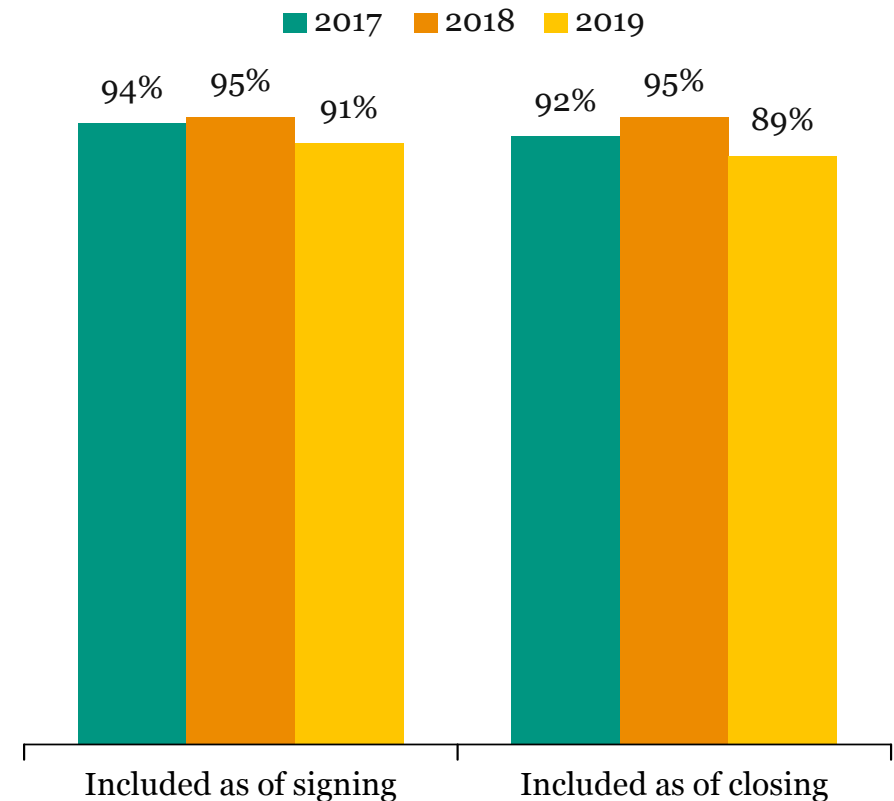
Accuracy of Seller's Representations (Materiality): Materiality Scrape

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

Example

“Each of the representations and warranties made by Seller in this Agreement shall be accurate in all material respects as of the Closing Date as if made on the Closing Date; provided that, for purposes of determining the accuracy of such representations and warranties, all materiality, “Material Adverse Effect” and similar qualifications contained in such representations and warranties shall be disregarded.”

Frequency



“Material Adverse Change” Condition (“MAC”)

Condition

“Stand-alone” MAC

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

“Back-door” MAC

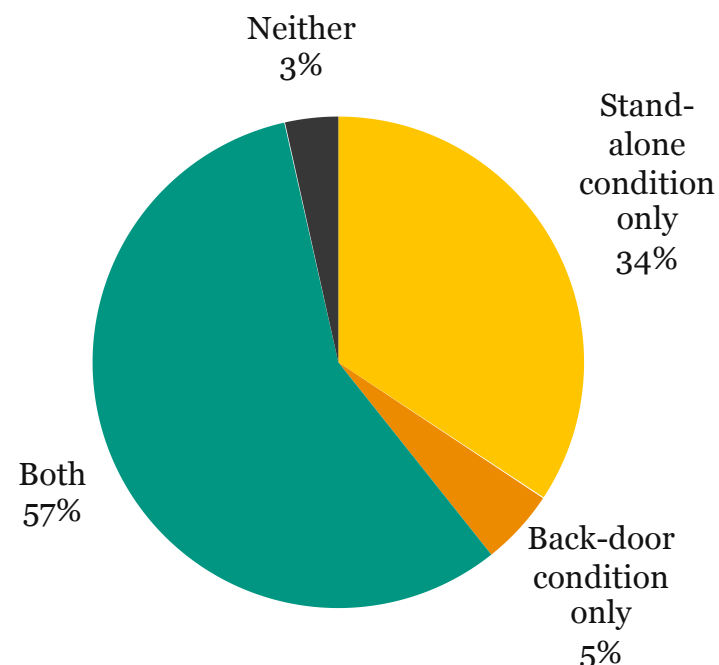
The Agreement includes an “Absence of Changes” representation:

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

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

“The representations and warranties made by Seller in this Agreement shall be true and correct in all respects when made and at the Closing Date as if made on the Closing Date.”

MAC condition details (2019 deals)



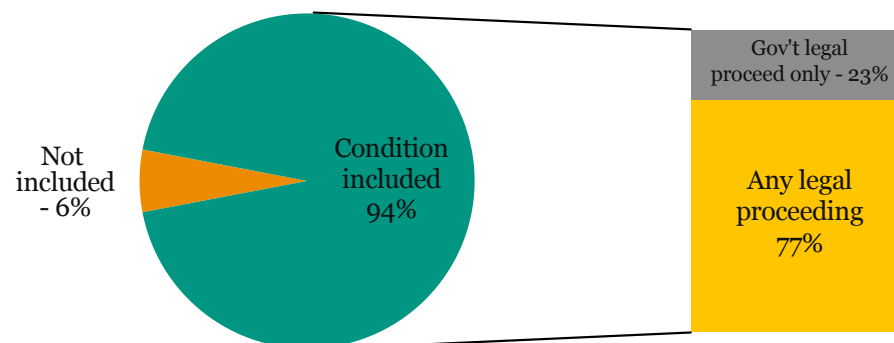
► **Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.**
Explore MarketStandard at srsacquiom.com/marketstandard/

“No Legal Proceedings” Condition

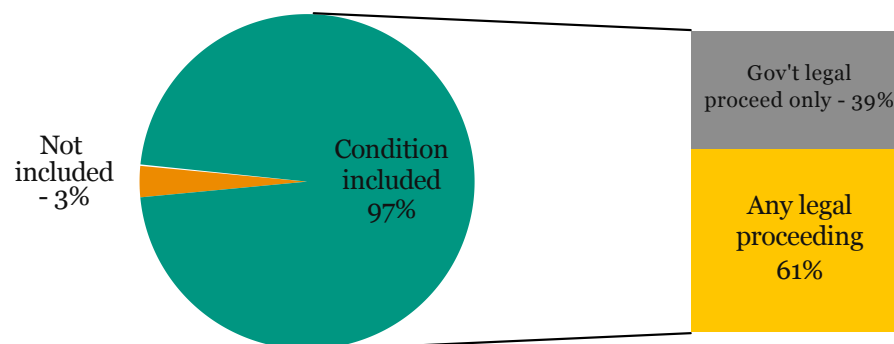
Example formulation

“There will not be pending [or threatened] action, suit, or similar legal proceeding brought by any Governmental Entity [or any Person] challenging or seeking to restrain or prohibit the consummation of the transactions contemplated herein.”

2019 Deals



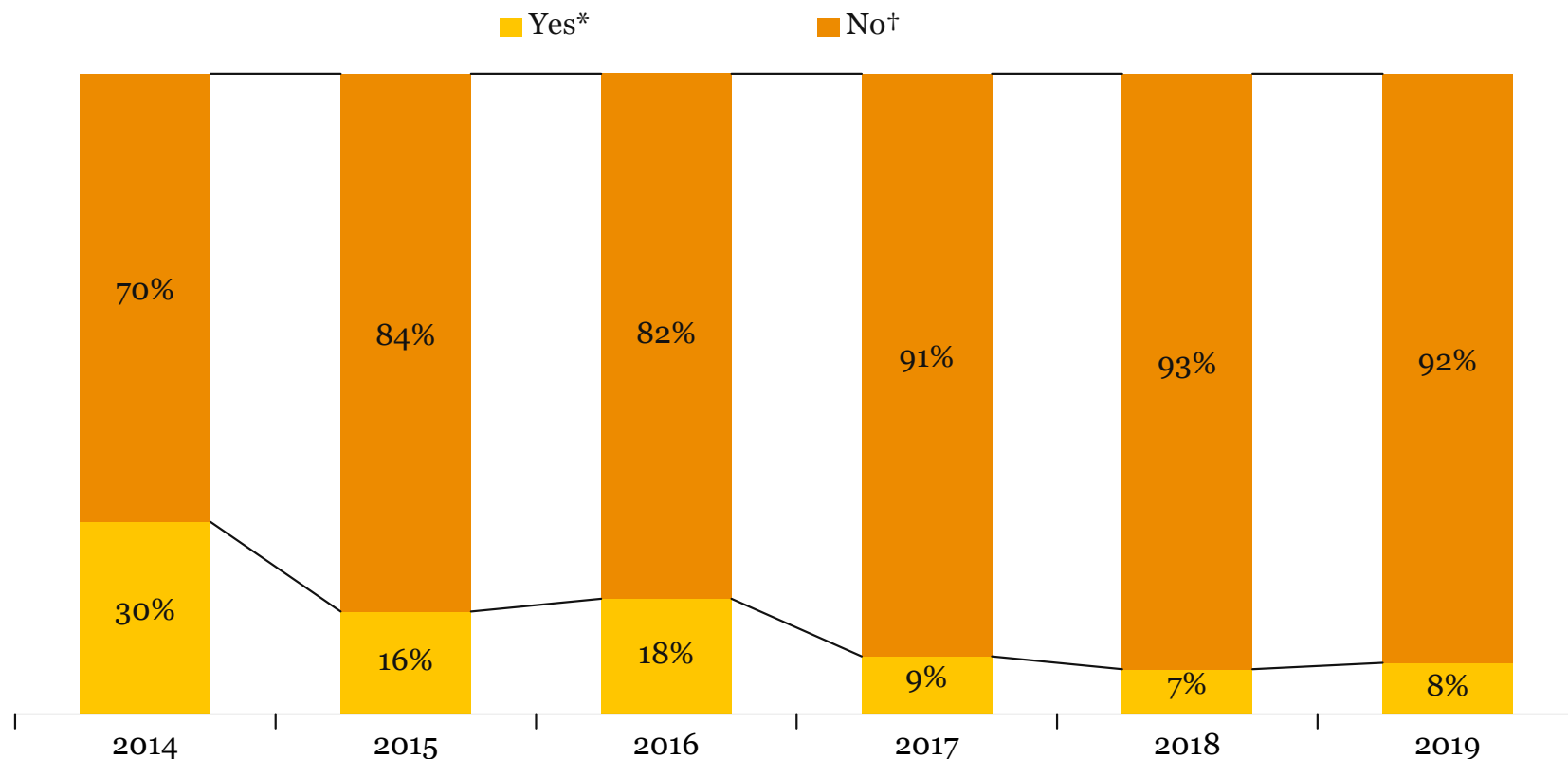
2018 Deals



► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.
Explore MarketStandard at srsacquiom.com/marketstandard/

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

Opinion required as a condition to closing



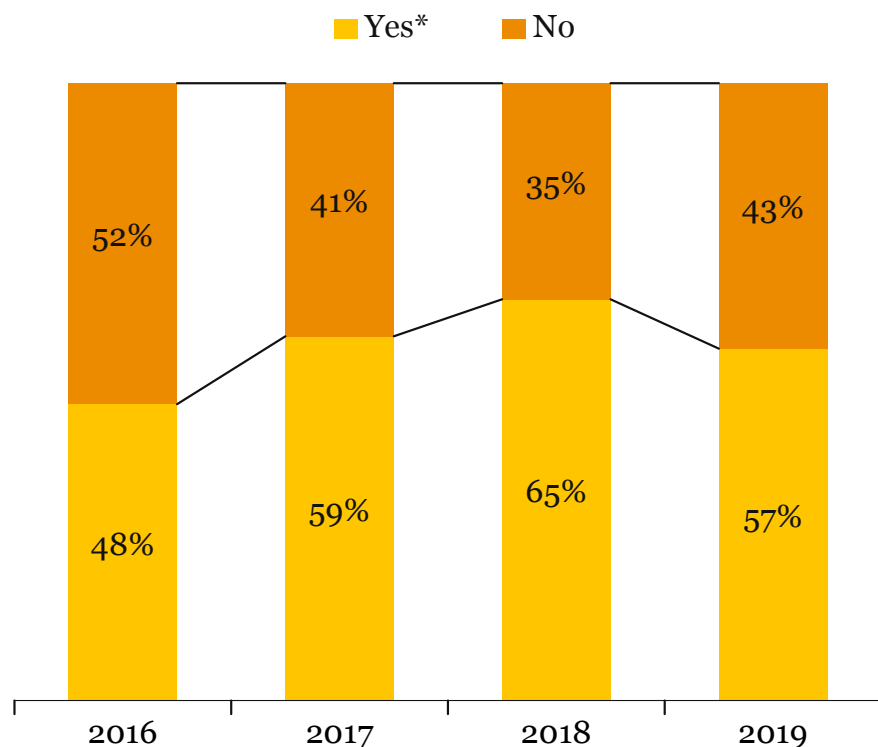
* Includes opinions delivered pursuant to both stand-alone and “closing deliverables” conditions.

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

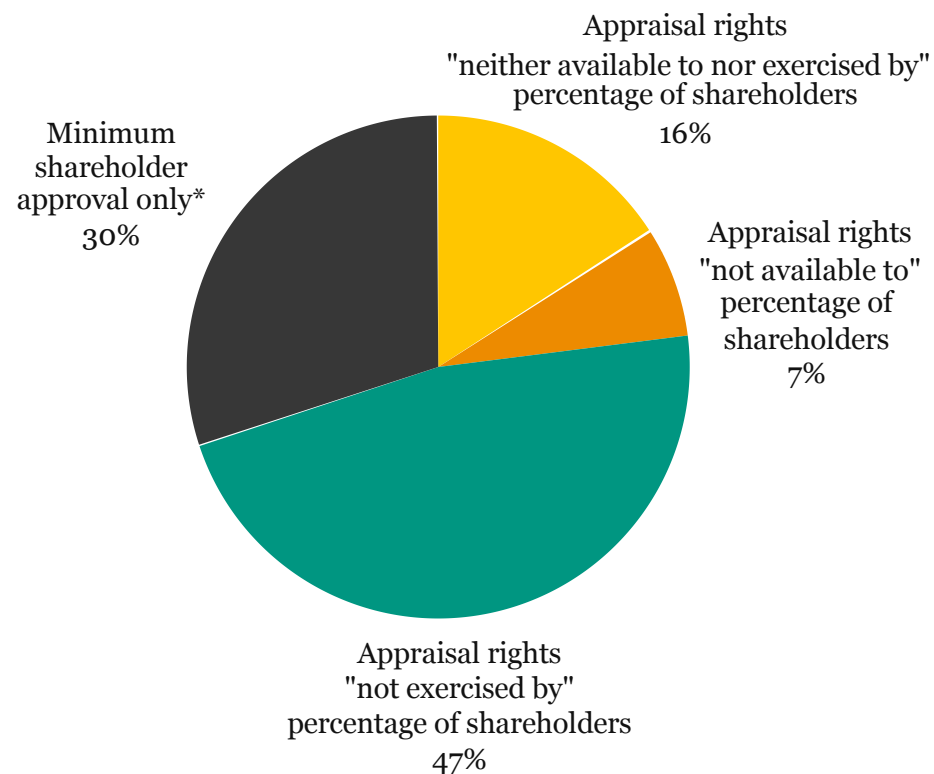
Appraisal Rights Condition

Subset: Mergers

Appraisal rights condition included



Drafting details (2019 deals including condition)

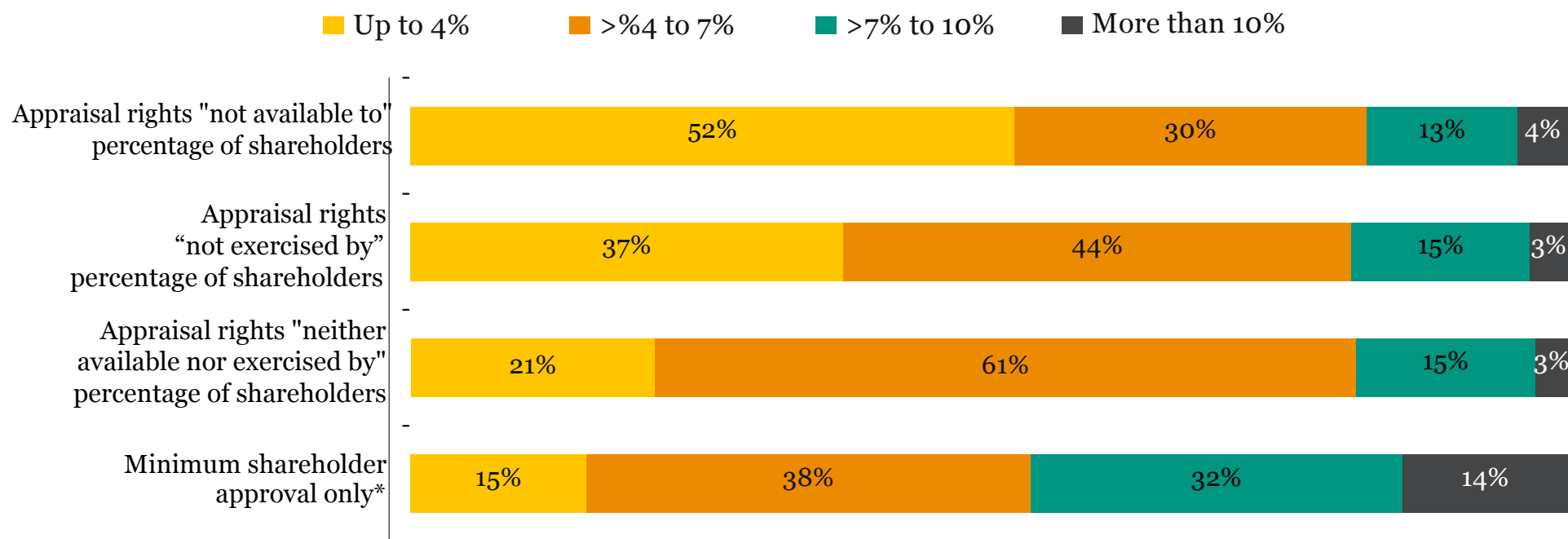


* Includes deals without an express appraisal rights condition but with a condition specifying a minimum percentage of shareholder votes (on a fully diluted basis) approving the merger, effectively waiving appraisal rights.

Appraisal Rights Condition: Thresholds

Subset: Mergers since 2016 with an appraisal rights condition

Condition threshold details

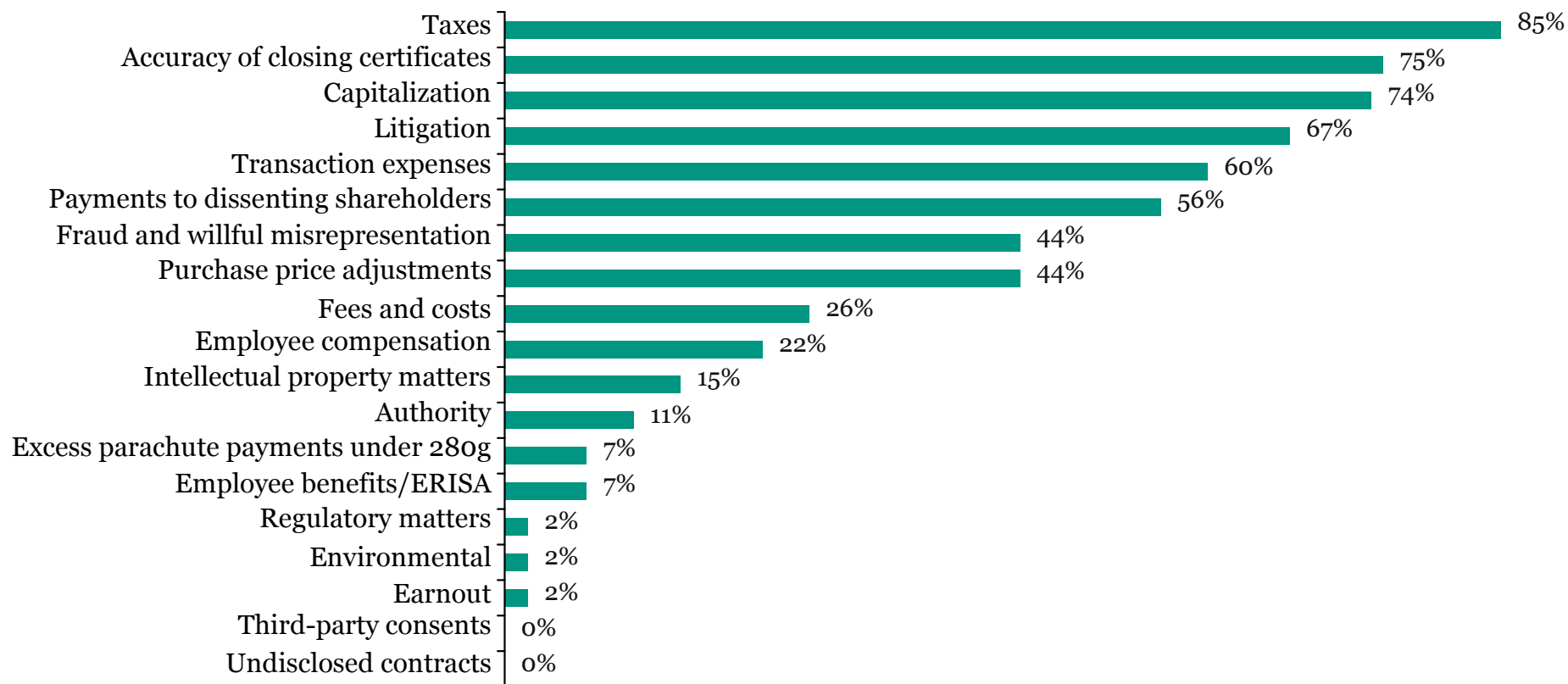


* These deals did not include an express appraisal rights condition, but did include a condition specifying a minimum percentage of shareholder votes (on a fully diluted basis) approving the merger, effectively waiving appraisal rights.

Indemnification

Stand-Alone Indemnities*

Frequency (2019 deals)



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

► **Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.**
Explore MarketStandard at srsacquiom.com/marketstandard/

“Sandbagging”

Examples

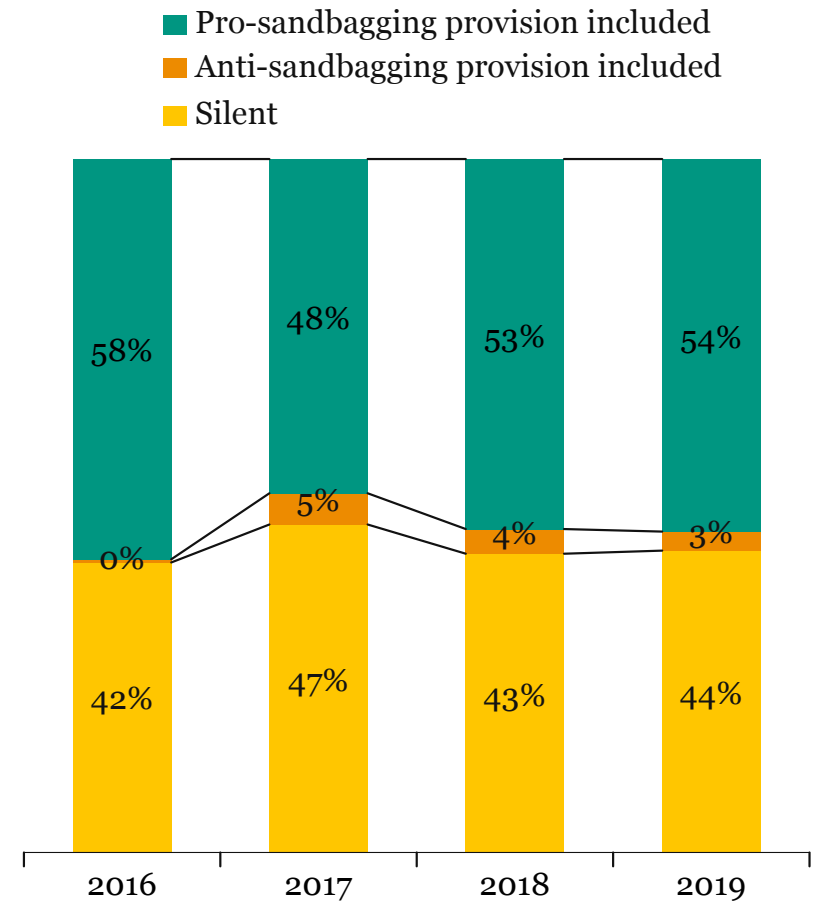
Pro-sandbagging

“The right to indemnification, reimbursement, or other remedies based upon any such representation or warranty will not be affected by any Knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of such representation warranty...”

Anti-sandbagging

“No party shall be liable under this Article for any Losses resulting from or relating to any inaccuracy in or breach of any representation or warranty in this Agreement if the party seeking indemnification for such Losses had Knowledge of such breach before Closing.”

Year-over-year trend



“Materiality Scrape” Example Definitions

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

“For purposes of this Article X (Indemnification), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect.”

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

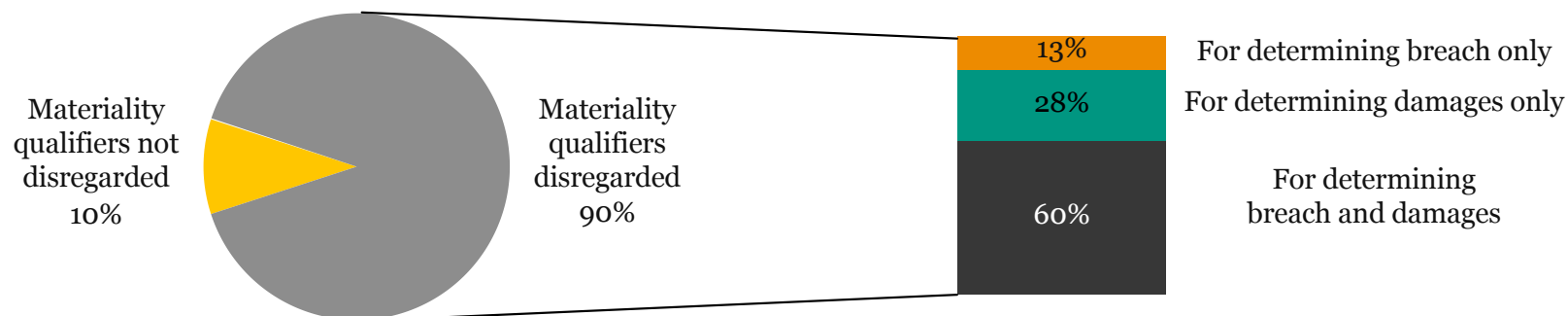
“For the sole purpose of determining Losses (and not for determining whether any breach of any representation or warranty has occurred), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect.”

Materiality qualifications in representations and warranties disregarded for determining breaches only

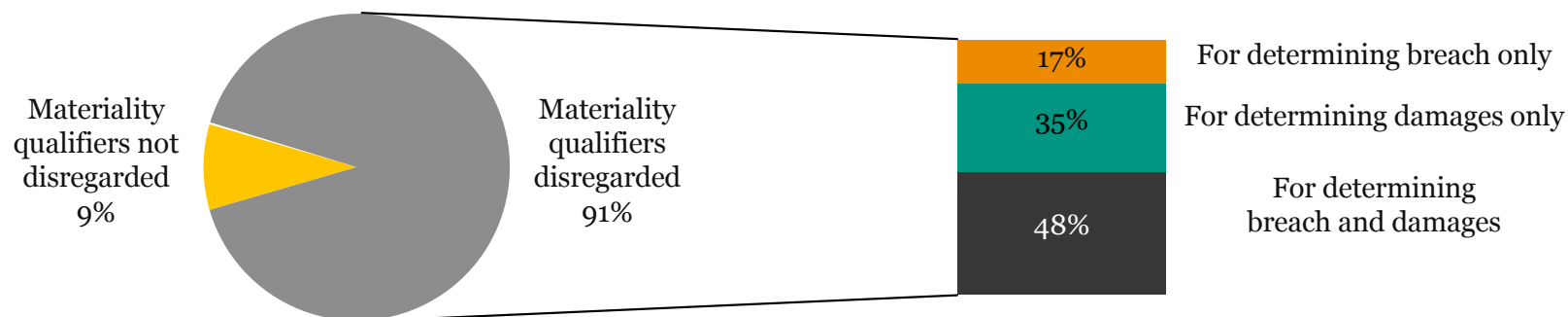
“For purposes of this Article VII (Indemnification), the representations and warranties of Seller shall not be deemed qualified by any references to materiality or to Material Adverse Effect in determining whether such representation or warranty has been breached.”

“Materiality Scrape” Inclusion

Subset: 2019 deals



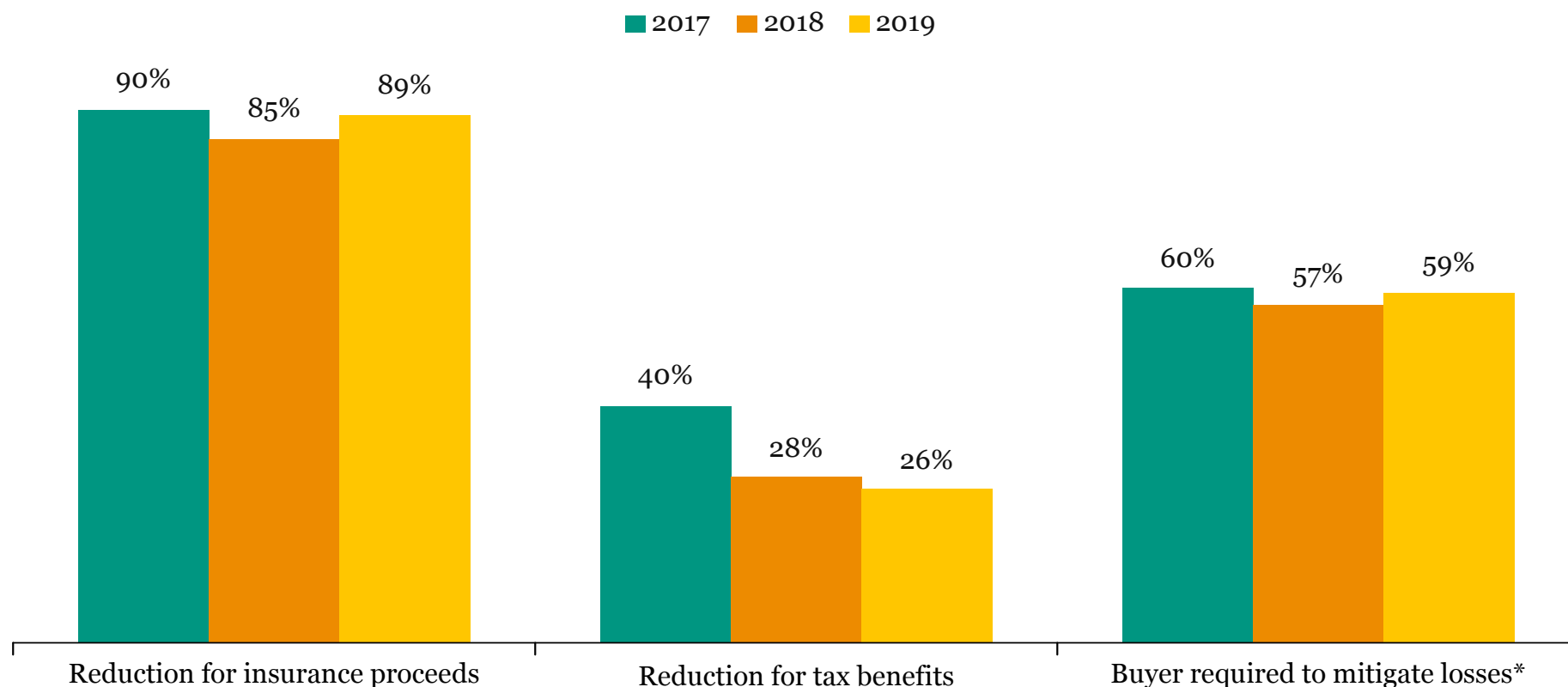
Subset: 2018 deals



► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point. Visit MarketStandard to explore more than 150 attributes with five different filters at srsacquiom.com/marketstandard/

Reductions Against Buyer's Indemnification Claims

Provision included



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

► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point. Visit MarketStandard to explore more than 150 attributes with five different filters at srsacquiom.com/marketstandard/

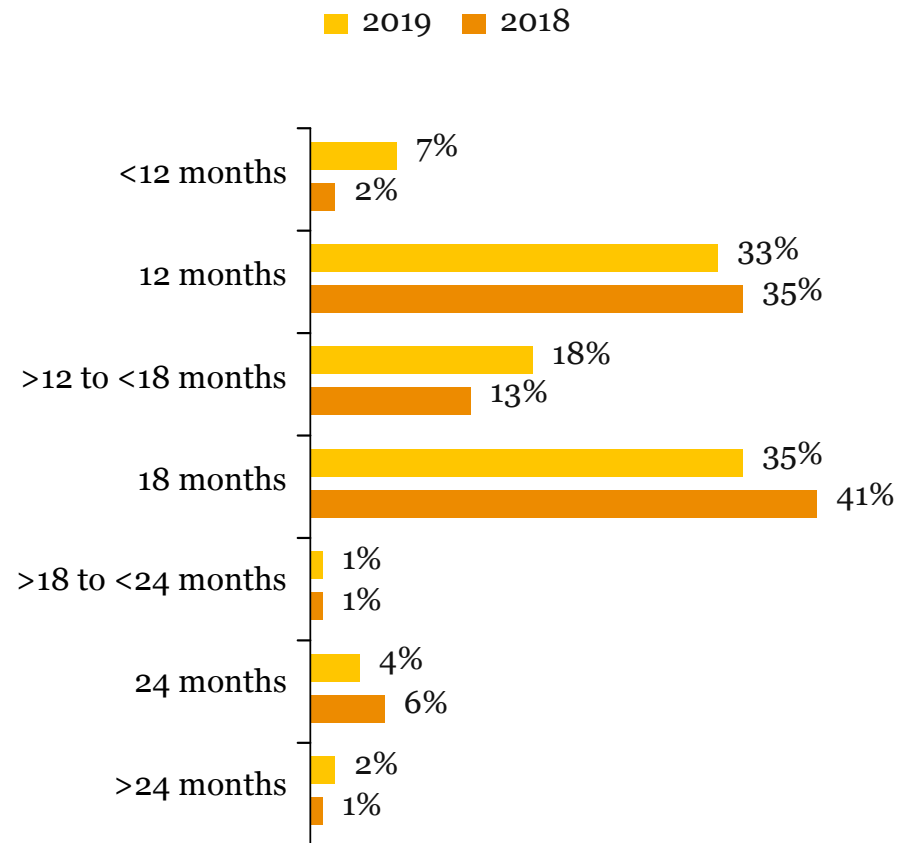
General Survival Period/Time to Assert Claims

Example survival provisions

“Section 10.1 Survival. All representations, warranties and covenants in this Agreement and the Disclosure Schedules and any other certificate or document delivered pursuant to this Agreement will survive the Closing for a period of 12 months.”

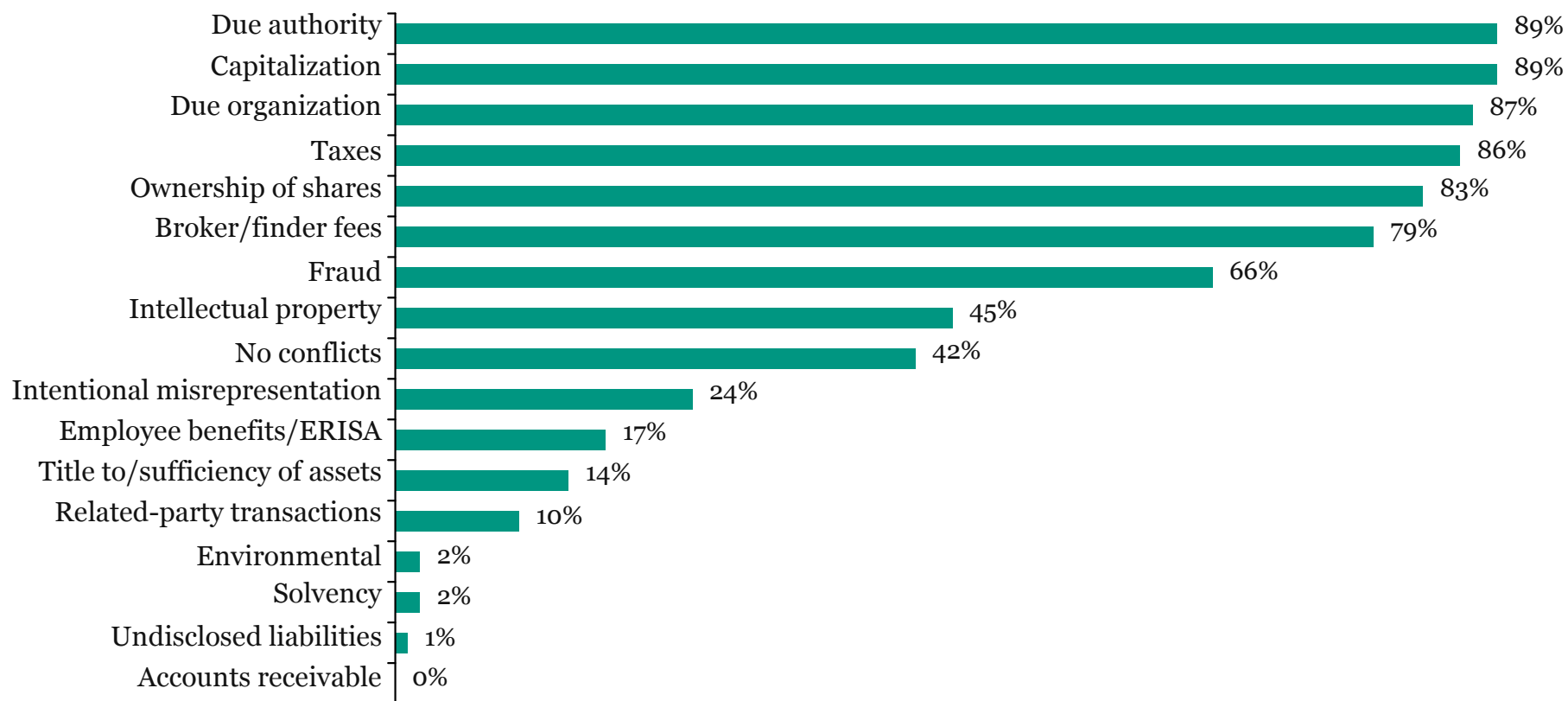
“Section 10.5 Time Limitations. If the Closing occurs, Seller will have no liability (for indemnification or otherwise) with respect to any representation or warranty unless on or before the 12-month anniversary of the Closing Buyer notifies Sellers of a Claim specifying the factual basis of such Claim in reasonable detail to the extent then known by Buyer.”

Survival period (2019 median: 15 months)



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

Carveout frequency (2019 deals)

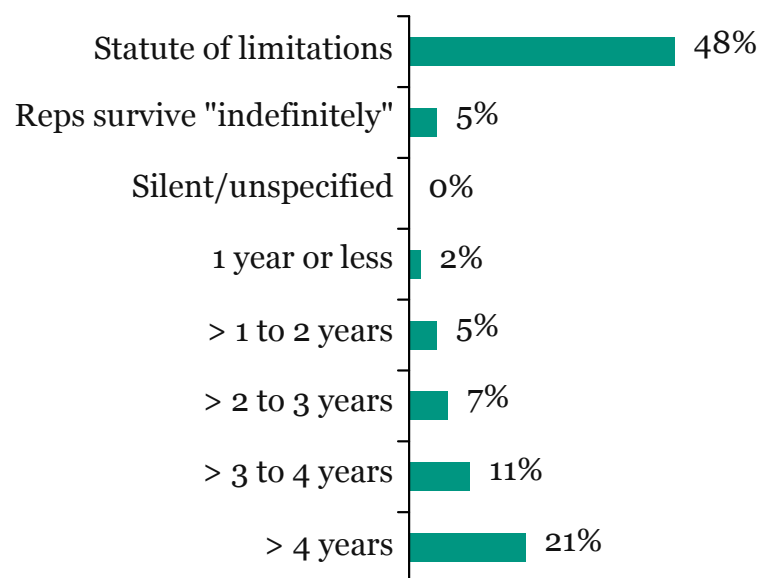


* Matters subject to carveouts survive longer than the general survival period.

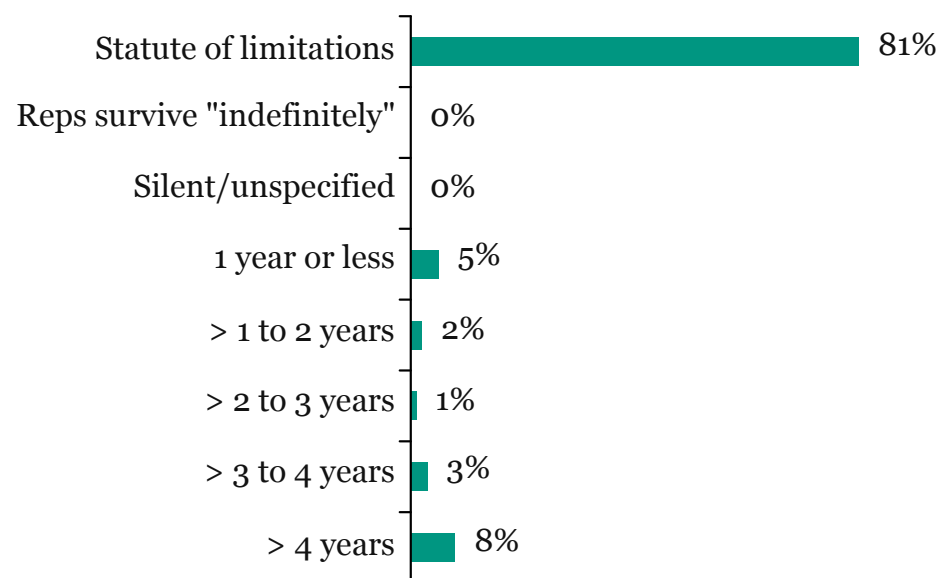
Second-Level Survival: “Fundamental” and Tax Representations

Subset: 2019 deals that include the specified carveout. Years below denote additional survival time after expiration of the general survival period.

Group of “Fundamental Representations”*



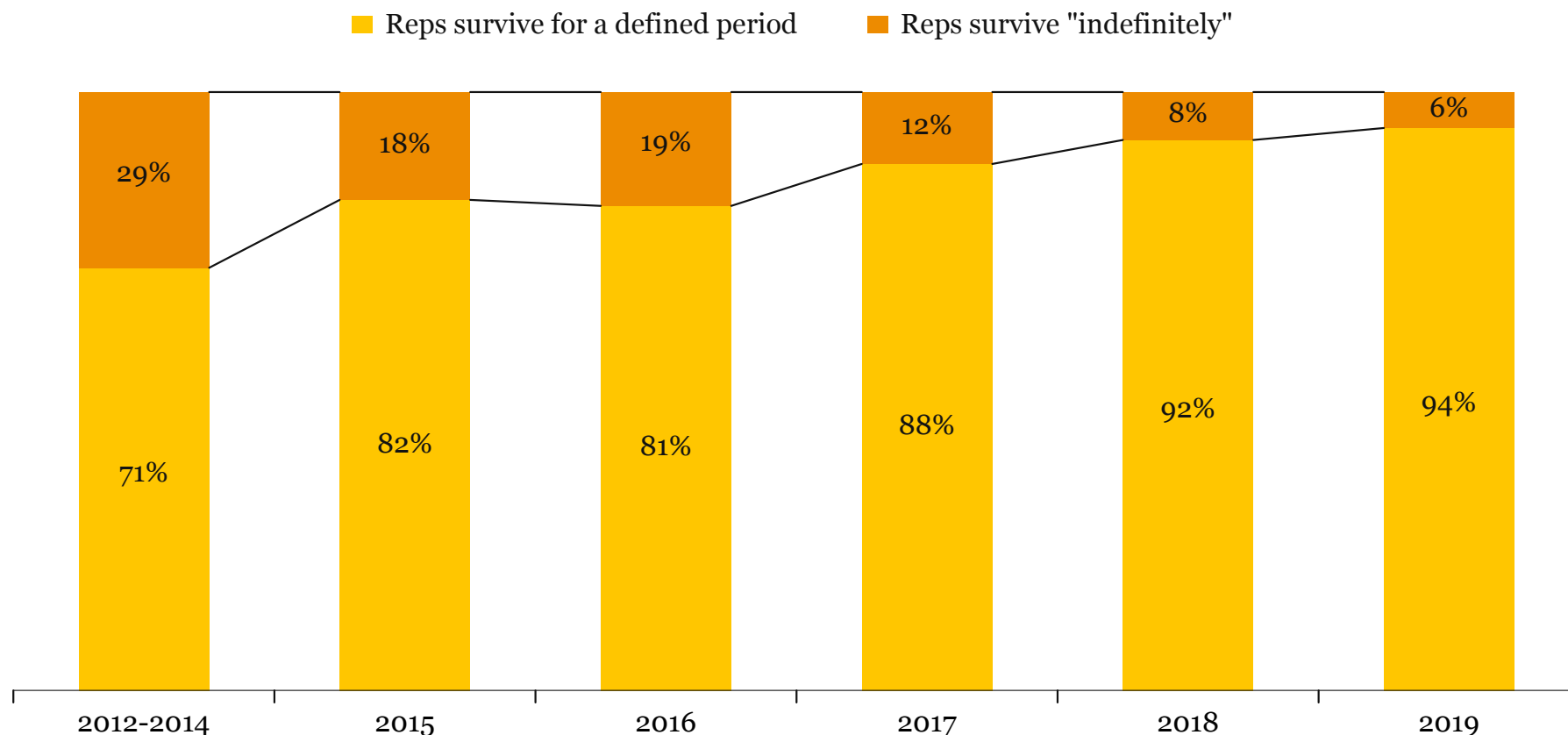
Tax representations



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

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

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

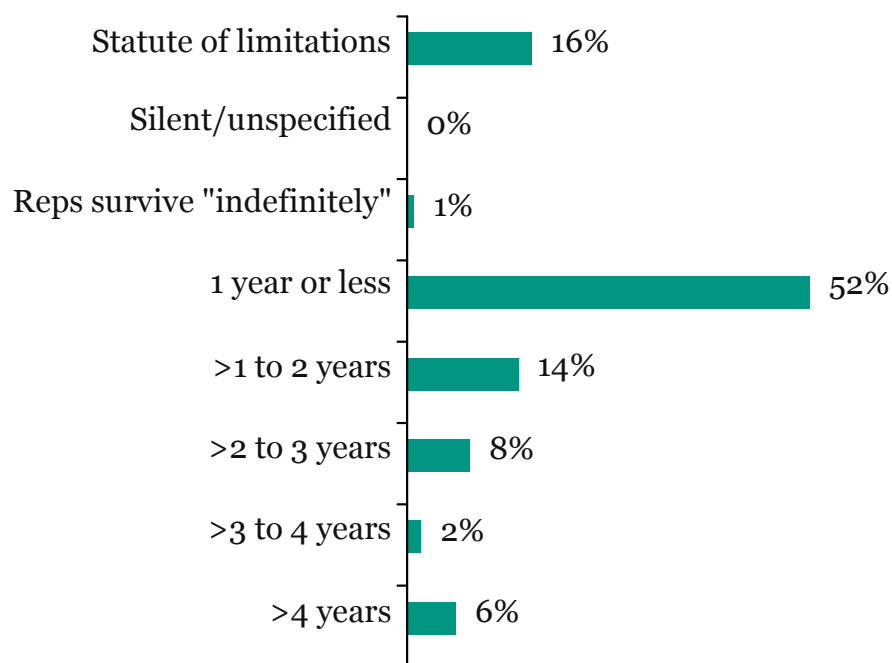


*In late 2014, the Delaware Court of Chancery held that a merger agreement provision allowing a Buyer to claw back consideration from stockholders for breaches of certain representations and warranties (1) up to the purchase price and (2) "indefinitely" after closing violated Delaware law (see *Cigna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

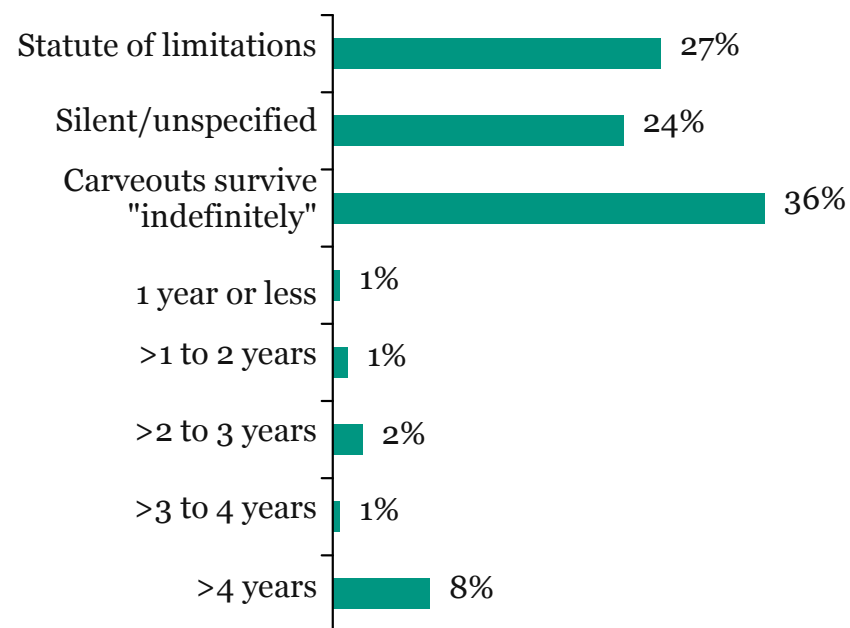
Second-Level Survival: IP Representations and Fraud

Subset: 2019 deals that include the specified carveout. Years below denote additional survival time after expiration of the general survival period.

Intellectual property representations



Fraud/intentional misrepresentation



Baskets: Definitions

Basket formulations

Deductible

“Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$300,000 (the ‘Deductible’) in which event Securityholders shall be responsible only for Losses exceeding the Deductible.”

First dollar

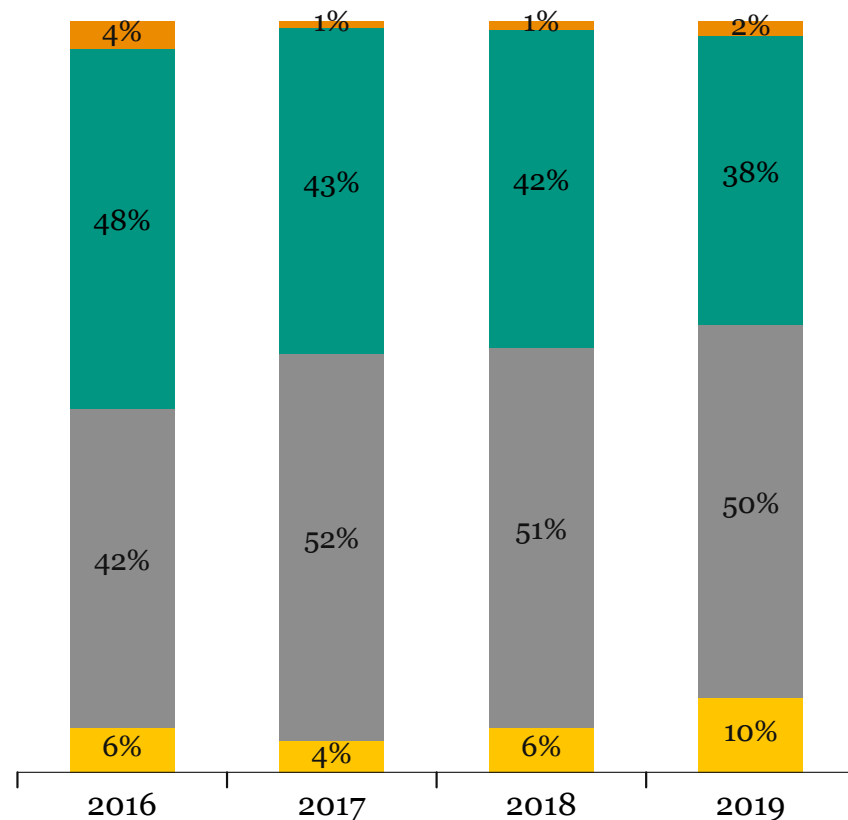
“Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$500,000 (the ‘Threshold’) in which event the Securityholders shall be responsible for the amount of all Losses, regardless of the Threshold.”

Combination

“Securityholders shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds \$500,000 (the ‘Threshold’) in which event the Securityholders shall be responsible only for Losses in excess of \$300,000 (the ‘Deductible’).”

Basket frequency

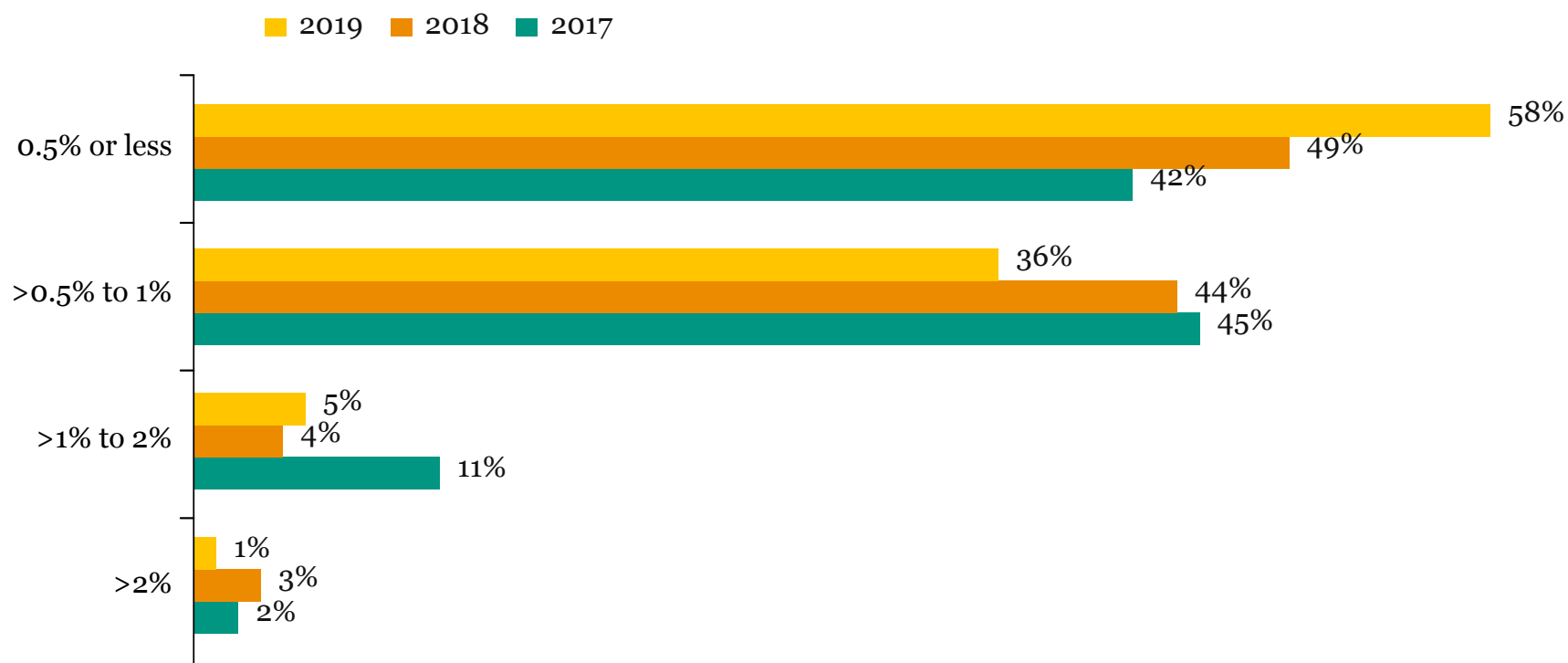
■ No basket ■ Deductible ■ First dollar ■ Combination



Baskets as a Percentage of Transaction Value

Subset: Deals with deductible and first-dollar baskets

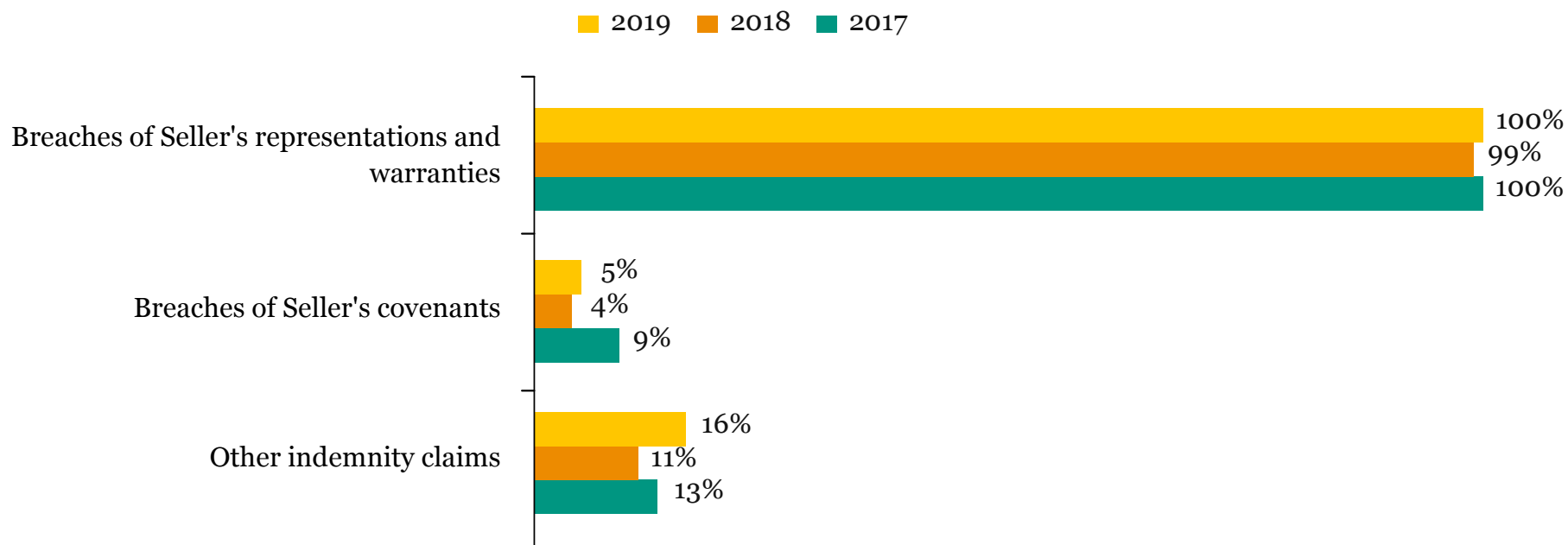
Basket sizes



Baskets: General Coverage*

Subset: Deals with baskets

Coverage details

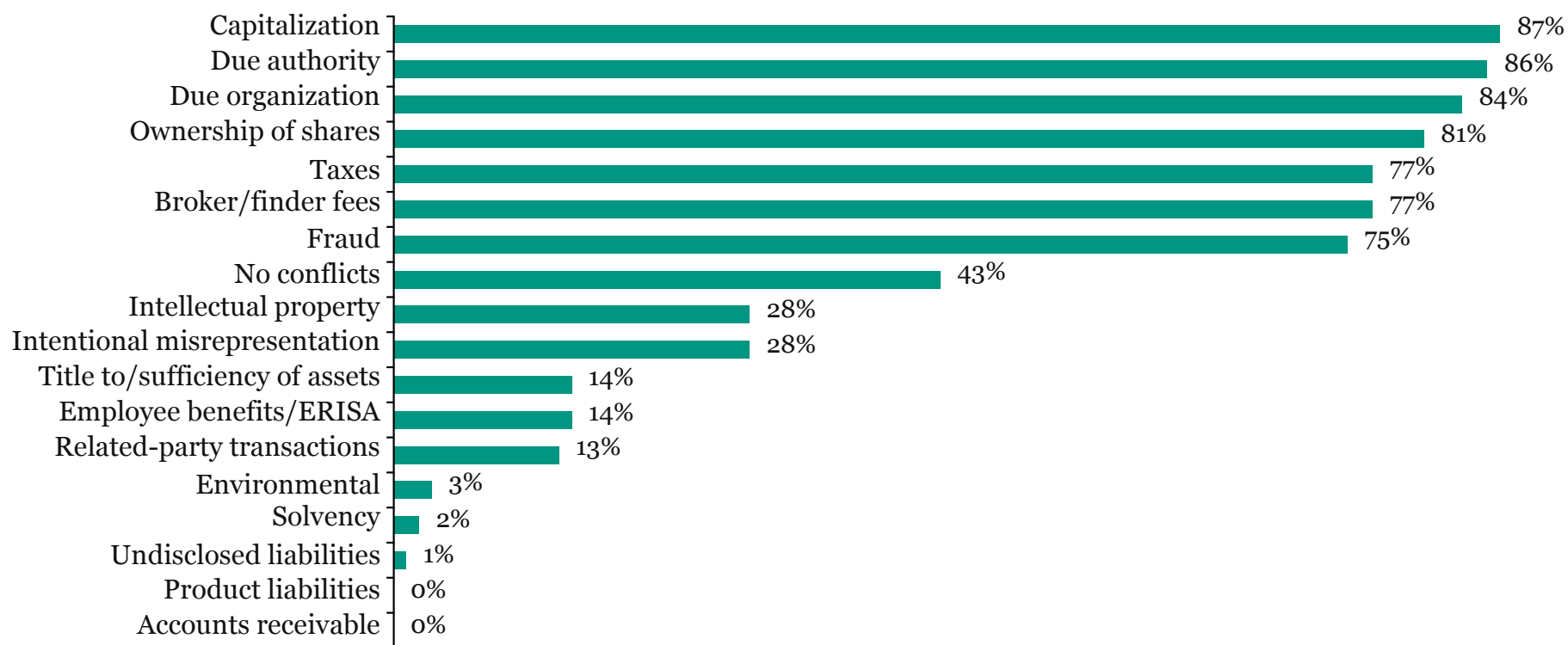


* Carveouts to general basket coverage are discussed on the next slide.

Baskets: Carveouts

Subset: 2019 deals with baskets

Carveout frequency

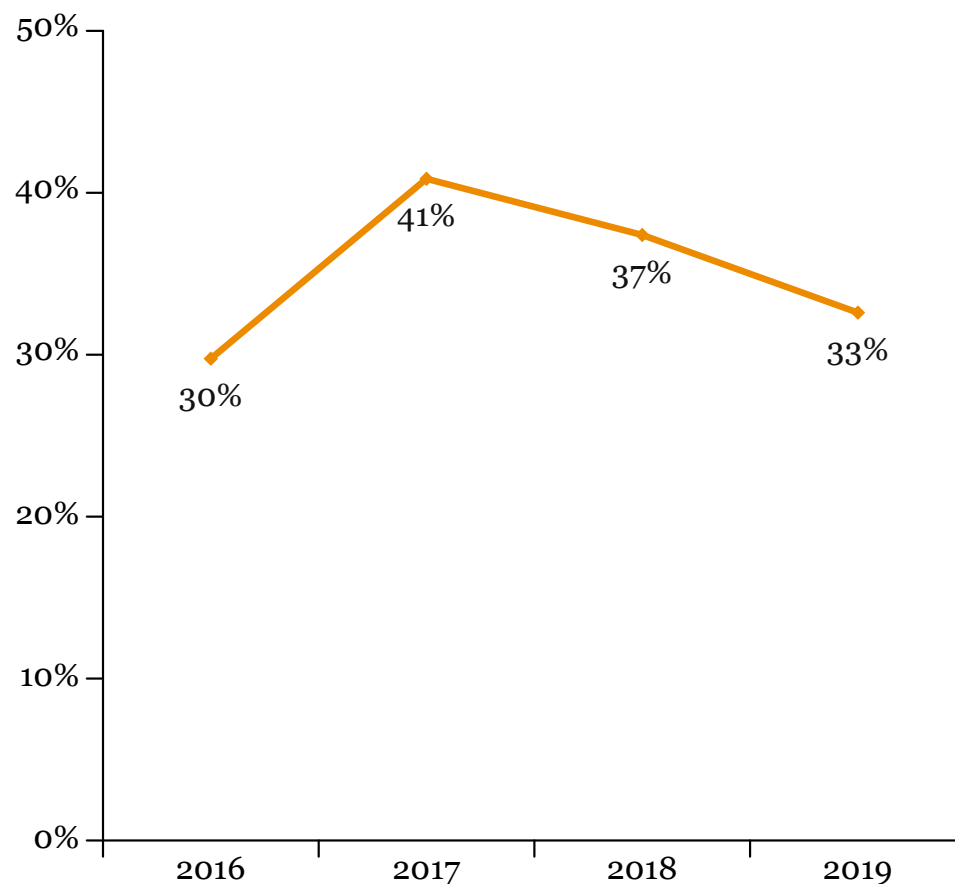


Baskets: Eligible Claim Threshold

Claim threshold formulation

“Securityholders shall not be required to indemnify Buyer for any individual item where the Loss relating to such claim (or series of claims arising from the same or substantially similar facts or circumstances) is less than \$25,000.”

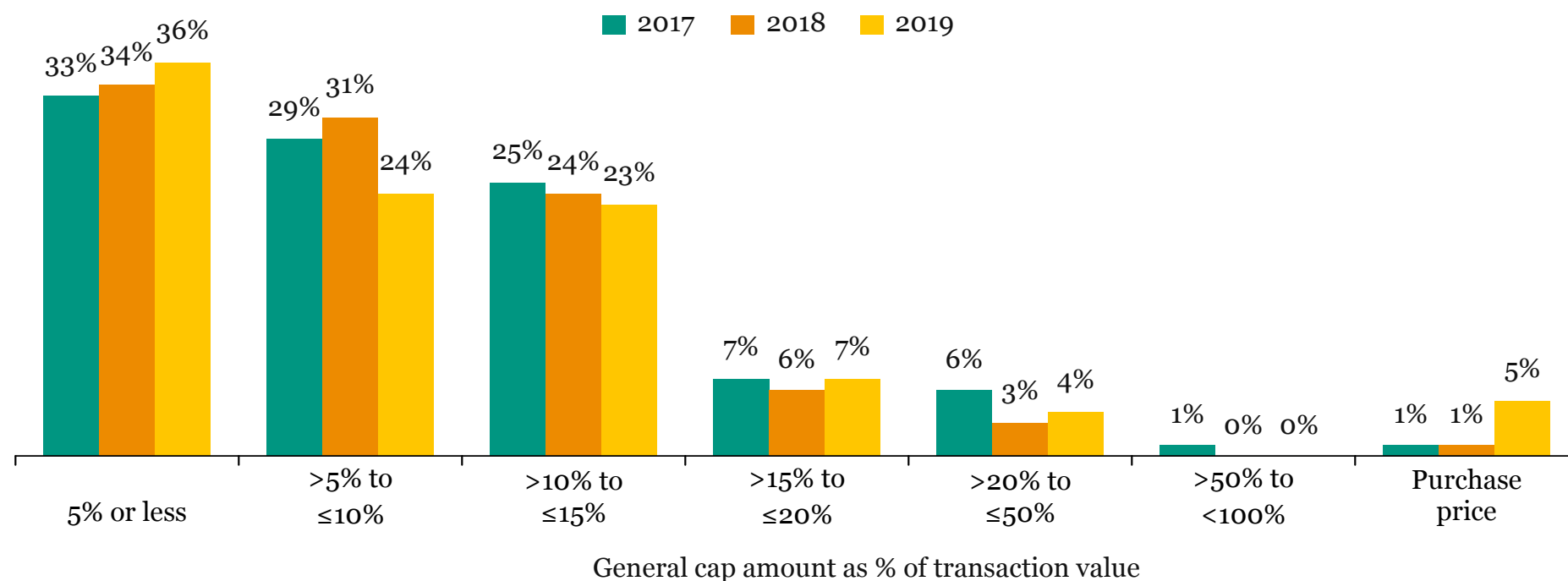
Threshold included, year-over-year



Caps as a Percentage of Transaction Value*: All Deals

For 2019, the average cap was 13.2%; the median was 10.0%. These figures represent all deals, including those in which the buyer has purchased an RWI policy (which generally results in a smaller liability cap). See the following slide for statistics where deals known to have buy-side RWI policies have been removed from the data set.

Details, 2017–2019



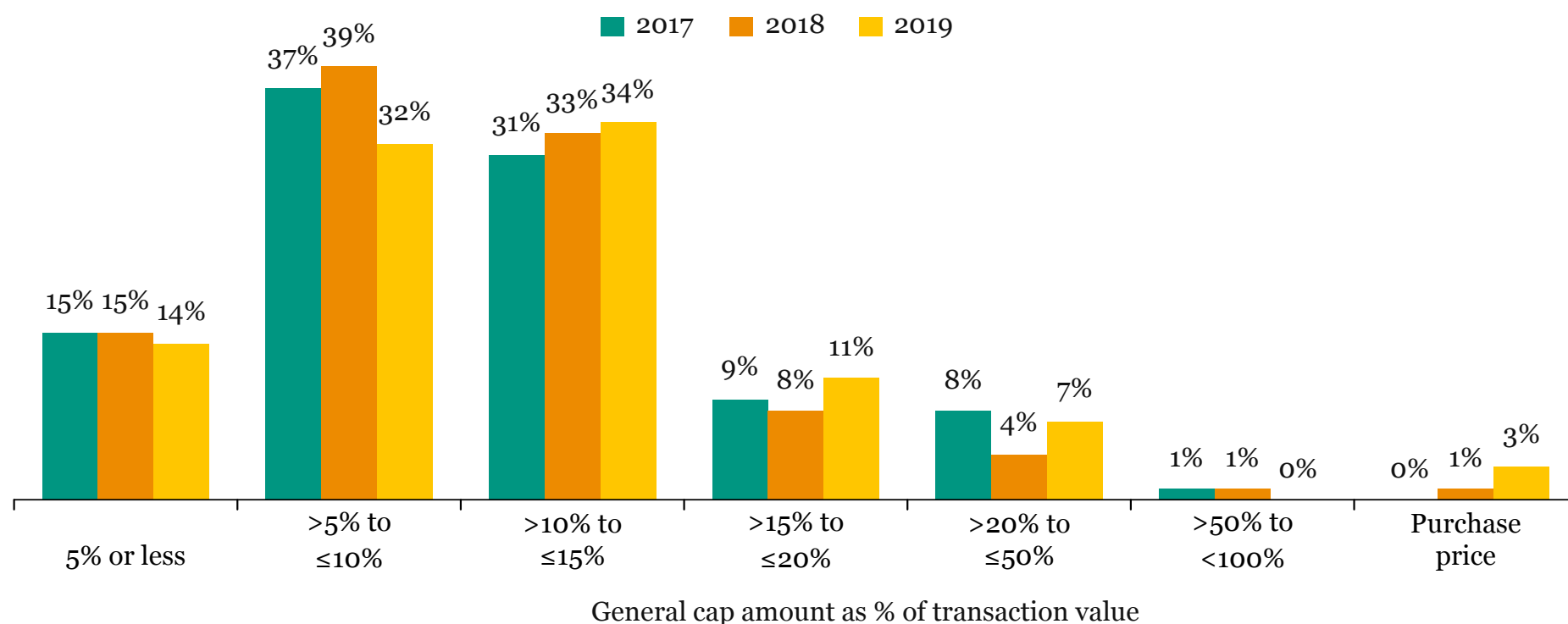
* In 2019 deals with escrows/holdbacks, 75% of caps equaled the escrowed amount.

► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point. Visit MarketStandard to explore more than 150 attributes with five different filters at srsacquiom.com/marketstandard/

Caps as a Percentage of Transaction Value*: Non-RWI

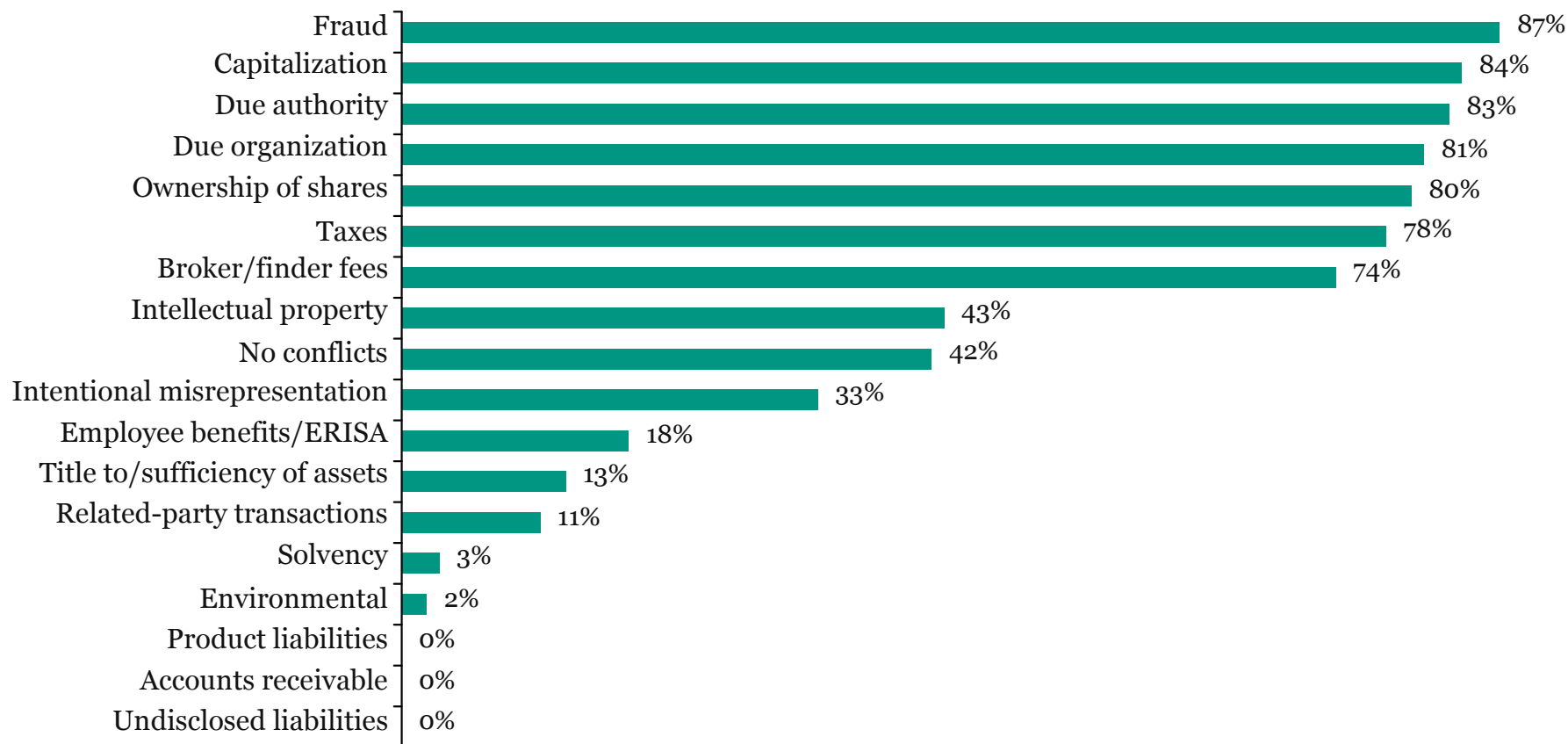
When deals in which the buyer has definitively purchased an RWI policy are eliminated from the data set, the average cap for the remaining deals in 2019 was 14.3%; the median was 10.7%. Note that buyers do not always disclose the presence of a buy-side RWI policy, so this sample set likely still contains some deals with policies.

Details, 2017–2019



Caps: Carveouts

Frequency (2019 deals)

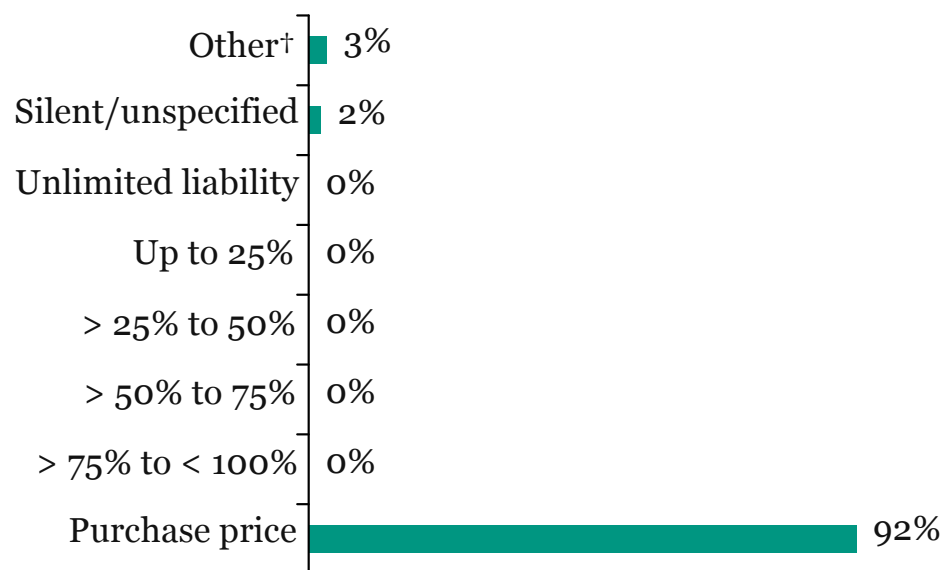


► Target industry, transaction value, Buyer Power Ratio, and other factors may affect this deal point.
Explore MarketStandard at srsacquiom.com/marketstandard/

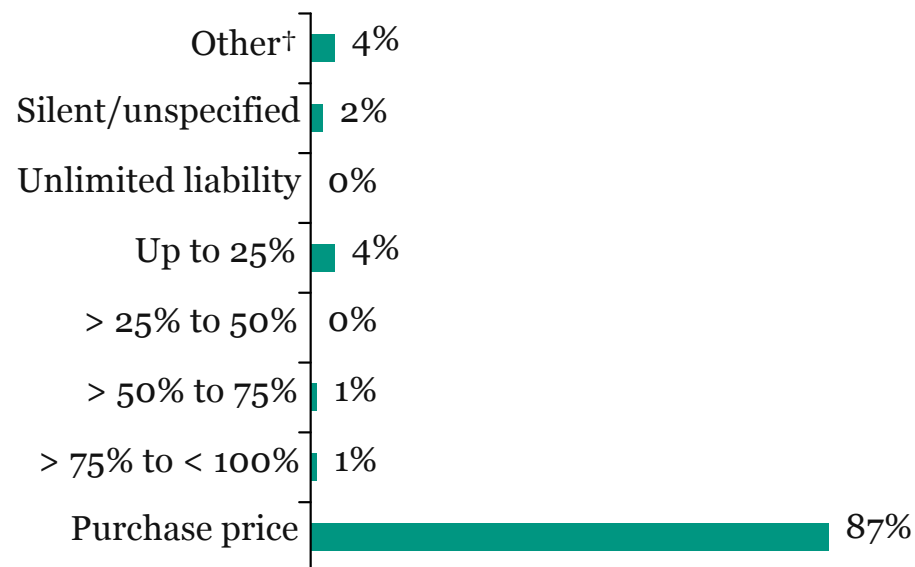
Second-Level Caps: “Fundamental” and Tax Representations

Subset: 2019 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).

Group of “Fundamental Representations”*



Tax representations



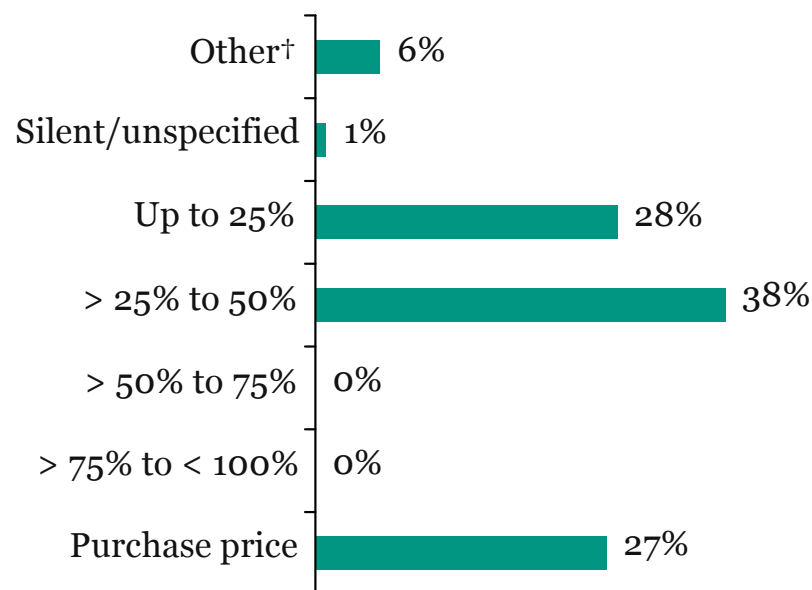
* For example: due organization, due authority, capitalization, etc. (other than taxes, intellectual property, and fraud).

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

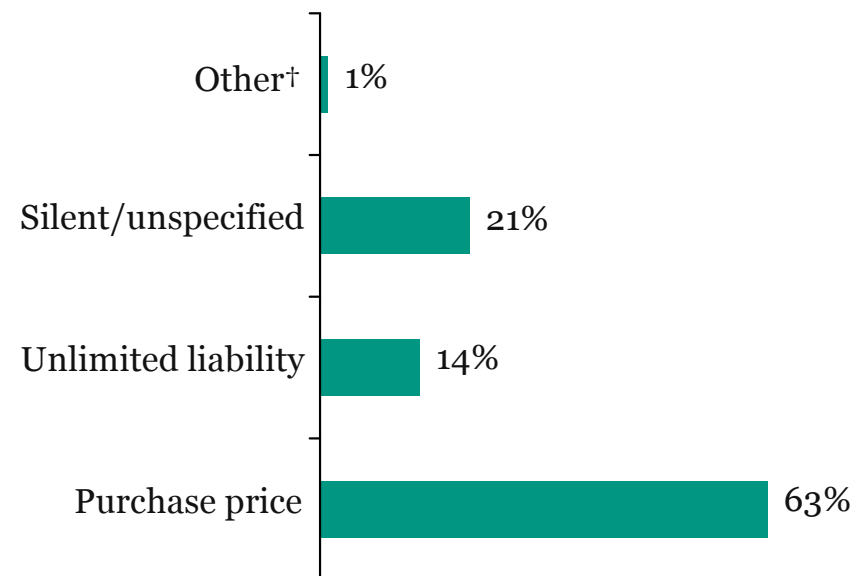
Second-Level Caps: IP Representations and Fraud

Subset: 2019 deals that include the specified carveout. Percentages below denote the second-level cap as a percentage of transaction value in absolute terms (not above the general cap).

Intellectual property representations



Fraud/intentional misrepresentation*



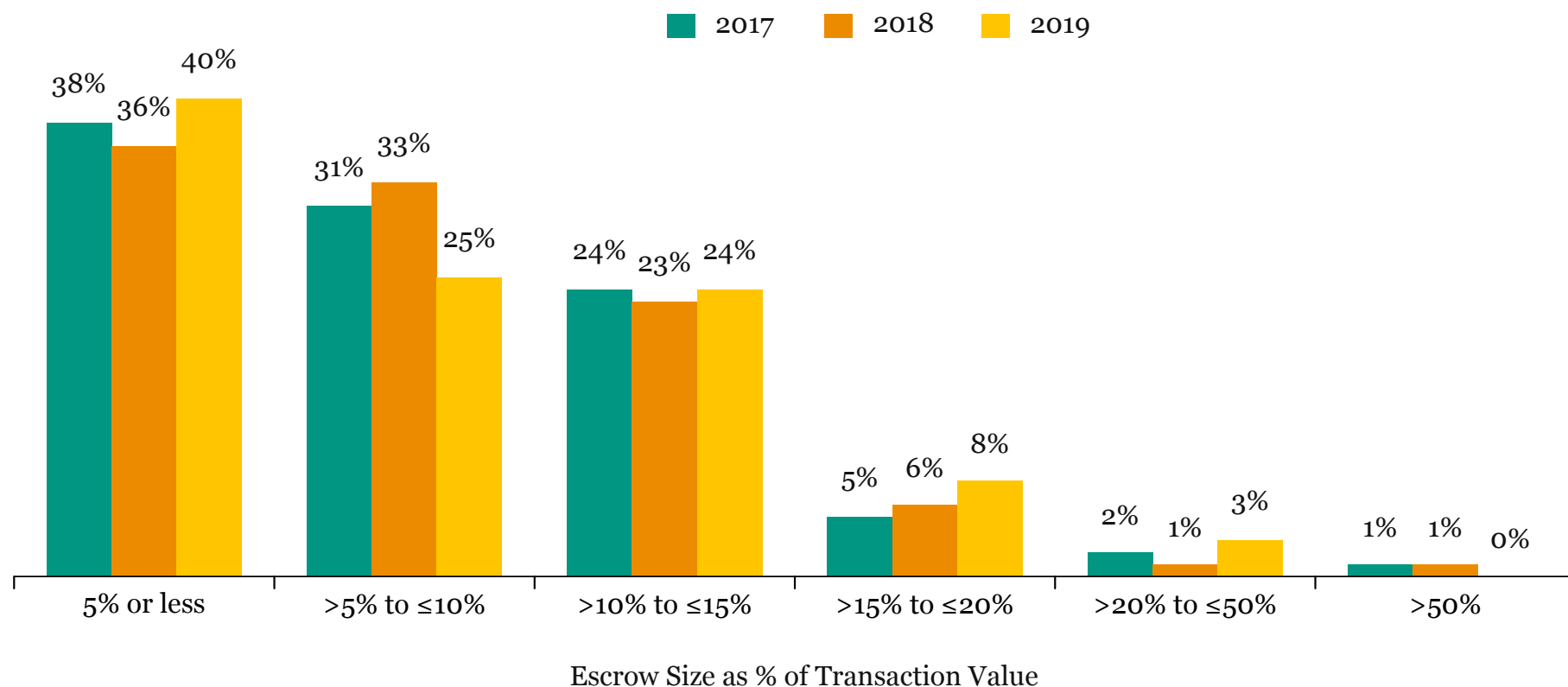
* Measures liability for shareholders that did not participate in the fraud (liability for participating shareholders was typically unlimited).

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

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

For 2019, the average escrow/holdback was 8.9%; the median was 9.9%. These figures represent all deals, including those in which the buyer has purchased an RWI policy (which generally results in a smaller escrow). See the following slide for statistics where deals known to have buy-side RWI policies have been removed from the data set.

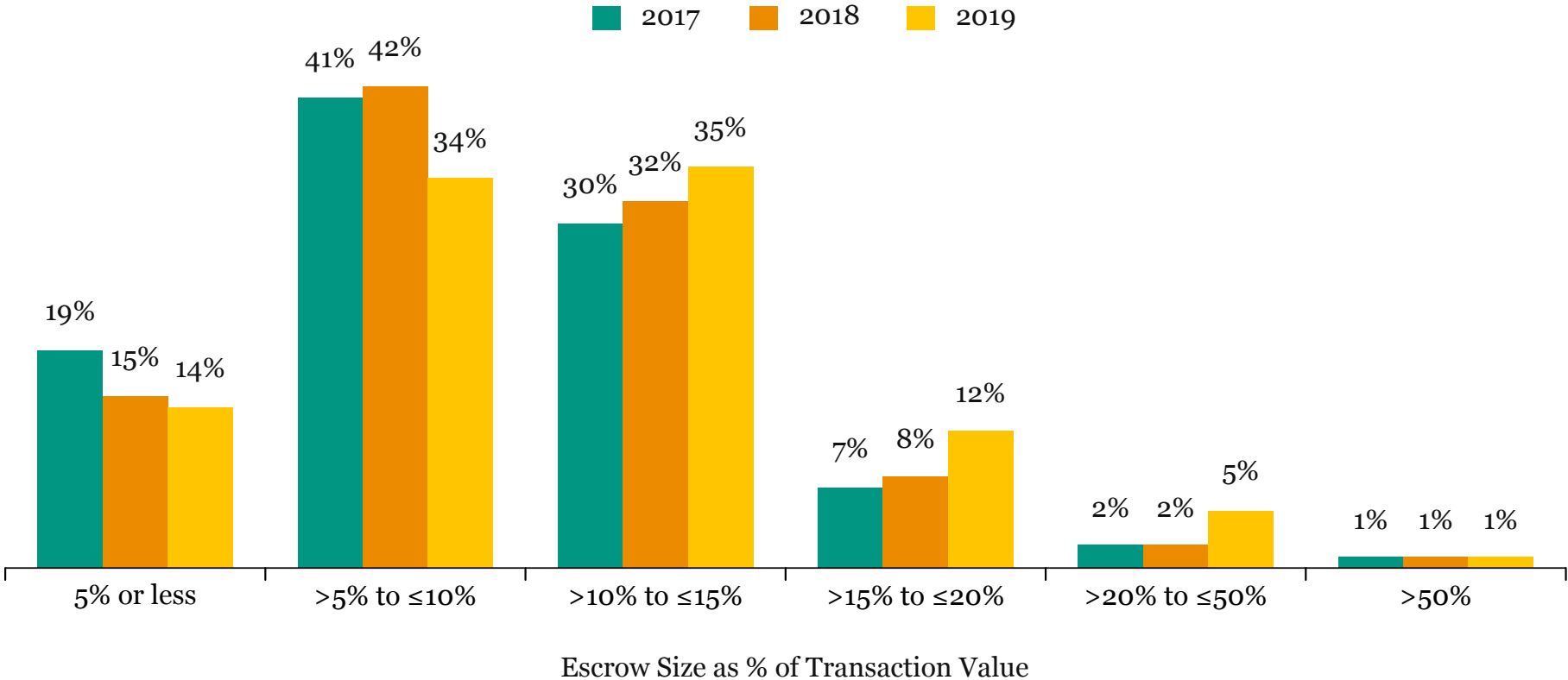
Details, 2017–2019



Escrows/Holdbacks as a Percentage of Transaction Value: Non-RWI

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 2019 was 12.5%; the median was 10.5%. 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, 2017–2019

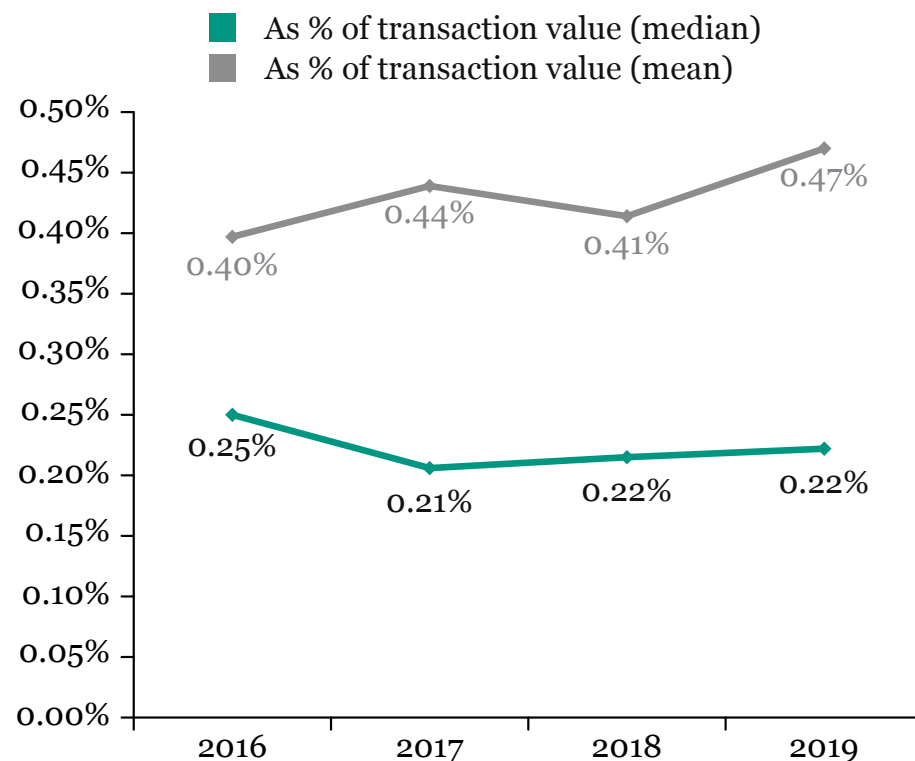
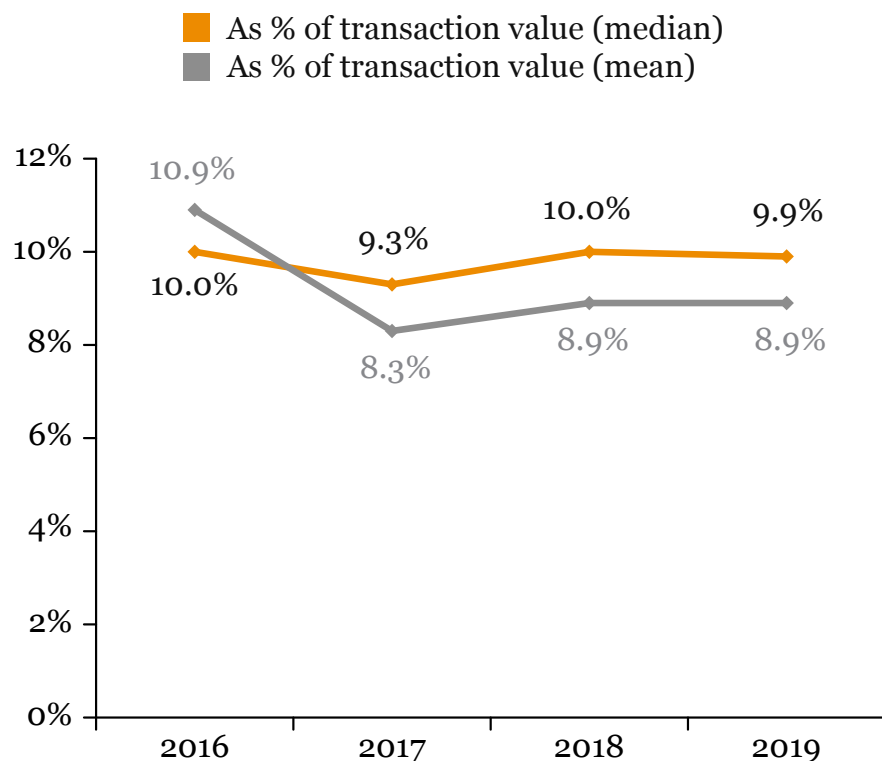


Escrows/Holdbacks and Expense Fund Sizes

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

Median/mean indemnification escrow/holdback size

Median/mean post-closing expense fund size*

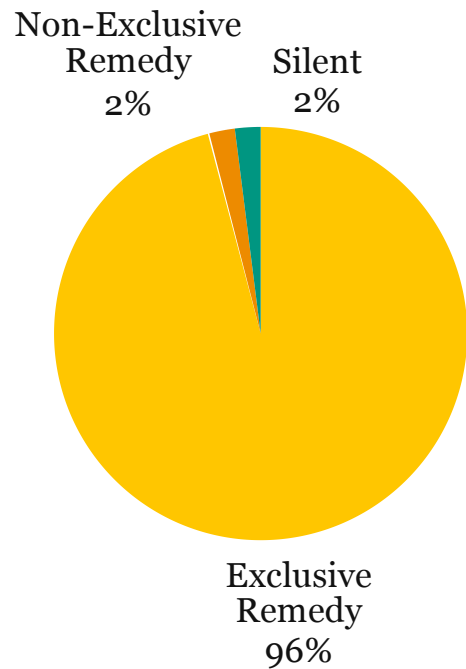


* Funds established at closing to fund post-closing expenses.

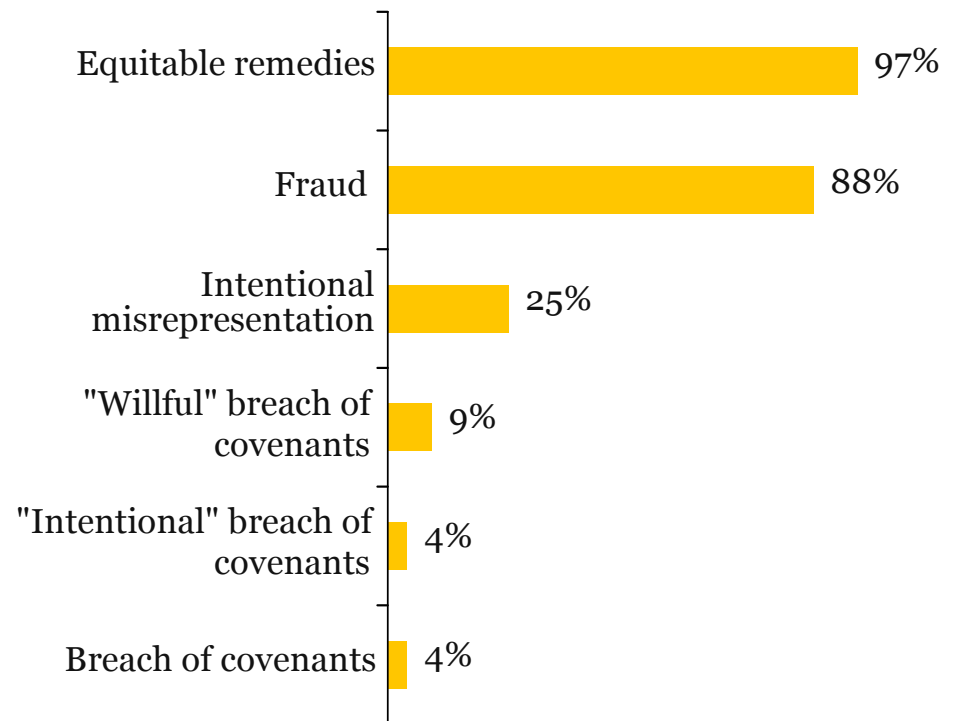
Indemnification as Exclusive Remedy for Breach

Subset: 2019 deals

Indemnification as exclusive remedy



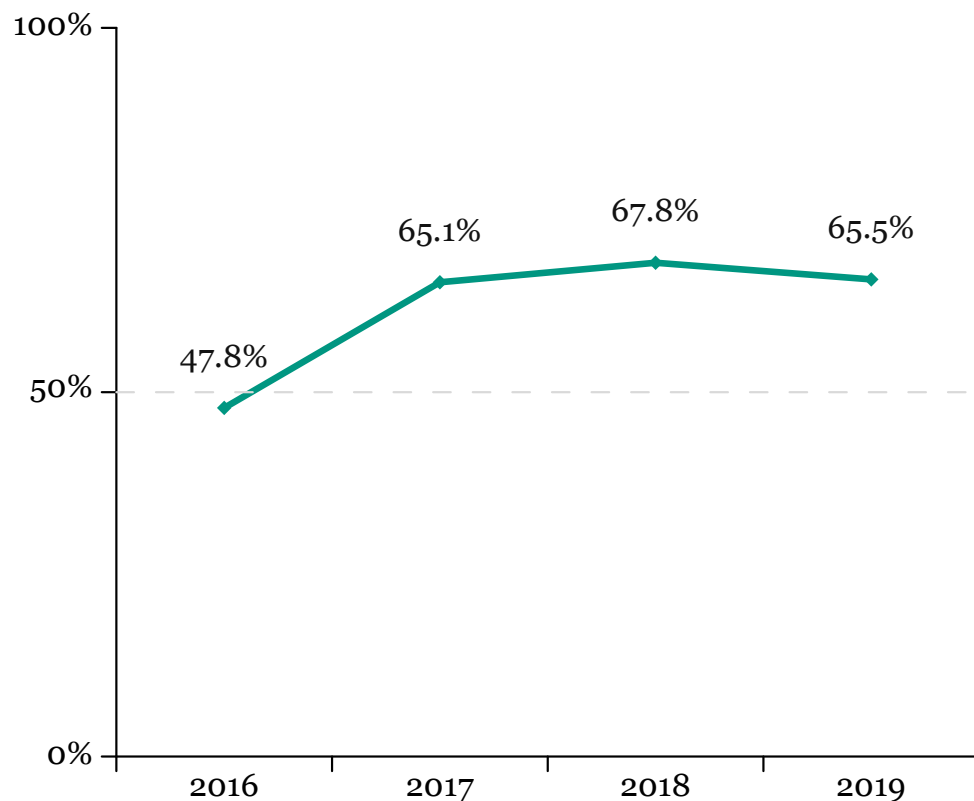
Carveouts to exclusive remedy



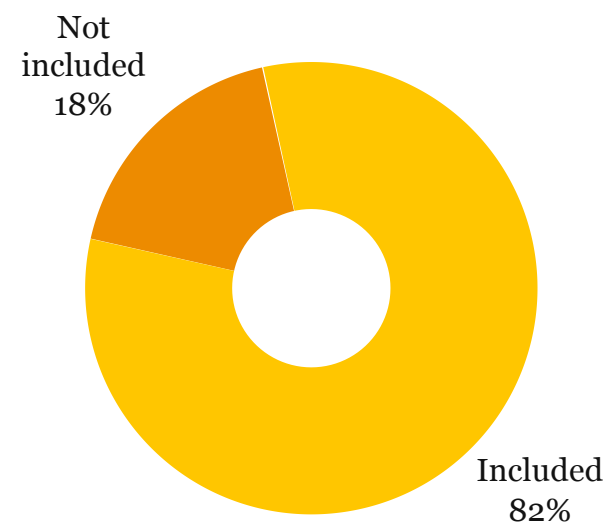
Dispute Resolution

Waivers

Legal representation conflict waiver* included



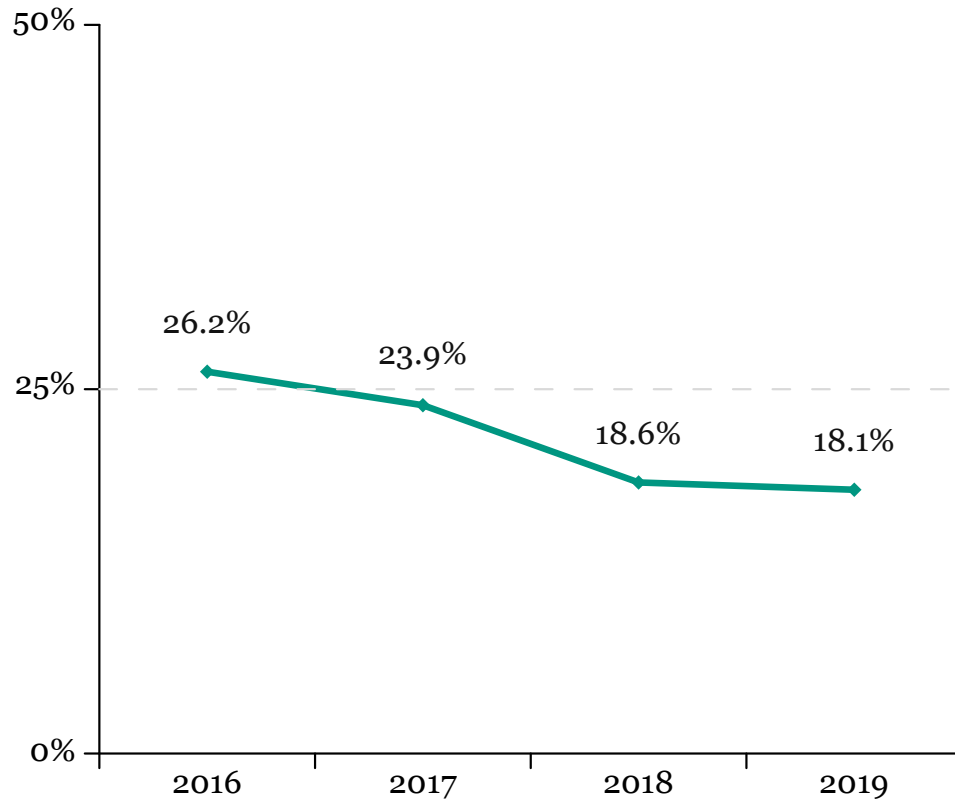
Waiver of jury trial (2019 deals)



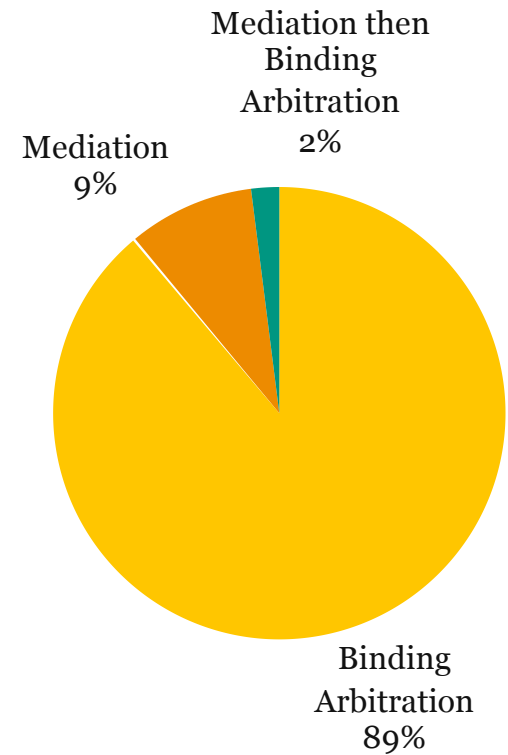
** A provision allowing seller's pre-closing counsel to represent the selling shareholders post-closing in matters relating to the acquisition.*

Alternative Dispute Resolution (“ADR”)*

ADR inclusion



Type of ADR (subset: general ADR included, 2019)

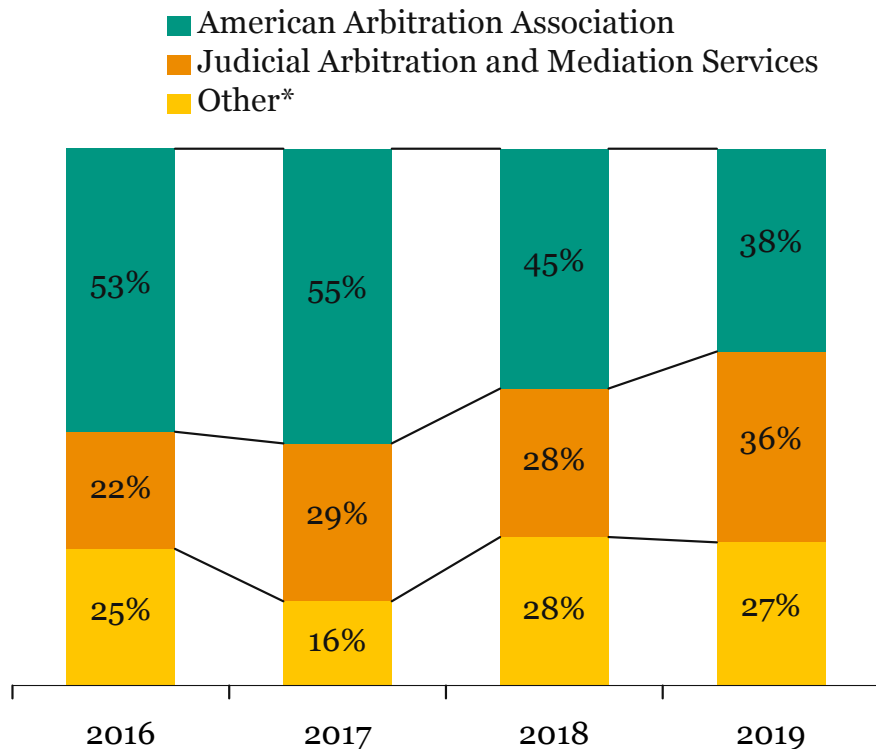


** Sample includes ADR provisions that apply to all disputes arising out of the agreement, and does not include ADR provisions limited to particular matters such as purchase price adjustments or earnouts.*

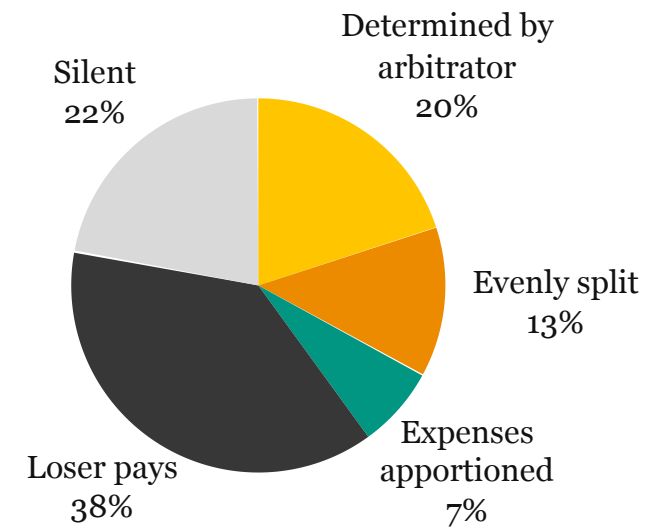
Alternative Dispute Resolution (“ADR”)

Subset: Deals with general ADR included

Institution/rules governing arbitration



Who pays arbitration expenses? (2019 deals)

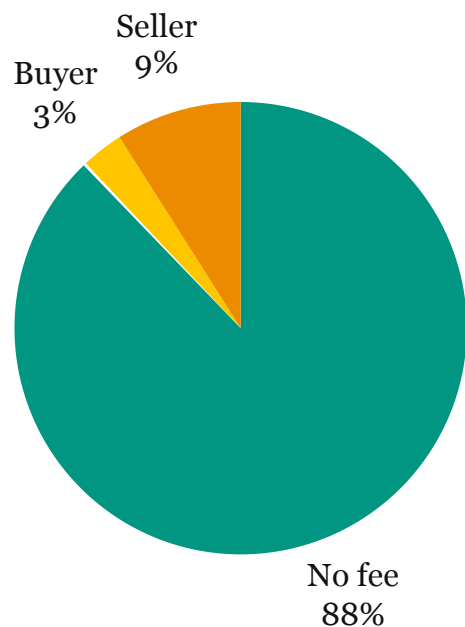


* “Other” frequently includes the International Chamber of Commerce and the Delaware Court of Chancery.

Termination Fees

Termination Fees

Fee paid by... (2019 deals)



Termination fees

The median termination fee to be paid by buyer was 5.5% (average 5.2%) of transaction value.*

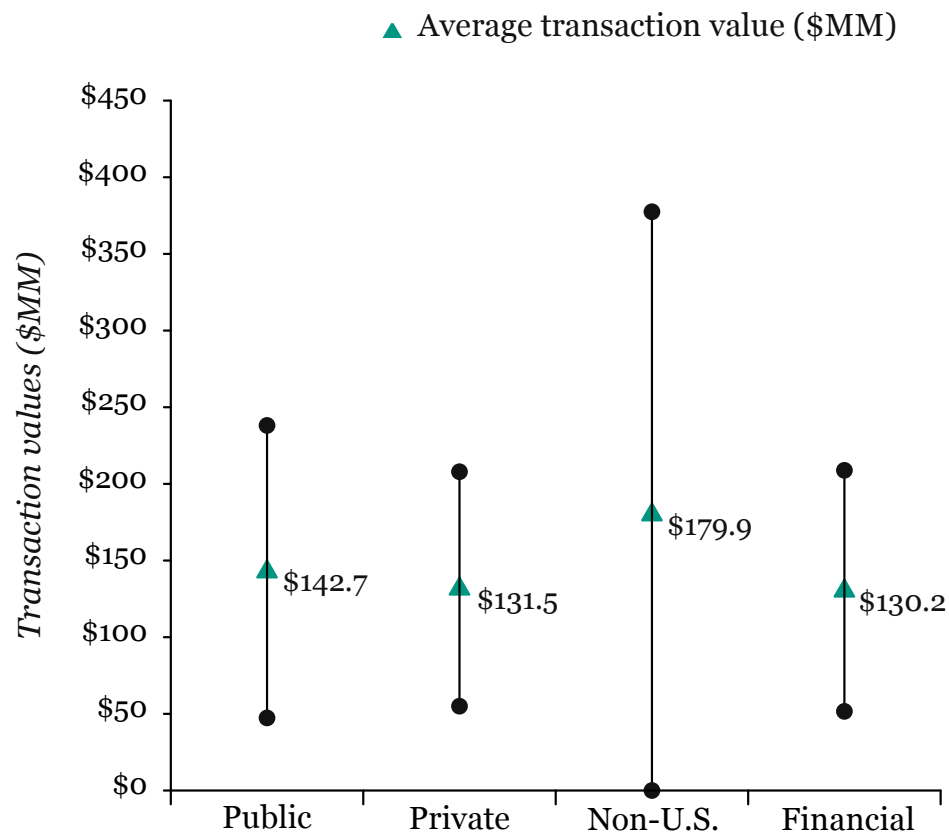
The median termination fee to be paid by seller is 4% (average 5.8%) of transaction value.*

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

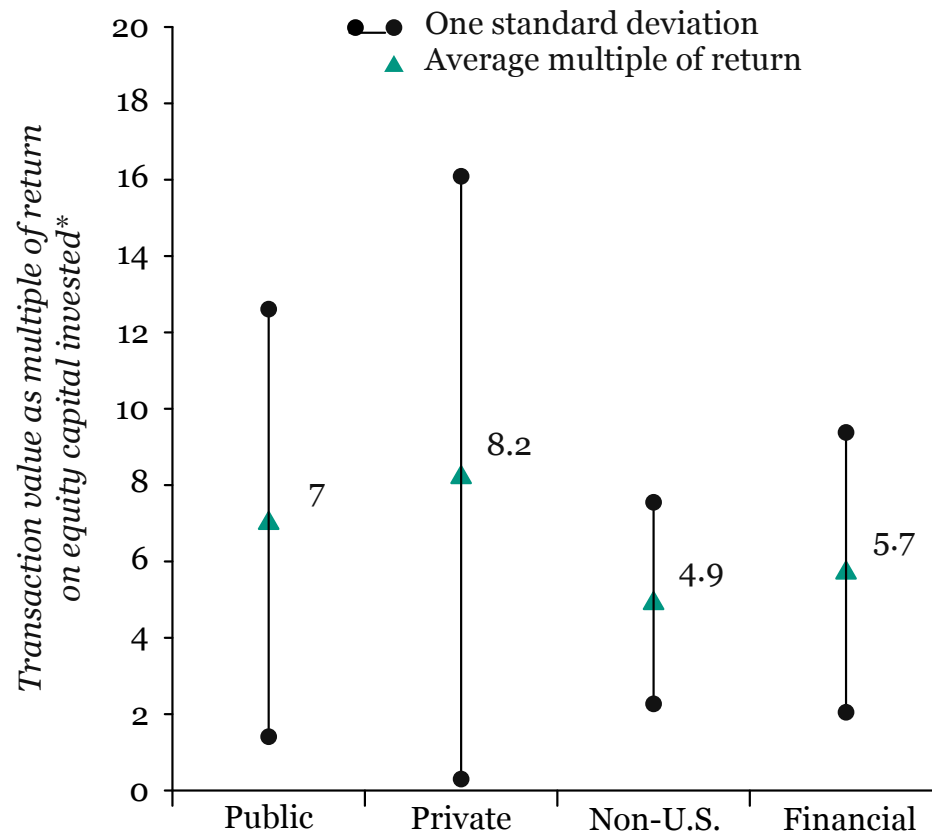
Correlations

Correlations: Transaction Value and Multiples, by Buyer Type

Transaction value vs. buyer type (2019 deals)



Multiple of return* vs. buyer type (2019 deals)



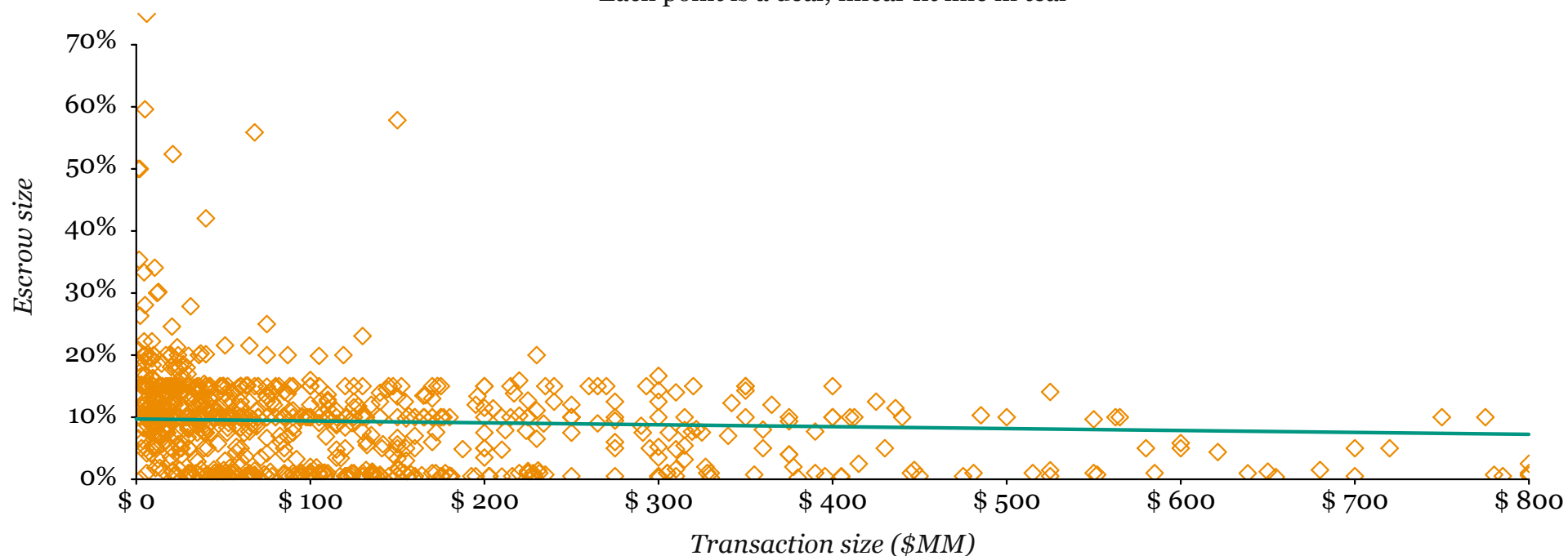
* Equity capital investment data provided by S&P Capital IQ™ and other databases.

Correlations: Transaction Value and Escrow Size

Data set: All deals closing in 2016–2019

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

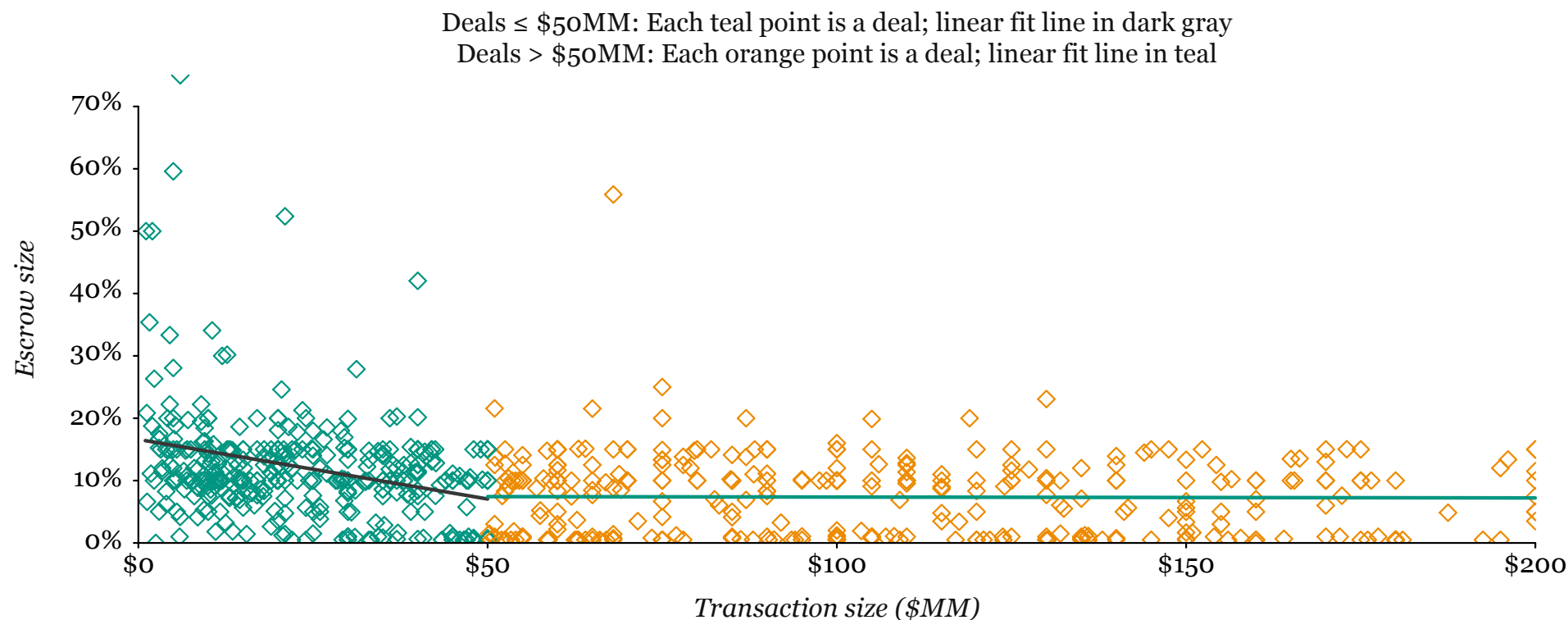
Each point is a deal; linear fit line in teal



Correlations: Transaction Value and Escrow Size (Detail)

Data set: All deals closing in 2016–2019

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



Glossary

Glossary #–B

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.

Appraisal rights

The statutory right available in most states to a corporation’s minority shareholders who object to a merger to have a fair price of their stock determined in a judicial proceeding and to require the corporation to repurchase their stock at that price. Appraisal rights are usually not available unless the shareholder meets certain requirements, such as voting against the merger or abstaining from voting.

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.

Basket

The basket is the threshold claim amount that must be reached before the seller becomes liable for the buyer’s losses; it functions in one of three ways. Under a “deductible” basket, the seller is only liable for damages in excess of the threshold amount. If the agreement includes a “first dollar” basket, the seller is liable for all damages once the threshold amount has been reached. A “combination” basket includes a threshold claim amount that is higher than its deductible amount.

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 sellers (and/or Target Company) in the acquisition agreement.

Glossary C–I

Cap

The maximum recovery a buyer may obtain for indemnification claims. Many agreements include separate caps for different types of breaches.

Closing date

The date on which the transaction is consummated, i.e., the date on which the purchase price is paid and the merger occurs.

Covenant

Covenants are actions that must be taken or not taken by the parties. In a merger agreement, covenants may require the parties to take actions both before and after the closing.

Earnout

A provision stating that the selling shareholders will obtain additional consideration if the seller or surviving company reaches certain milestones. Examples include revenue targets, receipt of regulatory approvals, etc.

Escrow/Holdback

A portion of the merger consideration that is deposited with a neutral third party (in the case of an escrow) or withheld by the buyer (in the case of a holdback) to be applied toward potential future indemnification claims by the buyer. After a specified period of time (the survival period), any consideration remaining in the escrow or holdback account is released to the selling shareholders.

Indemnification

Where one party (typically the seller) to an agreement reimburses the other (typically the buyer) for losses they incur related to a breach or representation or warranty or a specified matter in the merger agreement.

Glossary J-Z

Management carveout

A plan put in place to incentivize the seller's management team or employees to stay with the company until it is sold, often by allocating a portion of the purchase price directly to such employees to be paid before satisfying liquidation-preference overhangs.

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.

Representations and warranties

Representations are statements of fact by the seller regarding the condition of its business, covering virtually all aspects of the company. Warranties are the seller's assurances to the buyer that the representations are true, and that if they are not, the buyer will be entitled to seek legal remedies.

Sandbagging

Where a party may seek indemnification for the other party's breach of the merger agreement even if the non-breaching party had knowledge of the breach prior to closing.

Signing date

The date on which the merger agreement is signed by the principal parties. Closing typically, but not always, occurs on a later date.

Survival

The time period after closing during which the buyer may make a claim against the seller or selling shareholders for breach of their representations, warranties and covenants. The time period is usually shorter than the applicable statute of limitations.

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Additional resources

- MarketStandard: <https://www.srsacquiom.com/marketstandard/>
- 2019 Life Sciences M&A Study: <https://www.srsacquiom.com/resources/2019-life-sciences-study/>
- 2019 Buy-side Representations and Warranties Deal Terms Study: <https://www.srsacquiom.com/resources/2019-buy-side-reps-warranties-insurance-deal-terms-study/>

