

# PRIVATE TARGET MERGERS & ACQUISITIONS DEAL POINTS STUDY

(INCLUDING TRANSACTIONS FROM 2020 AND Q1 2021)



PRIVATE TARGET

A PROJECT OF THE  
M&A MARKET TRENDS SUBCOMMITTEE  
OF THE  
MERGERS & ACQUISITIONS COMMITTEE

## PRIVATE TARGET M&A DEAL POINTS STUDY

A Project of the M&A Market Trends Subcommittee  
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Findings presented in this Study do not necessarily reflect the personal views of the Committee or Working Group members or the views of their respective firms. In addition, the acquisition agreement provisions that form the basis of this Study are drafted in many different ways and do not always fit precisely into particular "data point" categories. Therefore, Working Group members have had to make various judgment calls regarding, for example, how to categorize the nature or effect of the provisions. As a result, the conclusions presented in this Study may be subject to important qualifications that are not expressly articulated in this Study.

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# PRIVATE TARGET STUDY SAMPLE OVERVIEW

- This Study analyzes publicly available acquisition agreements for transactions for which definitive agreements were executed and/or completed in 2020 and the first quarter of 2021 that involved private targets being acquired by public companies (referred to throughout as “Deals in 2020-21”). The previous studies published in 2019, 2017, 2015, 2013, 2011, 2009, 2007, and 2006 analyzed such agreements for transactions completed and/or executed in 2018-19, 2016-17, 2014, 2012, 2010, 2008, 2006, and 2004, respectively. Footnotes throughout refer to deals in 2020-21; footnotes regarding prior years are provided in the previous studies and are not reprinted here.
- The final Study sample of 123 acquisition agreements excludes agreements for transactions in which the target was in bankruptcy, reverse mergers (including any identifiable de-SPAC transactions), divisional sales, and transactions otherwise deemed inappropriate for inclusion. Asset deals comprised 18.7% of the Study sample.
- Certain metrics in this study may not total to 100% due to rounding.

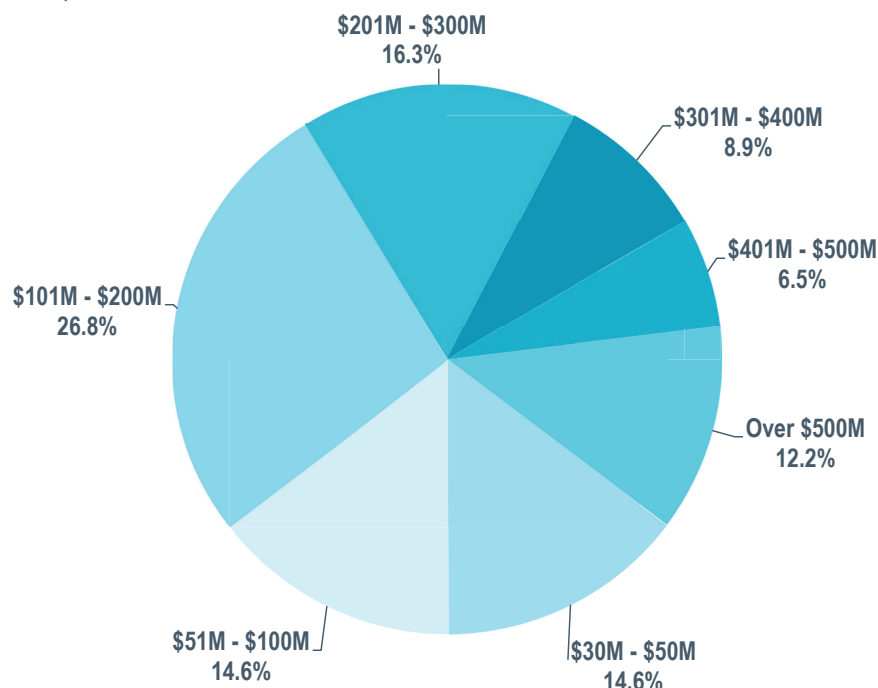
Transaction Value* Range	# of Deals	Closing	
		Deferred**	Simultaneous Sign-and-Close
\$30M - \$750M	123	101	22

\* For purposes of this Study, it is assumed that transaction value is equal to “Purchase Price” as that term is used in the underlying acquisition agreements.

\*\* May include pending and terminated deals.

# PRIVATE TARGET STUDY SAMPLE OVERVIEW

(by transaction value\*)

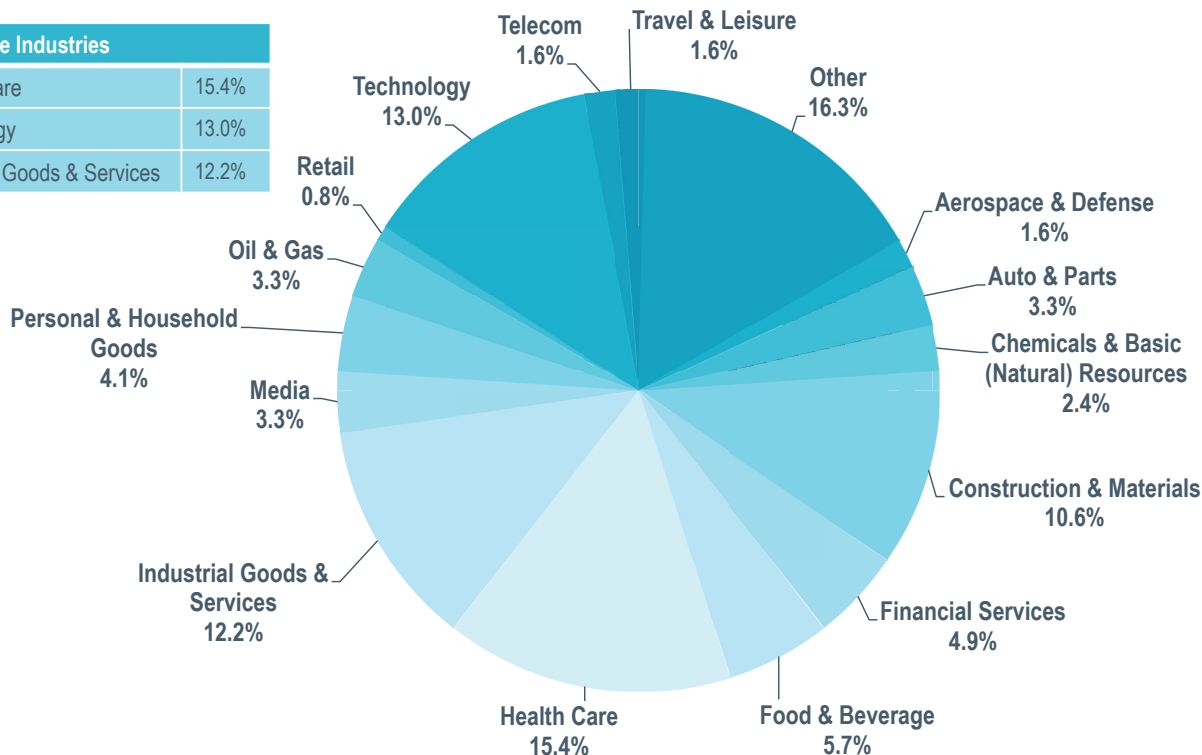


\* For the Study sample, the average transaction value was \$233.6 million and the median transaction value was \$180 million.

# PRIVATE TARGET STUDY SAMPLE OVERVIEW

(by industry)

Top Three Industries	
Health Care	15.4%
Technology	13.0%
Industrial Goods & Services	12.2%



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# FINANCIAL PROVISIONS

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## FINANCIAL PROVISIONS

### POST-CLOSING PURCHASE PRICE ADJUSTMENTS

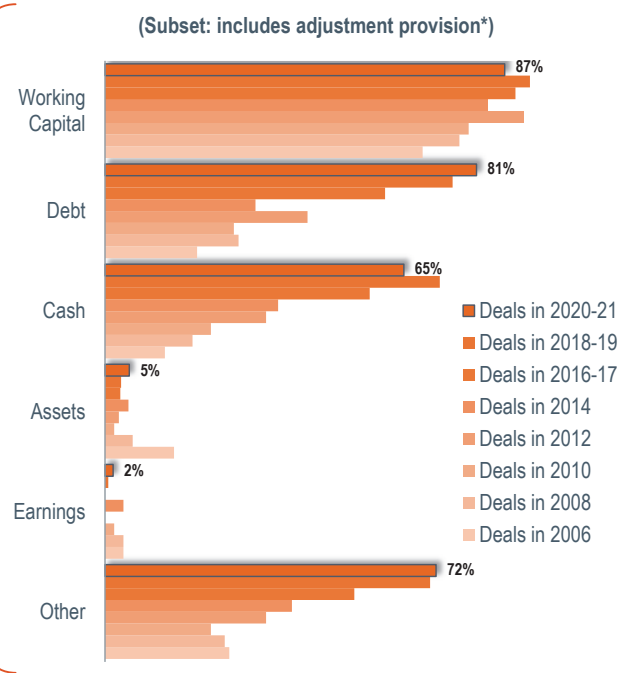
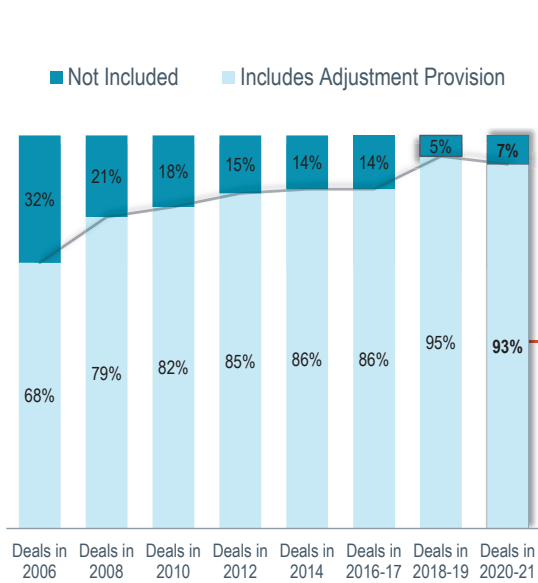
The “Adjustment Amount” (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital. If the Adjustment Amount is positive, the Adjustment Amount shall be paid by wire transfer by Seller to an account specified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

...

“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”) was \_\_\_\_\_ dollars (\$\_\_\_\_\_).

(ABA Model Asset Purchase Agreement)

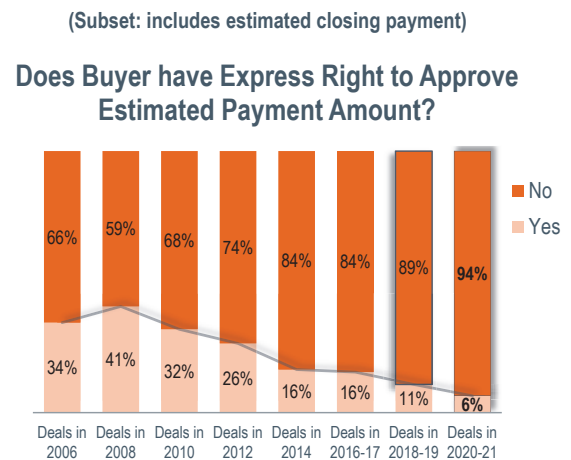
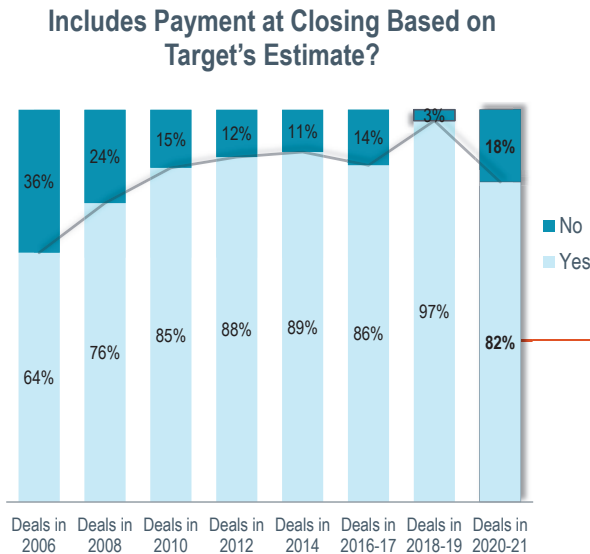
# POST-CLOSING PURCHASE PRICE ADJUSTMENTS



\* 86% of the post-closing purchase price adjustments were based on more than one metric.

# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – ESTIMATED PAYMENTS AT CLOSING

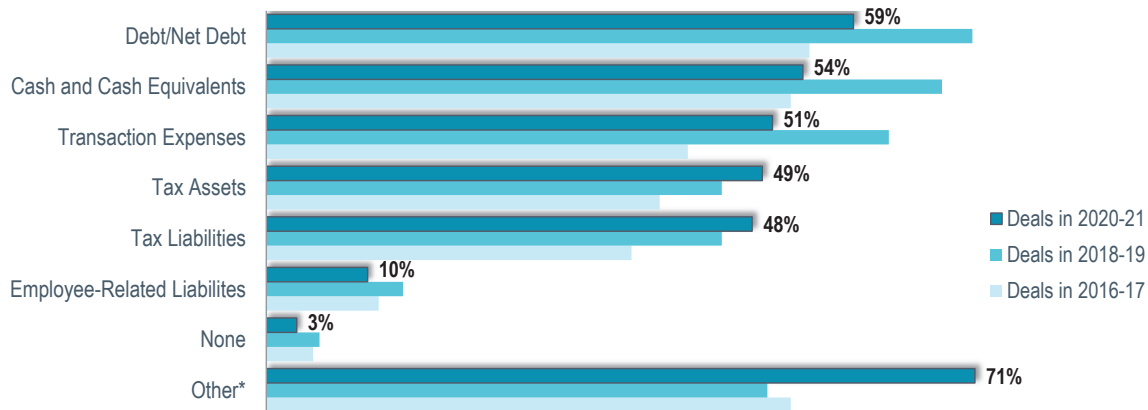
(Subset: deals with post-closing purchase price adjustment)



# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – WORKING CAPITAL EXCLUDES CERTAIN ITEMS

(Subset: deals with working capital purchase price adjustment)

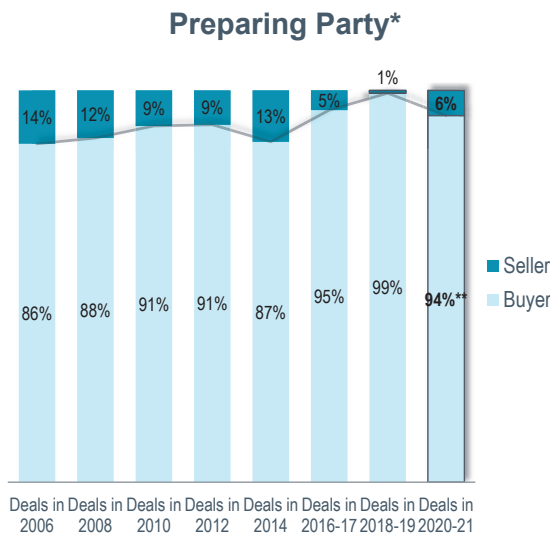
“Adjusted Working Capital” means current assets minus current liabilities; provided, however, that “Adjusted Working Capital” **excludes from current assets all [tax assets and excludes from current liabilities all tax liabilities]**.



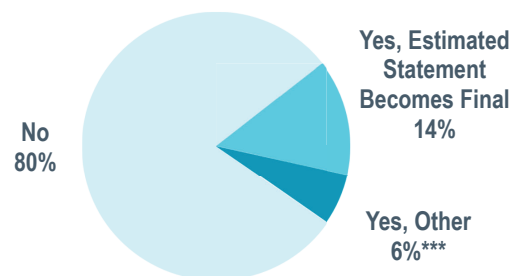
\* Most deals in “Other” category did not make the relevant exhibit publicly available.

# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – PREPARATION OF CLOSING BALANCE SHEET

(Subset: deals with post-closing purchase price adjustment)



Does Agreement Address Consequences for Late Delivery of Post-Closing Statements



**New Data**

\* Does not include “Indeterminable” or “Not Applicable” or “Other” categories measured in deals in prior years.

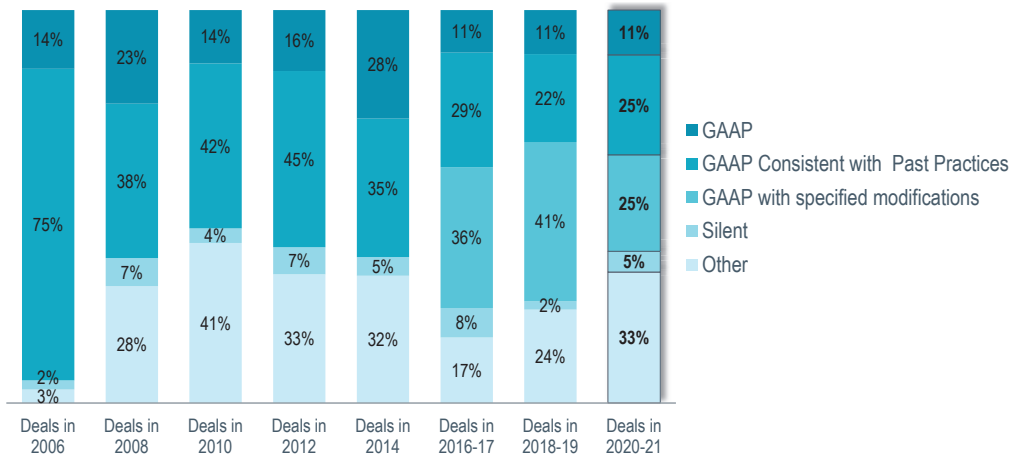
\*\* Includes one deal with mutual agreement on preparation.

\*\*\* The most common scenario in the “Other” category was seller having the right to choose to accept the estimated statement as final or create its own closing statement.

# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – PREPARATION OF CLOSING BALANCE SHEET

(Subset: deals with post-closing purchase price adjustment)

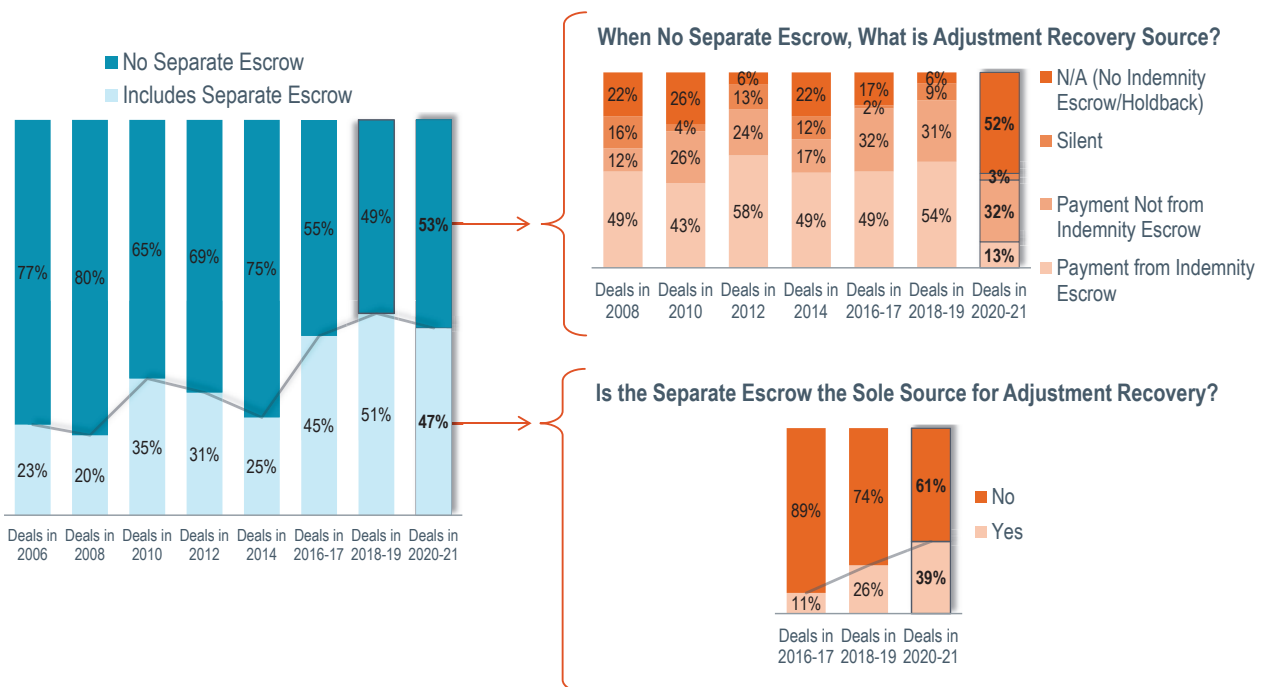
Methodology\*



\* Does not include “Indeterminable” or “Consistent with Prior Financial Statements” categories measured in deals in prior years.

# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – SEPARATE ESCROW

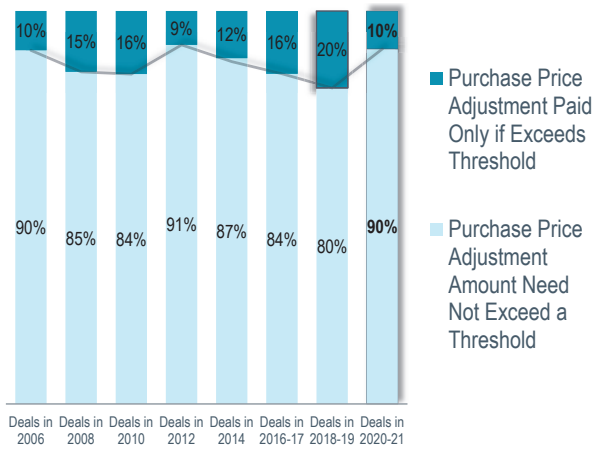
(Subset: deals with post-closing purchase price adjustment)



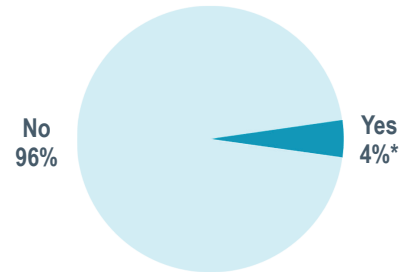


# POST-CLOSING PURCHASE PRICE ADJUSTMENTS – THRESHOLD

(Subset: deals with post-closing purchase price adjustment)

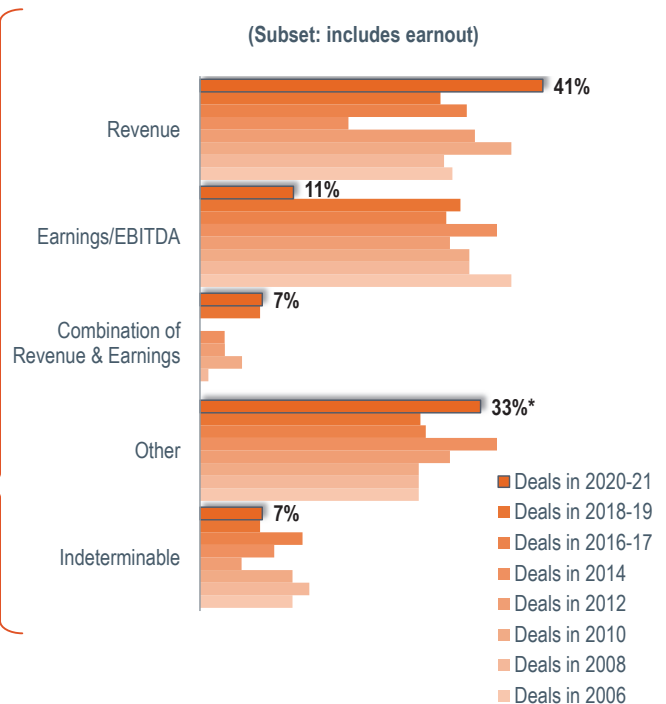
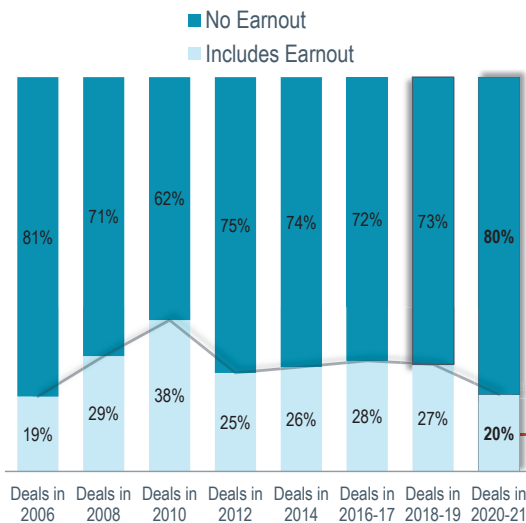


Specified Remedies if Review Info Not Timely Provided?



\* Includes appointment of an accountant, extension of review period.

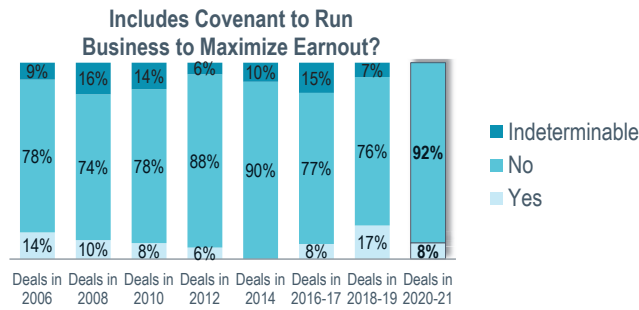
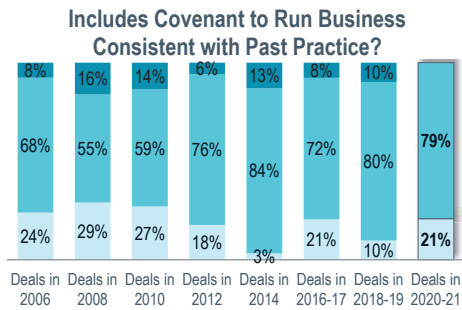
# EARNOUTS



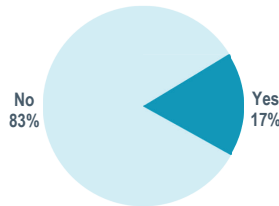
\* Includes 3 deals that are also reflected in the "Revenue" category (also had regulatory approval or unavailable criteria in addition to revenue).

# EARNOUTS – BUYER’S COVENANTS AS TO ACQUIRED BUSINESS\*

(Subset: deals with earnouts)



Covenant to Run Business as Stand-Alone Entity/Division

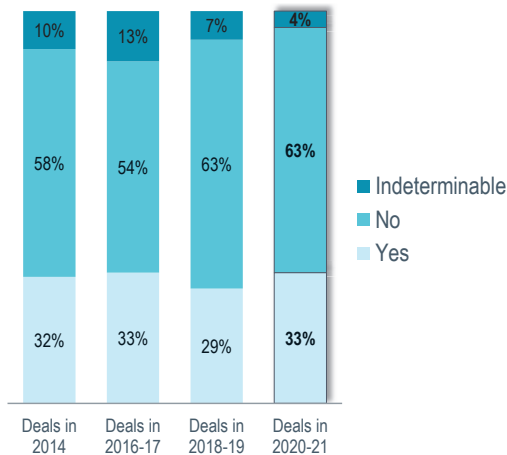


\* 42% of the deals with earnouts contained at least one of these covenants and 4% of the deals with earnouts contained at least two of the three covenants. 12 deals not reflected in this 42% contained other provisions protecting Seller’s right to an earnout, such as good faith efforts, no change to accounting practices, and allocation of sufficient marketing resources. 80% of the deals with earnouts contained some other language protecting Seller’s right to the earnout, such as covenants regarding marketing, commercially reasonable efforts to obtain regulatory approvals, not taking actions in bad faith, and no new debt.

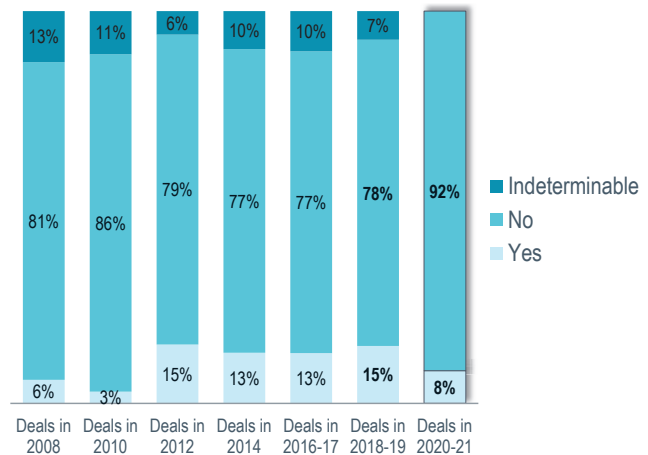
# EARNOUTS – BUYER’S OPERATION AND EXPRESS DISCLAIMER OF FIDUCIARY RELATIONSHIP

(Subset: deals with earnouts)

Includes Right of Buyer to Operate Post-Closing in Buyer’s Discretion?



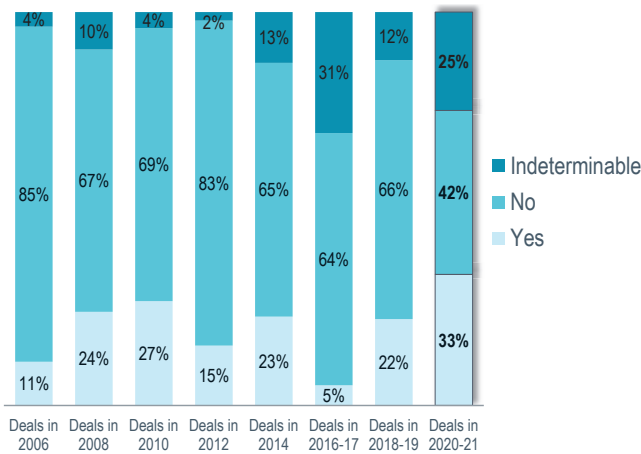
Includes Express Disclaimer of Fiduciary Relationship?



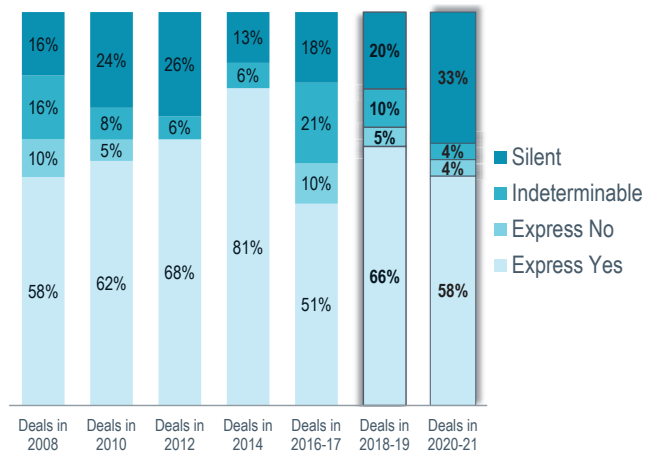
# EARNOUTS – ACCELERATION AND OFFSETS

(Subset: deals with earnouts)

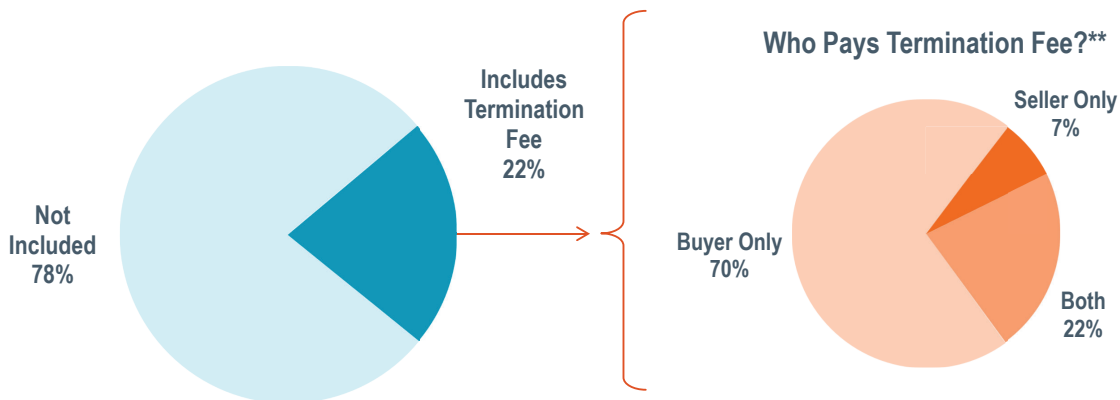
**Does Earnout Expressly Accelerate on Change of Control?**



**Can Buyer Offset Indemnity Payments Against Earnout?**



# TERMINATION FEES\*



\* Payable by either Buyer or Seller.

\*\* Includes two deals where the amount of the termination fee was not determinable (one payable by Seller and one payable by Buyer).

# TERMINATION FEES AS % OF TRANSACTION VALUE



(subset: deals with determinable termination fees)

	Mean	Median	Minimum (> 0)	Maximum
<b>All deals</b>				
Buyer pays:	6.35%	4.62%	0.32%	36.22%
Seller pays:	3.91%*	4.35%*	0.64%*	6.59%*
<b>Deals with transaction values of \$30-100M</b>				
Buyer pays:	6.42%	6.42%	0.80%	12.05%
Seller pays:	N/A	N/A	N/A	N/A
<b>Deals with transaction values of \$101M-300M</b>				
Buyer pays:	4.43%	4.17%	0.32%	11.67%
Seller pays:	3.98%*	4.35%*	0.64%*	6.59%*
<b>Deals with transaction values of \$301M or more</b>				
Buyer pays:	11.44%	6.75%	3.70%	36.22%
Seller pays:	3.82%	3.34%	2.61%	5.50%

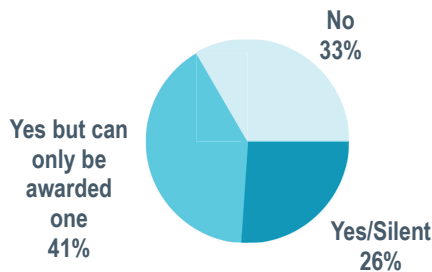
\* Includes one deal where the average of a range was used for purposes of calculating the termination fee.

# TERMINATION FEES

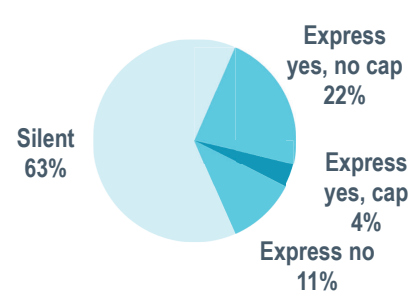


(subset: deals with determinable termination fees)

Entitled to seek payment of fee and specific performance?



Is party seeking payment entitled to costs/expenses incurred?



Receipt of fee precludes breach damages?



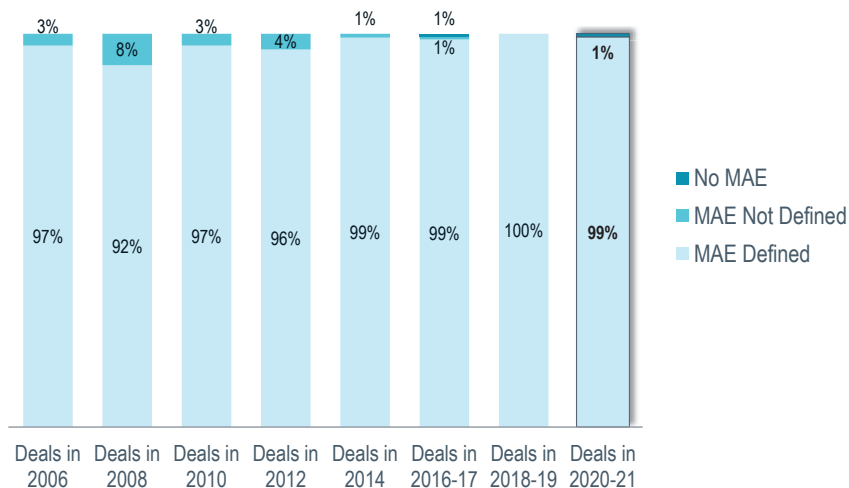
# PERVASIVE QUALIFIERS

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## PERVASIVE QUALIFIERS

### DEFINITION OF “MATERIAL ADVERSE EFFECT”

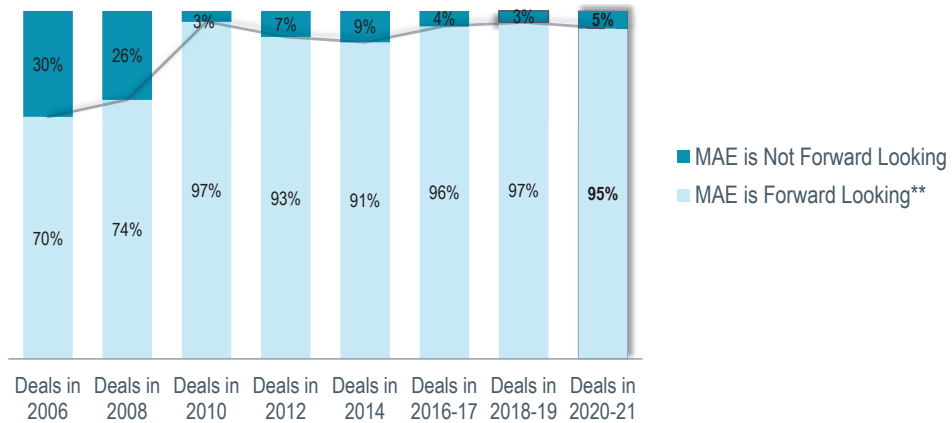
“Material Adverse Effect” means any result, occurrence, fact, change, event, or effect that has a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of Target.



## DEFINITION OF “MATERIAL ADVERSE EFFECT” – FORWARD LOOKING STANDARDS\*

(Subset: deals with MAE definition)

“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....



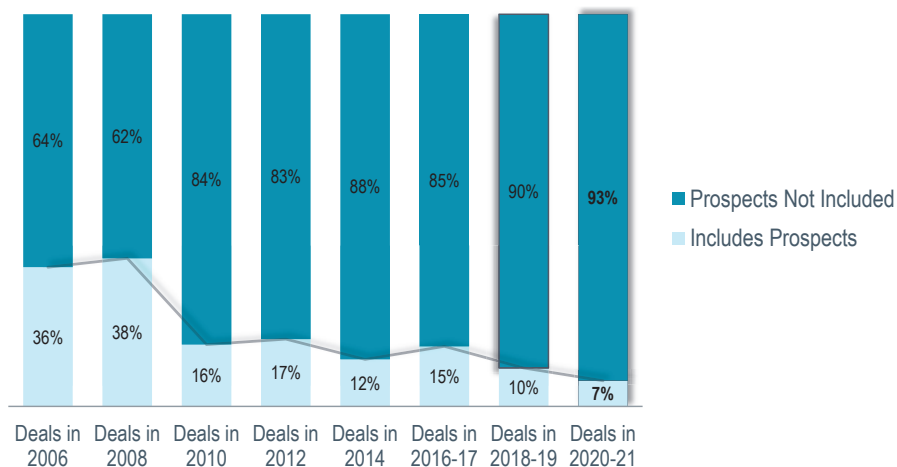
\* Because many agreements use multiple forward looking standards (e.g., “would be” or “could be”), often without a discernible consistency regarding the use of each standard, data as to the prevalence of various forward looking standards is omitted.

\*\* 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.

## DEFINITION OF “MATERIAL ADVERSE EFFECT” – PROSPECTS

(Subset: deals with MAE definition)

“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), results of operations, or *prospects* of Target.



## DEFINITION OF “MATERIAL ADVERSE EFFECT”

### BUYER’S ABILITY TO OPERATE TARGET’S BUSINESS POST CLOSING TARGET’S ABILITY TO CONSUMMATE CONTEMPLATED TRANSACTION

“Material Adverse Effect” means any result, occurrence, fact, change, event, or effect that is or could reasonably be expected to have a materially adverse effect on (i) the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of Target, (ii) **Seller’s ability to consummate the transactions contemplated hereby**, or (iii) **Buyer’s ability to operate the business of Target immediately after Closing in the manner operated by Seller before Closing**.

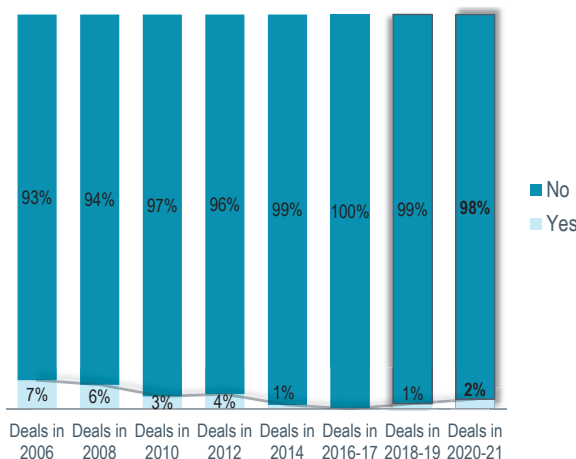
### INCLUDES REFERENCE TO SPECIFIC DOLLAR AMOUNT THRESHOLD

“Material Adverse Effect” means any result, occurrence, fact, change, event, or effect that is or could reasonably be expected to (a) be materially adverse to (i) the business, assets, properties, condition (financial or otherwise), or results of operations of Target and its subsidiaries, taken as a whole, or (ii) the ability of Target to perform its obligations under this Agreement; or (b) result in losses to Target and its subsidiaries, taken as a whole, **in an aggregate amount equal to or exceeding \$\_\_\_\_\_**.

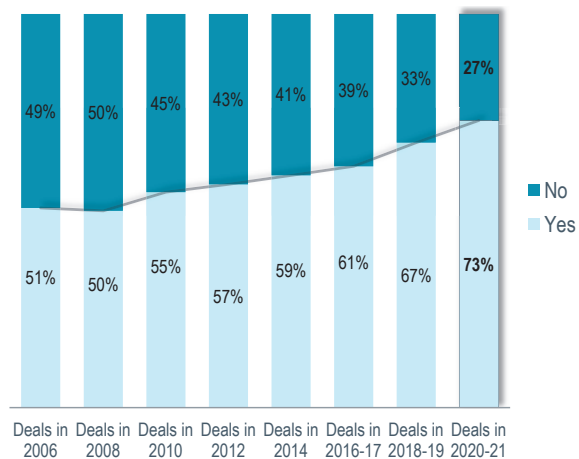
## DEFINITION OF “MATERIAL ADVERSE EFFECT”

(Subset: deals with MAE definition)

Includes Buyer’s Ability to Operate Target’s Business Post Closing?

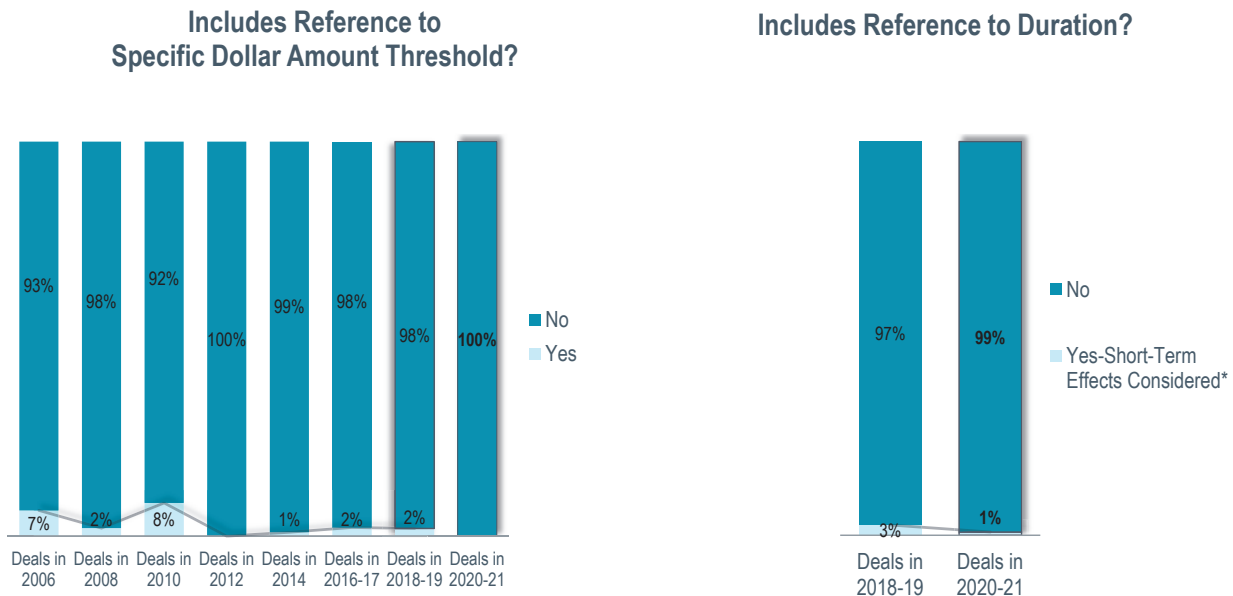


Includes Target’s Ability to Consummate Contemplated Transaction?



# DEFINITION OF “MATERIAL ADVERSE EFFECT”

(Subset: deals with MAE definition)

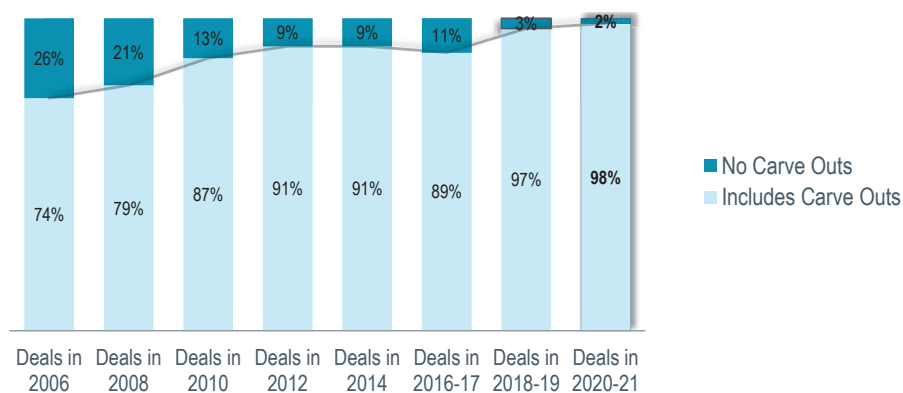


\* Represents one deal that states “when viewed on both a long-term and a short-term basis...”

# DEFINITION OF “MATERIAL ADVERSE EFFECT” – CARVE OUTS

(Subset: deals with MAE definition)

“Material Adverse Effect” means..., **except to the extent resulting from\*** (A) changes in general local, domestic, foreign, or international economic conditions, (B) changes affecting generally the industries or markets in which Target 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.

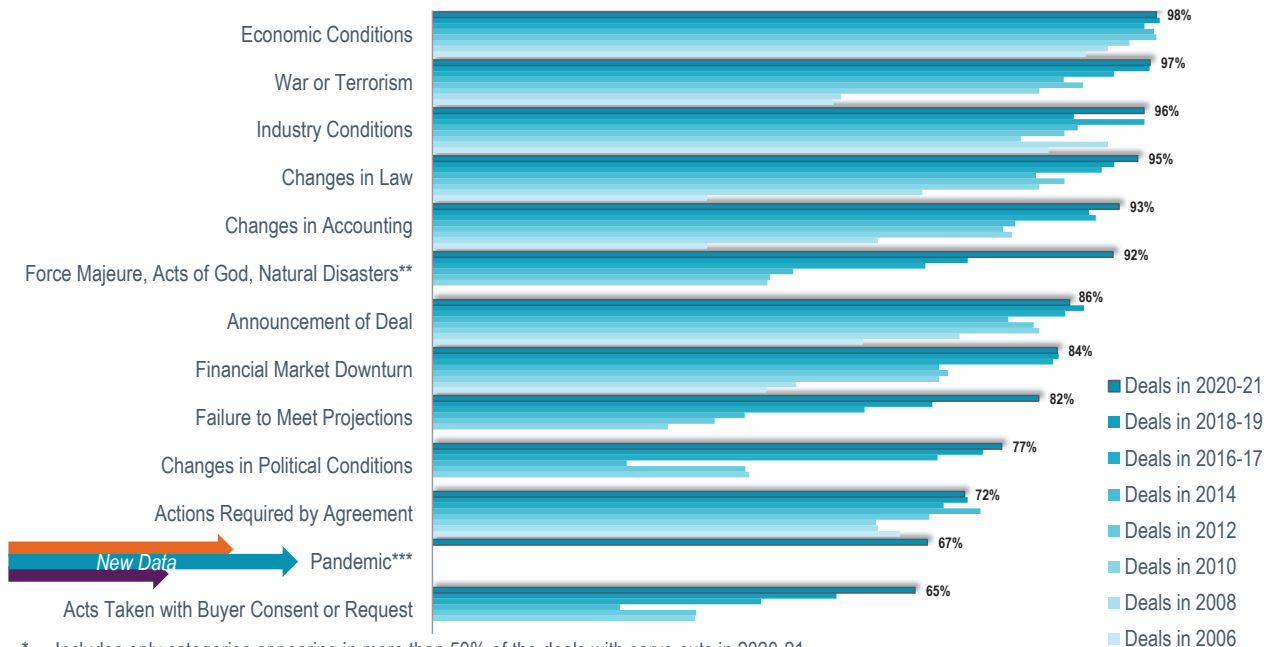


\* Please see page 36 regarding relational language for carve outs.



# DEFINITION OF “MATERIAL ADVERSE EFFECT” – CARVE OUTS

(Subset: deals with MAE definition with carve outs\*)

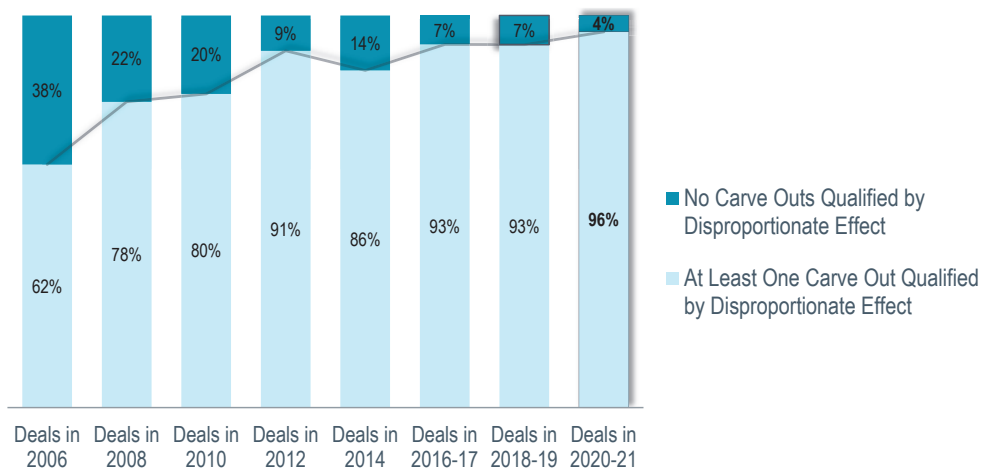


\* Includes only categories appearing in more than 50% of the deals with carve outs in 2020-21.  
 \*\* Without express reference to pandemics/COVID but could be interpreted as including same.  
 \*\*\* Not measured before deals in 2020-21. Includes carve outs as to pandemics generally, COVID-19 specifically, and/or governmental responses to same.

# DEFINITION OF “MATERIAL ADVERSE EFFECT” – CARVE OUTS QUALIFIED BY DISPROPORTIONATE EFFECT

(Subset: deals with MAE definition with carve outs)

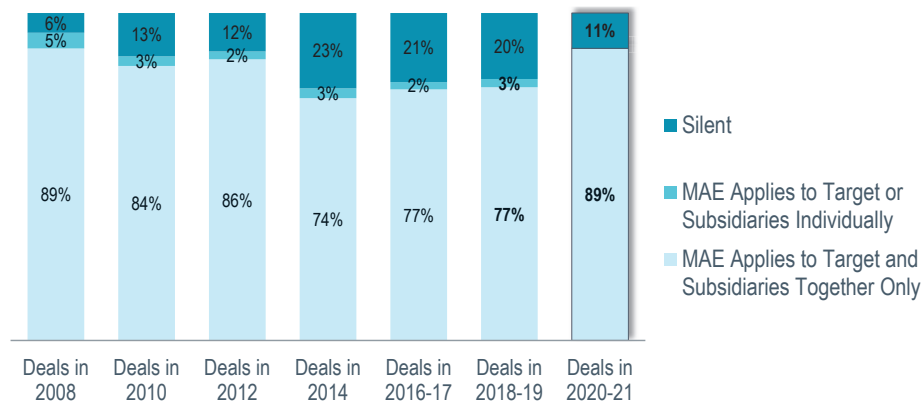
“Material Adverse Effect” means..., except to the extent resulting from... ***(provided that such event, change, or action does not affect Target in a substantially disproportionate manner).***



# DEFINITION OF “MATERIAL ADVERSE EFFECT” – CARVE OUTS APPLICATION TO INDIVIDUAL SUBSIDIARIES

(Subset: deals with MAE definition with carve outs\*)

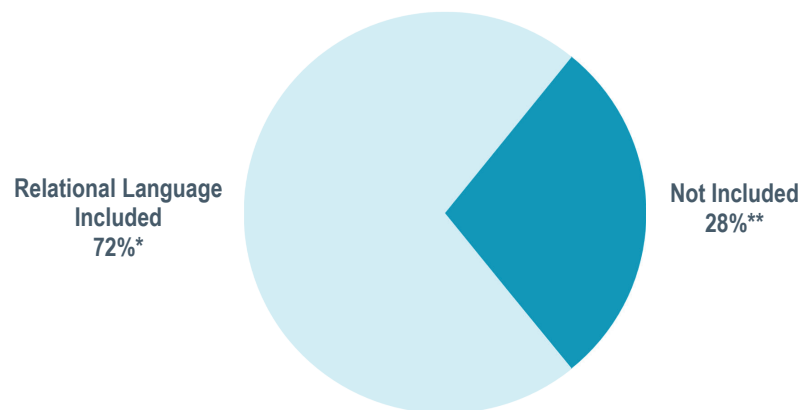
“Material Adverse Effect” means any result, occurrence, fact, change, event, or effect that is or could reasonably be expected to have a materially adverse effect on the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of **Target or any of its Subsidiaries**.



\* Excludes 49 deals where Target had no subsidiaries.

# DEFINITION OF “MATERIAL ADVERSE EFFECT” – CARVE OUTS – RELATIONAL LANGUAGE

(Subset: deals with MAE definition with carve outs)



\* Includes “resulting from,” “arising from or related to,” “attributable to,” and other variations.

\*\* Example: “... provided, however, that none of the following, alone or in combination, constitute or shall be taken into account in determining whether there has been or will be a Material Adverse Effect:”

# KNOWLEDGE – STANDARDS

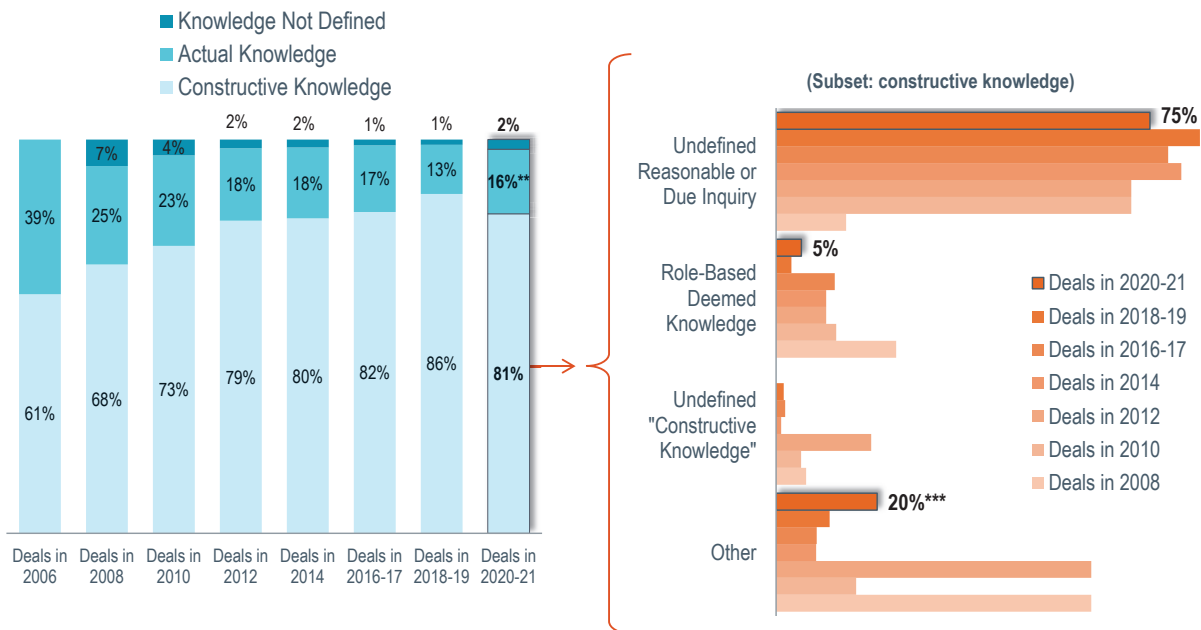
## ACTUAL KNOWLEDGE

“Knowledge” means *the actual knowledge of the directors and officers of Target.*

## CONSTRUCTIVE KNOWLEDGE (ROLE-BASED DEEMED KNOWLEDGE)

“Knowledge of Target” means the actual knowledge of the Chief Executive Officer, the President and the Chief Financial Officer of Target *and the knowledge that each such person would reasonably be expected to obtain in the course of diligently performing his or her duties for Target.*

# KNOWLEDGE – STANDARDS\*



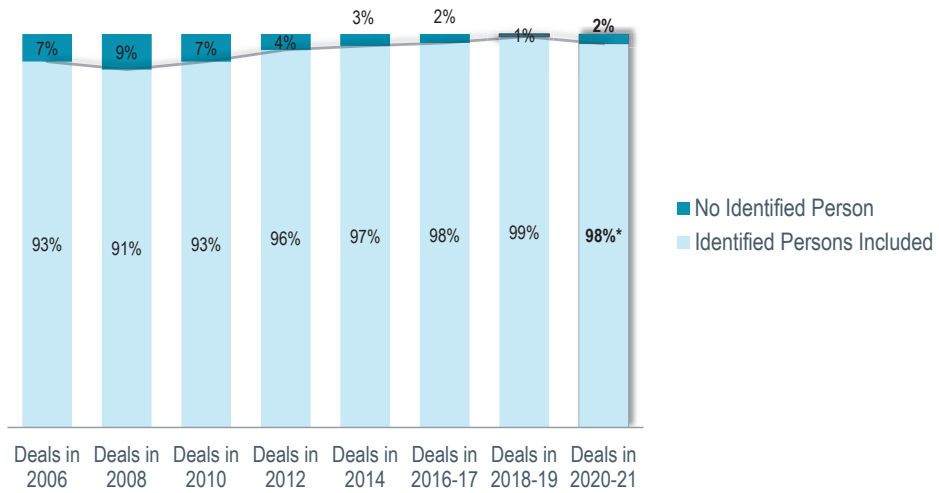
\* Excludes one deal in which the Knowledge definition was in an unfiled exhibit or was redacted.

\*\* Includes one deal that also provided for constructive knowledge as to compliance with health care laws.

\*\*\* Most identify persons/groups of whom reasonable inquiry needs to be made.

# KNOWLEDGE – WHOSE KNOWLEDGE IS IMPUTED?

(Subset: deals with definitions of knowledge)



\* Includes two deals in which knowledge was not defined.

## TARGET'S REPRESENTATIONS AND WARRANTIES

# FINANCIAL STATEMENTS – “FAIR PRESENTATION” REPRESENTATION

## “FAIRLY PRESENTS” IS GAAP QUALIFIED

The financial statements fairly present (and the financial statements delivered pursuant to Section 5.8 will fairly present) the financial condition and the results of operations, changes in shareholders’ equity and cash flows of [Target] as at the respective dates of and for the periods referred to in such financial statements, **all in accordance with GAAP.**

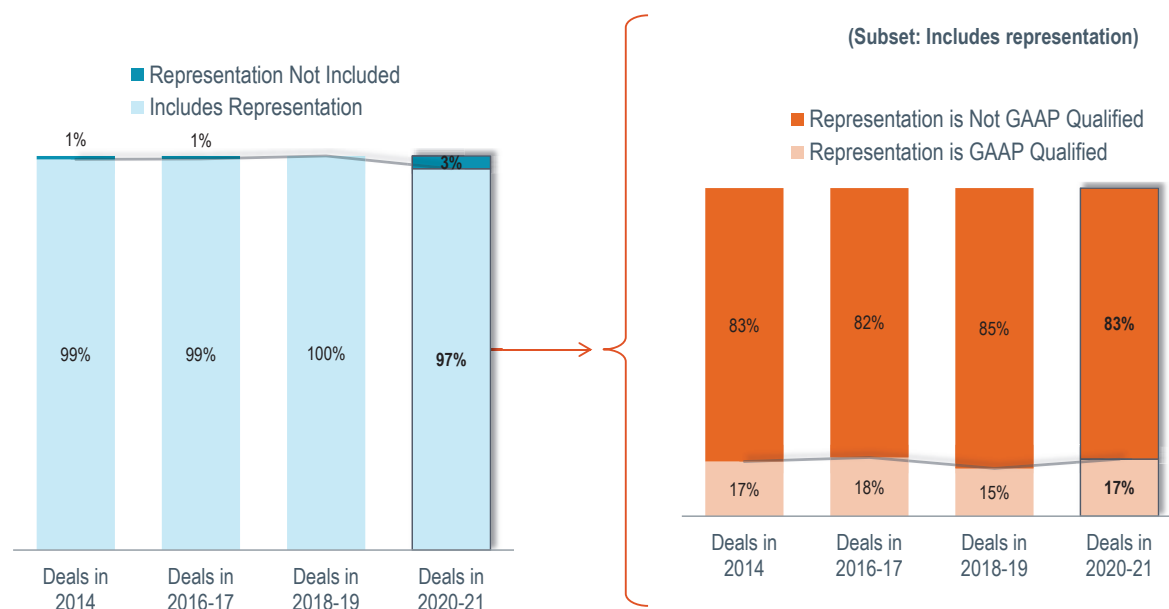
*(ABA Model Asset Purchase Agreement)*

## “FAIRLY PRESENTS” IS NOT GAAP QUALIFIED

The Financial Statements (i) fairly present the consolidated financial condition and the results of operations, changes in shareholders’ equity, and cash flows of [Target] as at the respective dates of, and for the periods referred to in, the Financial Statements, and (ii) were prepared in accordance with GAAP, subject, in the case of the Unaudited Financial Statements, to normal recurring year-end adjustments.

*(ABA Model Stock Purchase Agreement, Second Edition)*

# FINANCIAL STATEMENTS – “FAIR PRESENTATION” REPRESENTATION\*



\* Excludes four deals with no financial statements representation.

# "NO UNDISCLOSED LIABILITIES" REPRESENTATION

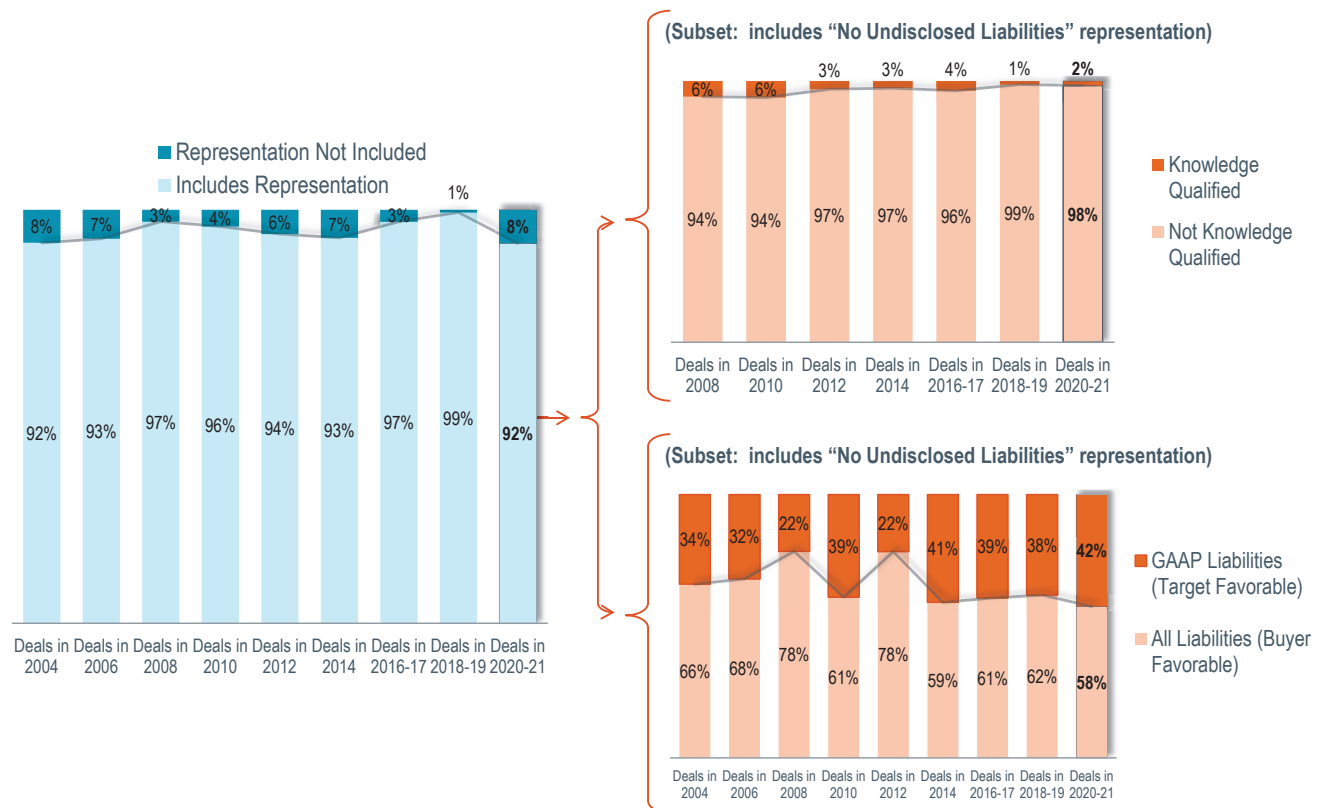
## BUYER-FAVORABLE FORMULATION

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

## TARGET-FAVORABLE FORMULATION

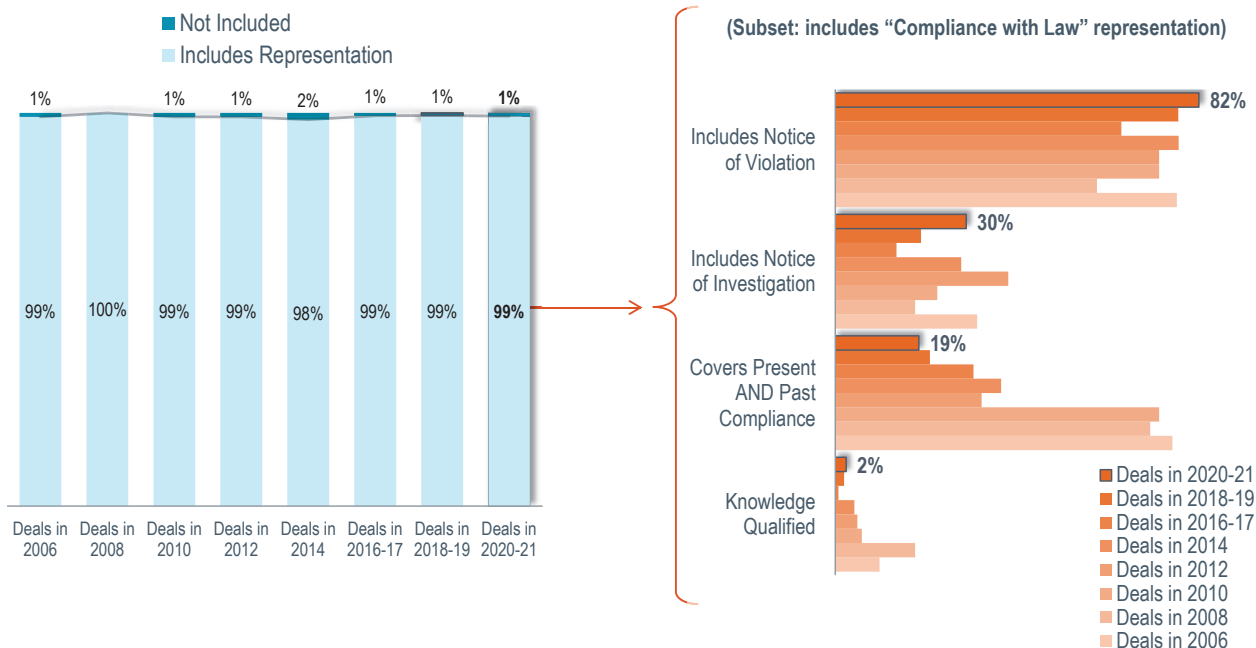
Target has no liability *of the nature required to be disclosed in a balance sheet prepared in accordance with GAAP* except for...

# "NO UNDISCLOSED LIABILITIES" REPRESENTATION



# COMPLIANCE WITH LAW REPRESENTATION

[To the Sellers' knowledge,] the business of Target [has been and] is being conducted in compliance with all applicable laws.



# "10b-5"/FULL DISCLOSURE REPRESENTATION

## "10b-5" FORMULATION

No representation or warranty or other statement made by [Target] in this Agreement, the Disclosure Letter, any supplement to the Disclosure Letter, the certificates delivered pursuant to Section 8.3, or otherwise in connection with the Contemplated Transactions contains any untrue statement of material fact or omits to state a material fact necessary to make the statements in this Agreement or therein, in light of the circumstances in which they were made, not misleading.

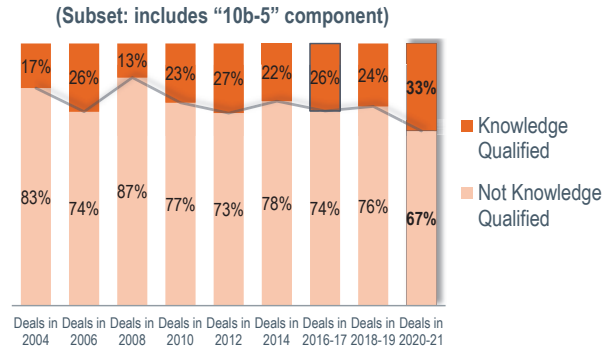
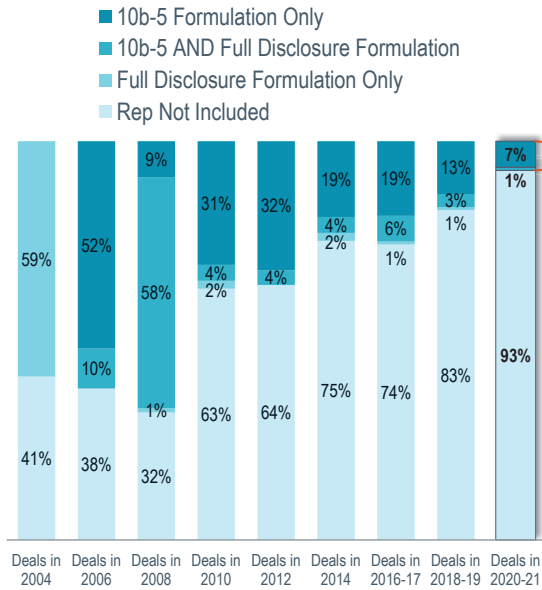
*(ABA Model Stock Purchase Agreement, Second Edition)*

## FULL DISCLOSURE FORMULATION

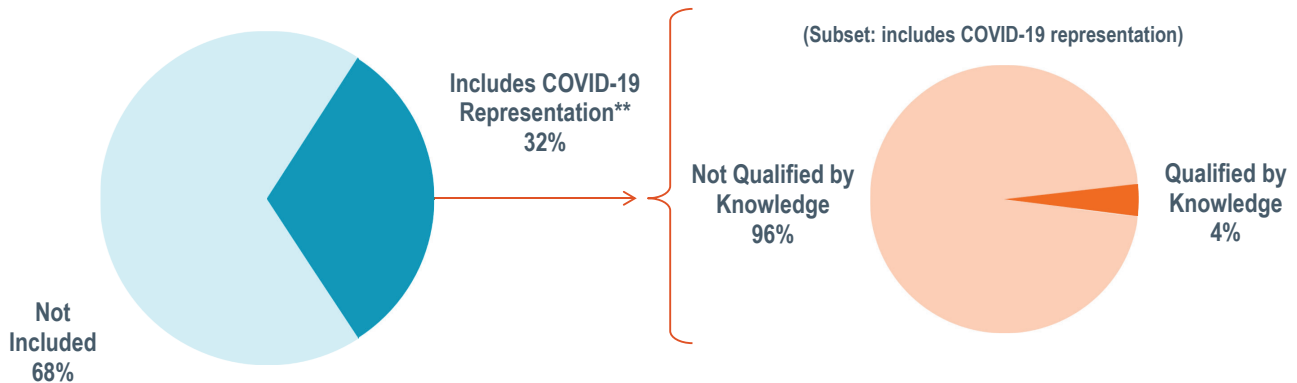
Seller does not have Knowledge of any fact that has specific application to Seller (other than general economic or industry conditions) and that may materially adversely affect the assets, business, prospects, financial condition or results of operations of Seller that has not been set forth in this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

*(ABA Model Asset Purchase Agreement)*

# "10b-5"/FULL DISCLOSURE REPRESENTATION



# COVID-19 REPRESENTATION\*



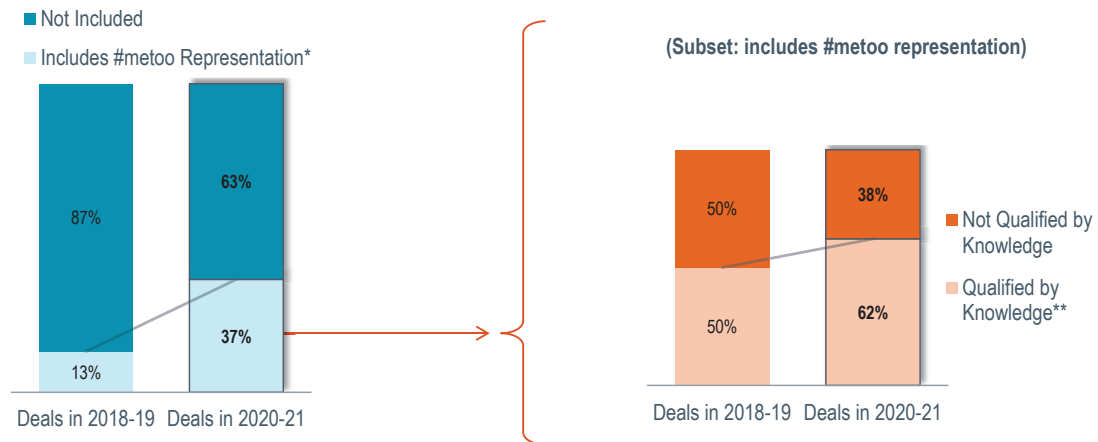
\* Excludes deals signed before March 11, 2020 (the date the World Health Organization declared a global pandemic).

\*\* Represents a variety of COVID-19-related representations, including as to the Paycheck Protection Program, furloughs, and supply chain matters; for specific representations see [https://www.americanbar.org/content/dam/aba/administrative/business\\_law/ma/covid-reps.pdf](https://www.americanbar.org/content/dam/aba/administrative/business_law/ma/covid-reps.pdf).



# #METOO REPRESENTATION

Target is not party to a settlement agreement with a current or former officer, employee or independent contractor of Target or its Affiliates that involves allegations relating to sexual harassment or misconduct. [To Target's Knowledge,] no allegations of sexual harassment or misconduct have been made against any current or former officer or employee of Target or its Affiliates.

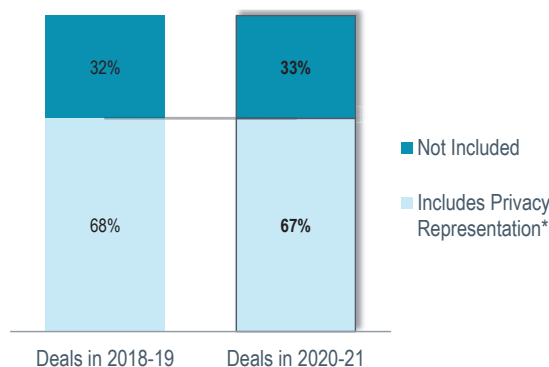


\* Must refer to sexual harassment and not just harassment generally. Does not include compliance with law representations alone.

\*\* Includes qualifications of entire representations and qualifications of only portions thereof.

# PRIVACY REPRESENTATION

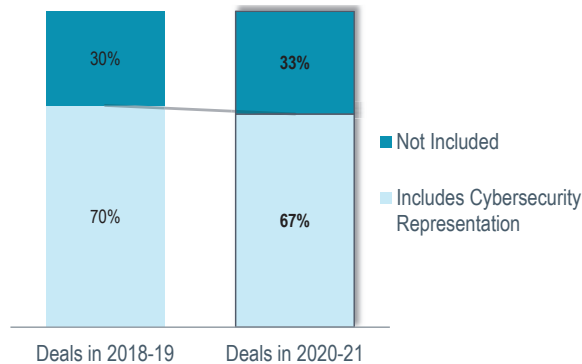
Target has complied with all Laws and contractual and fiduciary obligations as to protection and security of Personal Data to which it is subject. Target has not received any inquiries from or been subject to any audit or Legal Proceeding by any Governmental Authority regarding Personal Data. Target has complied with its policies and procedures as to collection, use, processing, storage and transfer of Personal Data. No Legal Proceeding alleging (a) a material violation of any Person's privacy rights or (b) unauthorized access, use or disclosure of Personal Data has been asserted or threatened to Target. Since [date], there has not been a material violation by Target of any Person's privacy rights or any unauthorized access, use or disclosure by Target of Personal Data.



\* Does not include representations that are limited to a specific area such as medical records. Does not include compliance with law representations alone.

# CYBERSECURITY REPRESENTATION

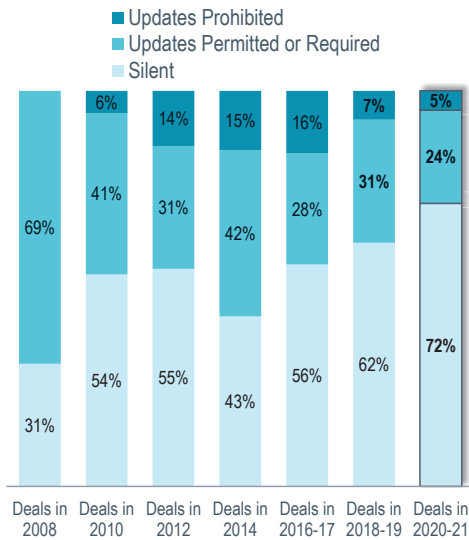
The information technology equipment and related systems owned, used or held for use by Target (“Systems”) are reasonably sufficient for the Business’s immediate needs. Since [date], there has been no unauthorized access, use, intrusion, or breach of security, or material failure, breakdown, performance reduction or other adverse event affecting any Systems that has caused or would reasonably be expected to cause any substantial disruption to the use of such Systems or the Business or any material loss or harm to Target or its personnel, property, or other assets.



## COVENANTS\*

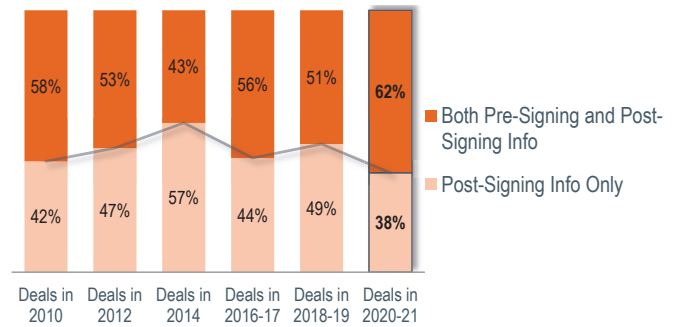
\* Includes deferred closing deals only.

# UPDATING OF DISCLOSURE SCHEDULES BEFORE CLOSING



(Subset: deals with updates permitted or required)

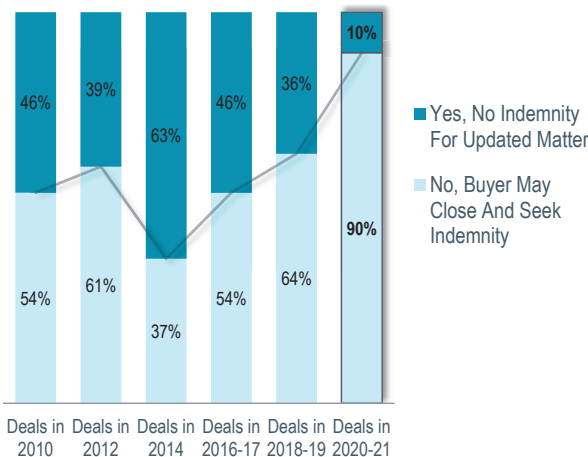
## What Information Can/Must Be Updated?



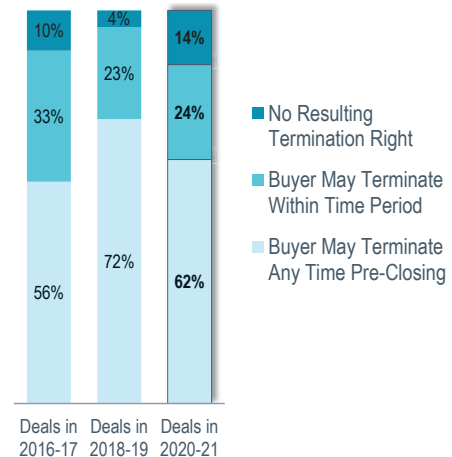
# UPDATING OF DISCLOSURE SCHEDULES BEFORE CLOSING

(Subset: deals with updates permitted or required)

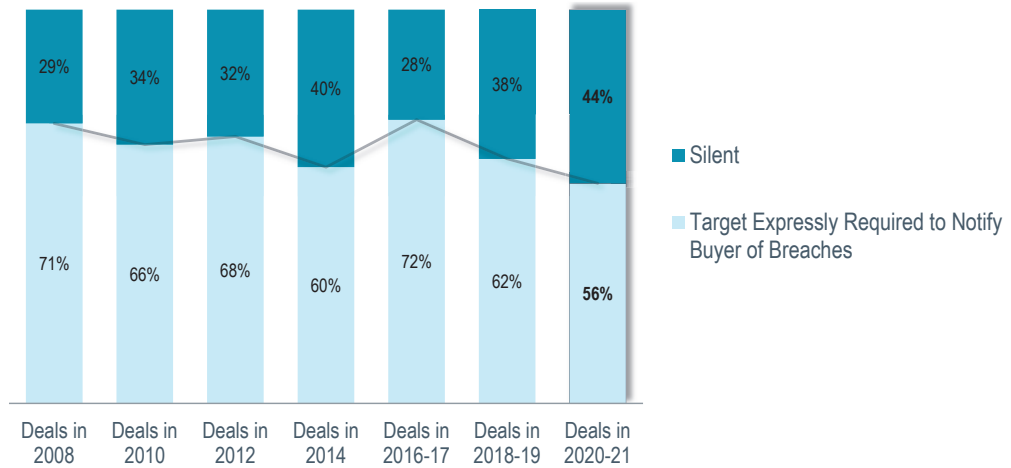
## Is Buyer's Right to Indemnification Limited for Updated Matters?



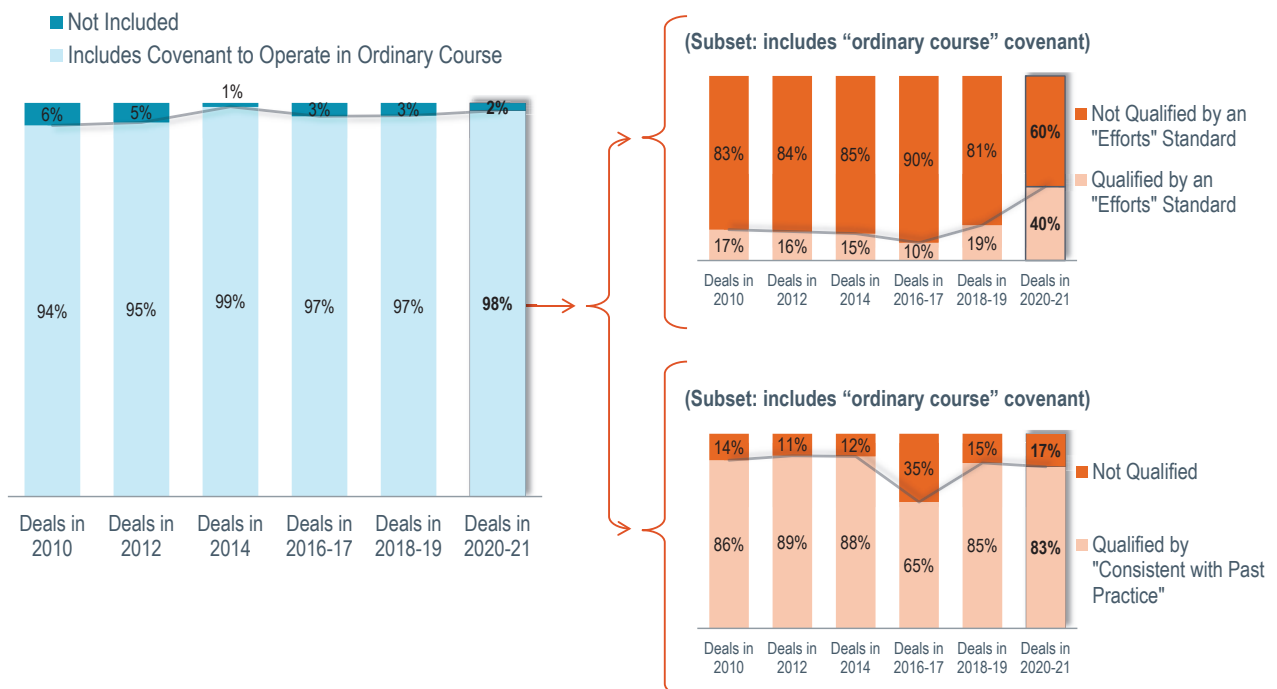
## Effect of Update on Buyer's Termination Right?



# NOTICE OF BREACHES OF REPRESENTATIONS, WARRANTIES, AND COVENANTS



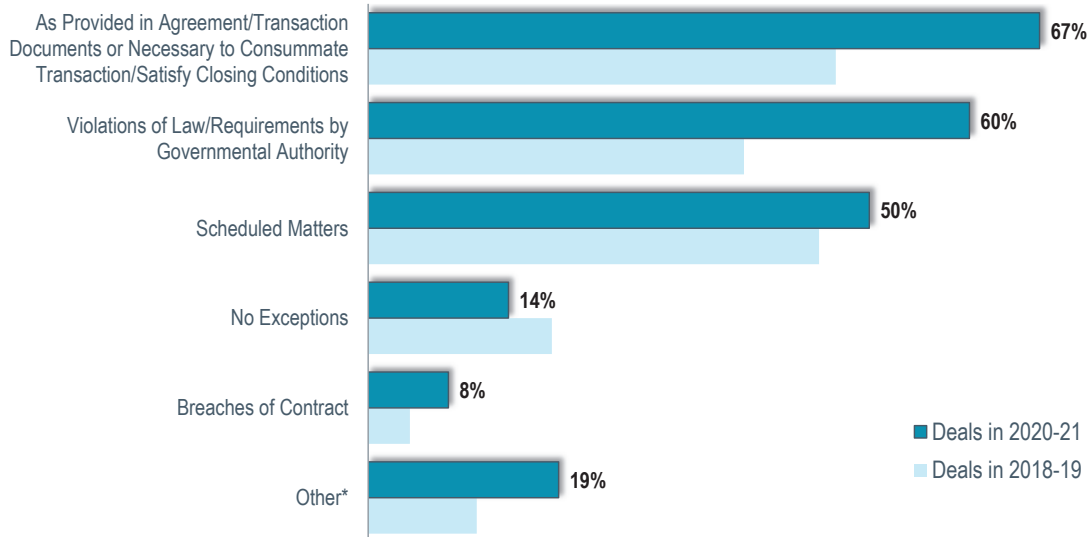
# OPERATION IN THE ORDINARY COURSE



\* Includes reasonable best efforts and commercially reasonable efforts to maintain/preserve business.

# OPERATION IN THE ORDINARY COURSE – CARVE-OUTS

(Subset: deals qualified by “Consistent with Past Practice”)



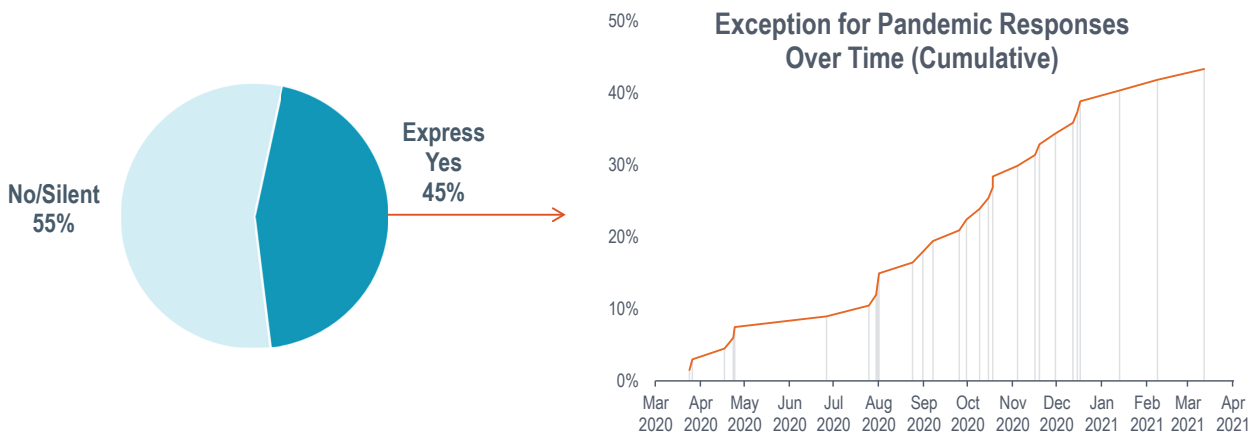
\* Includes exceptions such as COVID-19 measures, changes in tax law/GAAP and restructuring.

# OPERATION IN THE ORDINARY COURSE – EXCEPTION FOR PANDEMIC RESPONSES\*



(Subset: deals qualified by covenant to “Operate in Ordinary Course”)

... except as ... required by Law or any actions taken, or omitted, in response to COVID-19 or COVID-19 Measures, so long as Seller consults with Buyer regarding such actions or omissions and considers the reasonable requests of Buyer with respect to such actions or omissions...



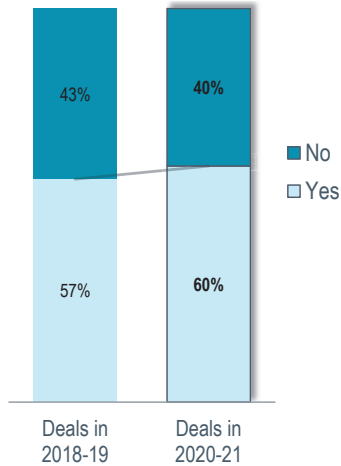
\* Excludes deals signed before March 11, 2020 (the date the World Health Organization declared a global pandemic).

# OPERATION IN THE ORDINARY COURSE – BUYER’S RIGHT TO WITHHOLD CONSENT

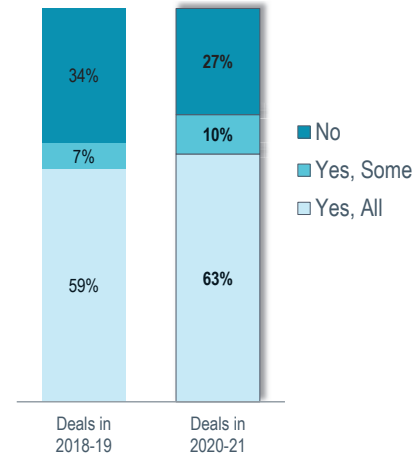
(Subset: deals qualified by covenant to “Operate in Ordinary Course”)

## Is Buyer Expressly Precluded from Unreasonably Withholding Consent to...

...Actions that Would Violate Ordinary Course Covenant?

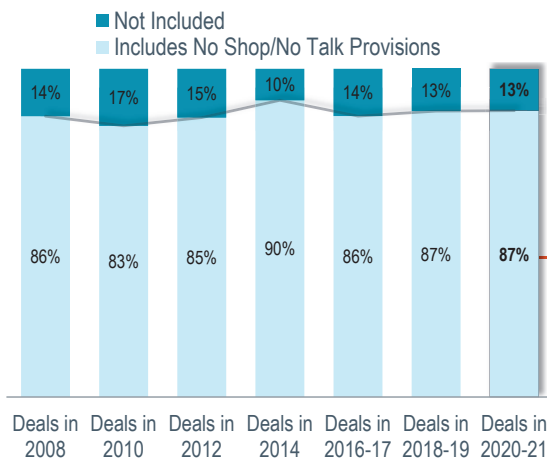


...Actions that Would Violate Target's Negative Covenants?

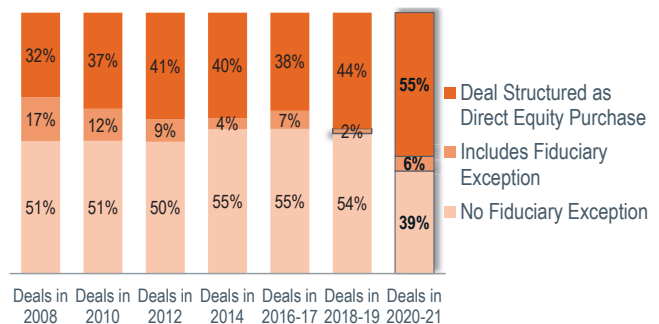


# COVENANTS – NO SHOP/NO TALK

Target will not, and will take all action necessary to ensure that none of Target’s Representatives will, (i) solicit, initiate, consider, encourage, or accept any Acquisition Proposal, or (ii) participate in any discussions, conversations, negotiations, or other communications 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.



(Subset: includes no shop/no talk provisions)



# CONDITIONS TO CLOSING\*

\* Includes deferred closing deals only.

M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, [https://www.americanbar.org/groups/business\\_law/committees/ma/deal\\_points/](https://www.americanbar.org/groups/business_law/committees/ma/deal_points/)

## CONDITIONS TO CLOSING

### ACCURACY OF TARGET'S REPRESENTATIONS – *WHEN* MUST THEY BE ACCURATE?

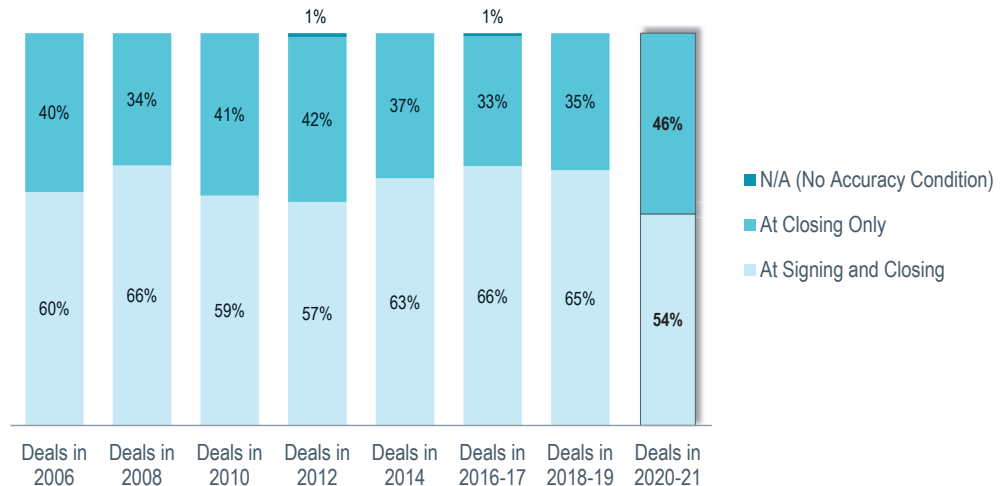
#### SINGLE POINT IN TIME: AT CLOSING

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

#### TWO POINTS IN TIME: AT SIGNING AND AT CLOSING

Each of the representations and warranties made by Target in this Agreement shall have been accurate in all respects *as of the date of this Agreement, and* shall be accurate in all respects *as of the Closing Date* as if made on the Closing Date.

## ACCURACY OF TARGET'S REPRESENTATIONS – *WHEN* MUST THEY BE ACCURATE?



## ACCURACY OF TARGET'S REPRESENTATIONS – *HOW* ACCURATE MUST THEY BE?

### ACCURATE IN ALL RESPECTS

Each of the representations and warranties made by Target 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 Target 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

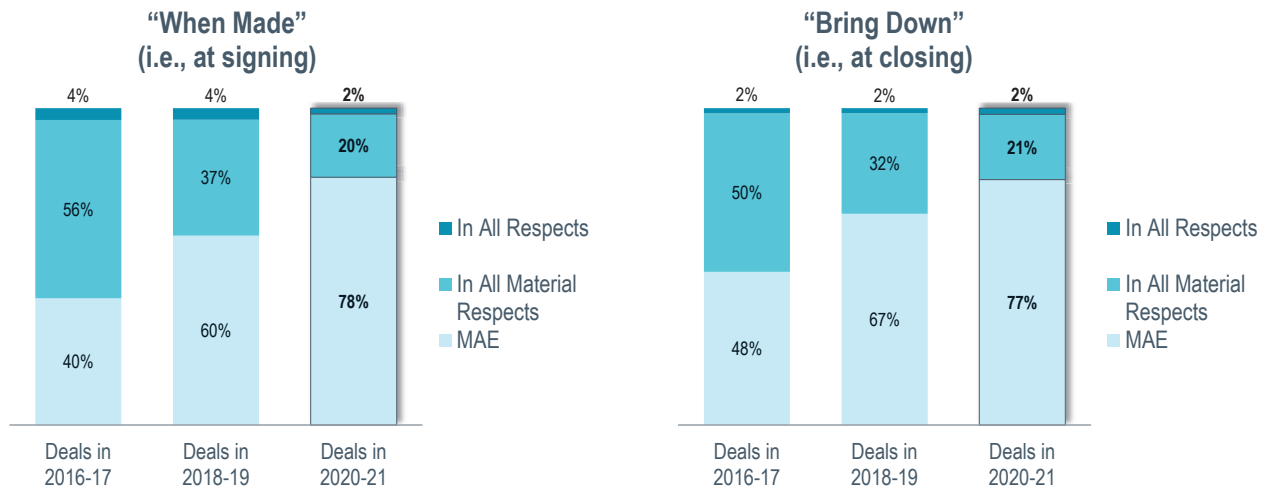
Each of the representations and warranties made by Target in this Agreement shall be accurate in all respects as of the Closing Date as if made on the Closing Date, *except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not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



## ACCURACY OF TARGET’S REPRESENTATIONS –

### HOW ACCURATE MUST THEY BE?

(inclusion of materiality qualifiers)



## ACCURACY OF TARGET’S REPRESENTATIONS –

### HOW ACCURATE MUST THEY BE?

(MAE qualifier with capitalization carve out)

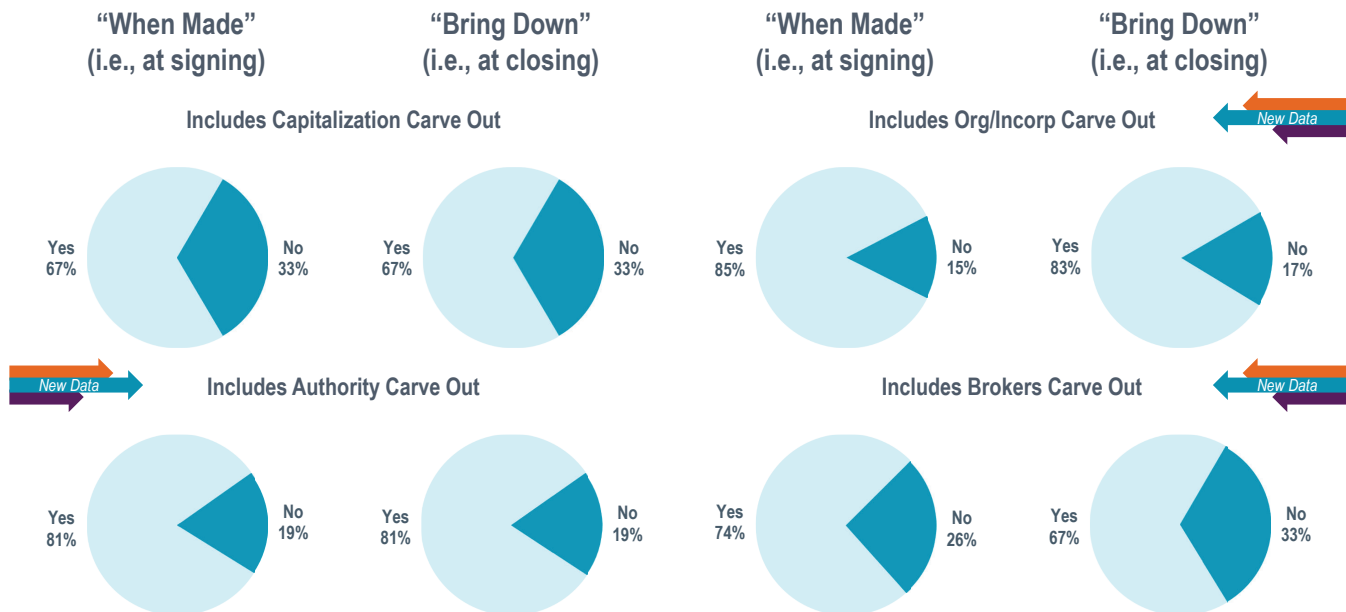
The representation and warranty set forth in **Section 3.3 (Capitalization) shall be accurate in all [material] respects** as of the Closing Date as if made on the Closing Date. Each of the **other representations and warranties** made by Target in this Agreement **shall be accurate** as of the Closing 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 constitute and could not reasonably be expected to have a Material Adverse Effect.**

# ACCURACY OF TARGET’S REPRESENTATIONS –

## HOW ACCURATE MUST THEY BE?

(MAE qualifier with certain carve outs)

(Subset: deals with qualifiers)



# ACCURACY OF TARGET’S REPRESENTATIONS –

## HOW ACCURATE MUST THEY BE?

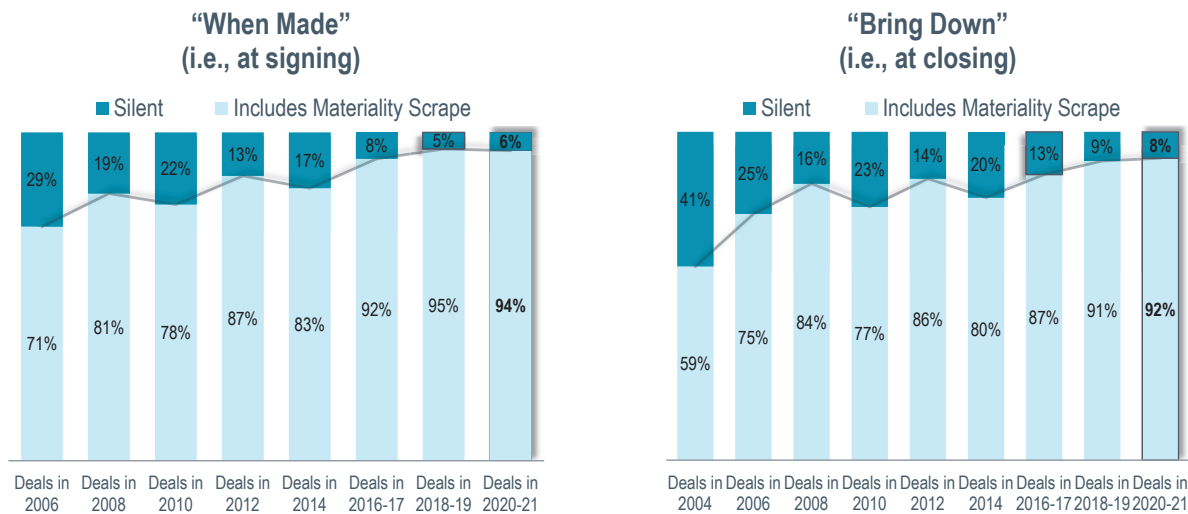
(materiality scrape)

Each of the representations and warranties made by Target 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 constitute and could not reasonably be expected to have a Material Adverse Effect ***(it being understood that, for purposes of determining the accuracy of such representations and warranties, all “Material Adverse Effect” qualifications and other materiality qualifications and similar qualifications contained in such representations and warranties shall be disregarded).***

# ACCURACY OF TARGET’S REPRESENTATIONS – HOW ACCURATE MUST THEY BE?

(materiality scrape)

(Subset: deals with materiality/MAE qualifiers)



# BUYER’S MAC CONDITION

## STAND-ALONE:

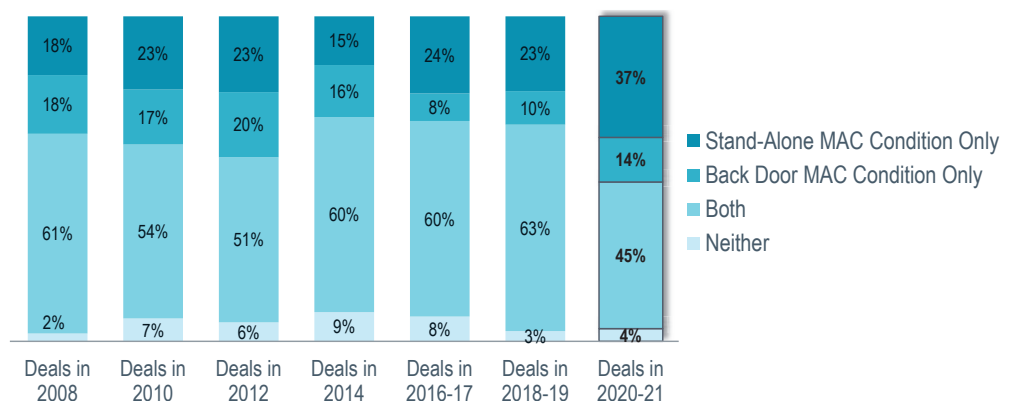
Since the date of this Agreement, there has not been any Target Material Adverse Change.

## “BACK DOOR”:

*“Absence of changes” representation*

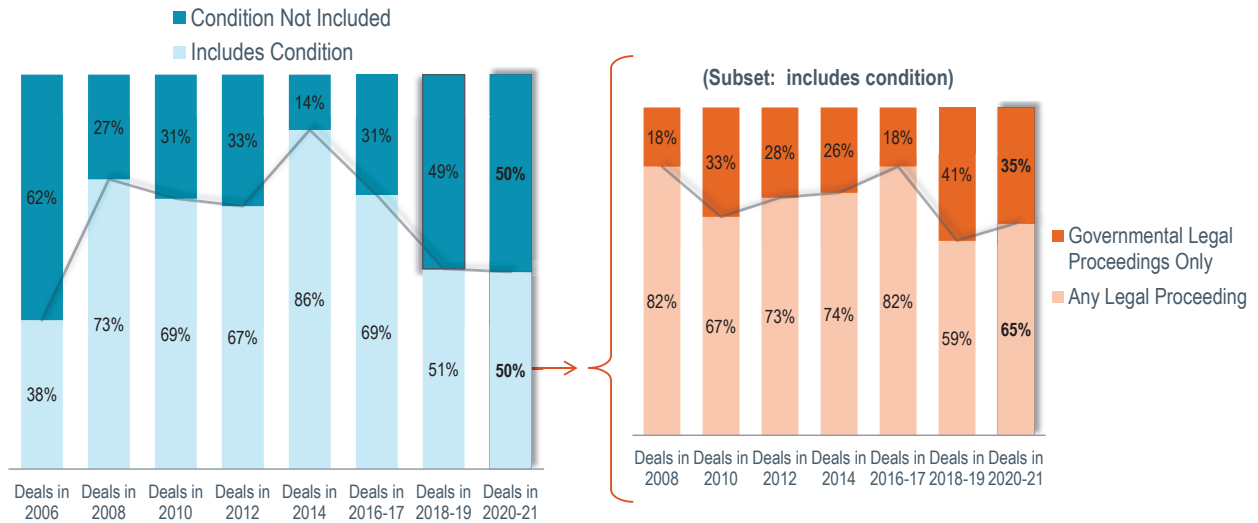
Since the Balance Sheet Date, there has not been any Target Material Adverse Change.

*Plus “bring down” formulation of “accuracy of representation” condition*



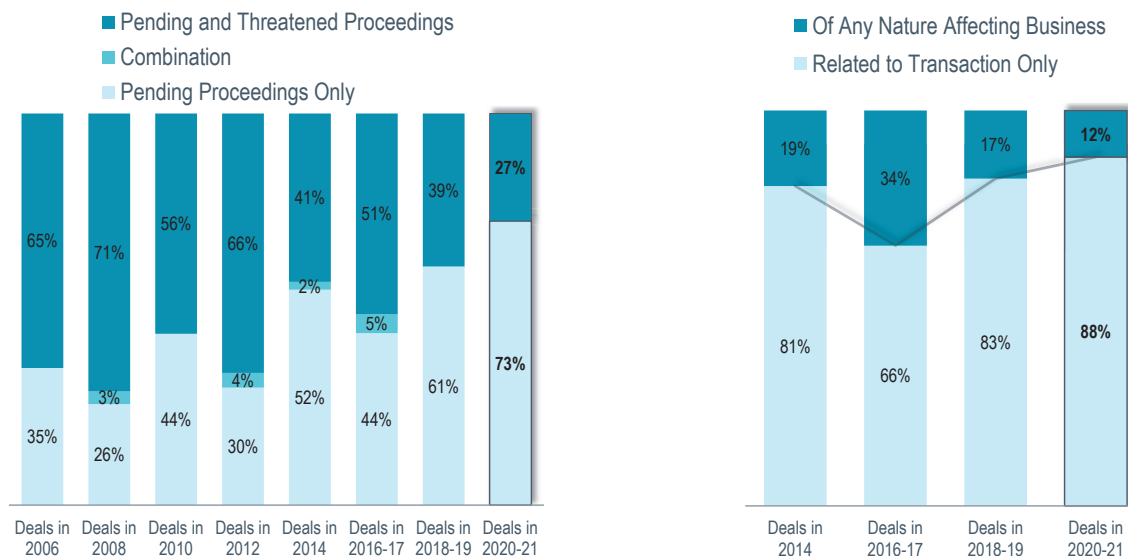
# NO LEGAL PROCEEDINGS CHALLENGING THE TRANSACTION (STAND ALONE CONDITION)

There will not be pending [or threatened] any action, suit, or similar legal proceeding brought by any Governmental Entity [or third party] challenging or seeking to restrain or prohibit the consummation of the Transactions.



# NO LEGAL PROCEEDINGS CHALLENGING THE TRANSACTION (STAND ALONE CONDITION)

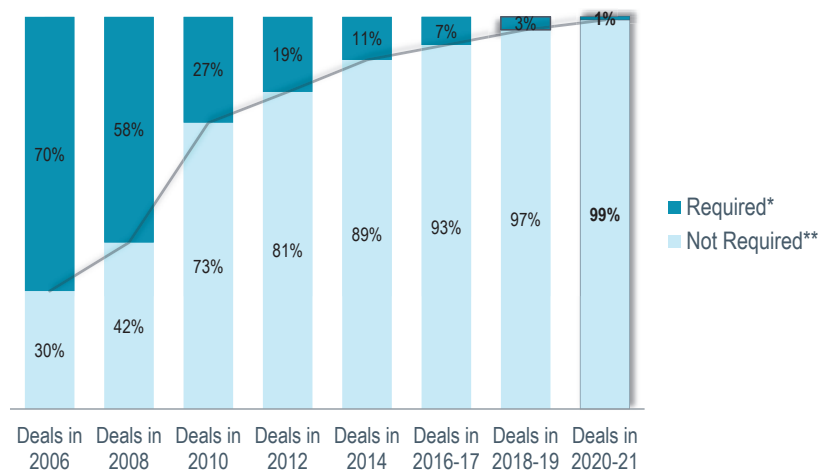
(Subset: deals with closing condition of no legal proceedings challenging the transaction)



\* Includes deals in which “threatened” only applies to a subset of legal proceedings (typically initiated by governmental entities).

## LEGAL OPINIONS (NON-TAX) OF TARGET'S COUNSEL

(All deals: includes simultaneous sign-and-close deals)



\* Typically as a condition to closing, but includes opinions required in a “closing deliveries” covenant.

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

## APPRAISAL RIGHTS

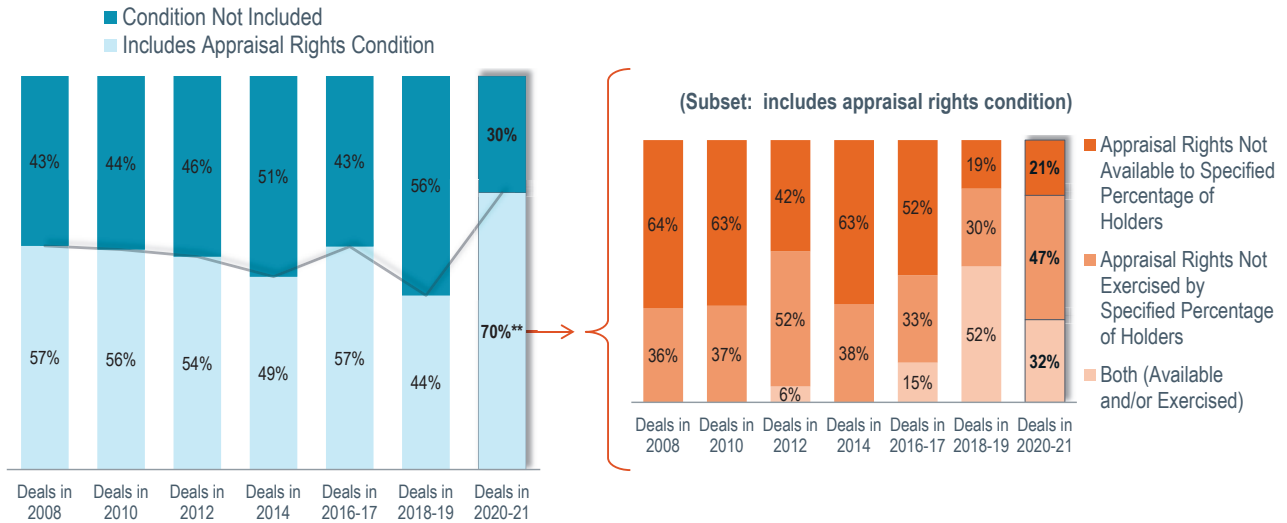
### APPRAISAL RIGHTS NOT AVAILABLE:

As of Closing, Eligible Dissenting Shares, or shares that may become Eligible Dissenting Shares, shall represent not more than [10]% of the total voting power of the outstanding shares of Company’s capital stock on such date, where “Eligible Dissenting Shares” means shares of Company’s common stock or preferred stock for which the holders have either demanded or perfected appraisal rights in accordance with DGCL Section 262 and have not effectively withdrawn or lost such appraisal rights.

### APPRAISAL RIGHTS NOT EXERCISED (OR PERFECTED):

Stockholders owning beneficially or of record no more than [5]% of the outstanding shares of Company’s common stock will have perfected their right of appraisal under the DGCL, and 20 days will have elapsed since the date of mailing notification of the Stockholders’ Consent to each Stockholder who has not executed the Stockholders’ Consent.

# APPRAISAL RIGHTS\*

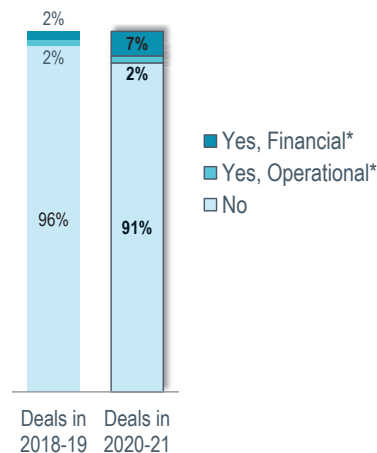


\* Represents only merger deals.

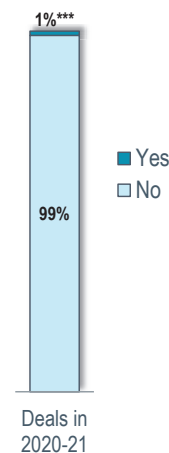
\*\* Includes three deals where the target was an LLC rather than a corporation: two Delaware LLCs with no appraisal rights condition and one Wisconsin LLC with an appraisal rights condition.

# BUSINESS PERFORMANCE/PANDEMICS

Stand-Alone Condition Regarding Target's Business Performance?



Stand-Alone Condition Regarding COVID/Pandemics\*\*



\* Includes one deal with both financial and operational conditions.

\*\* Excludes deals signed before March 11, 2020 (the date the World Health Organization declared a global pandemic).

\*\*\* Reflects one deal in which closing was conditioned on financing not failing "solely due to the financial effects" of COVID-19 on the target.

# SANDBAGGING/NON-RELIANCE

M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, [https://www.americanbar.org/groups/business\\_law/committees/ma/deal\\_points/](https://www.americanbar.org/groups/business_law/committees/ma/deal_points/)

## SANDBAGGING/NON-RELIANCE

### “SANDBAGGING”

#### BENEFIT OF THE BARGAIN/PRO-SANDBAGGING

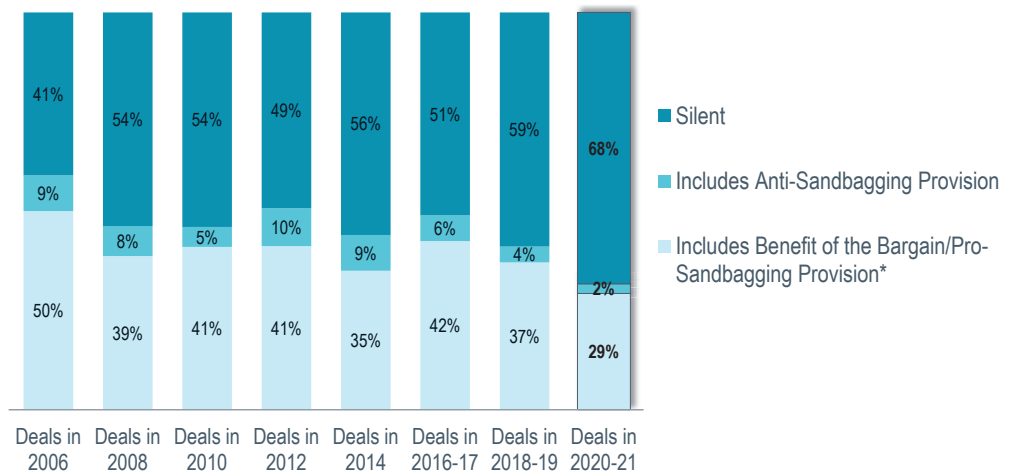
The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, covenant, or obligation ***will not be affected by ... any investigation conducted or any Knowledge acquired at any time***, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation.

(ABA Model Stock Purchase Agreement, Second Edition)

#### 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.***

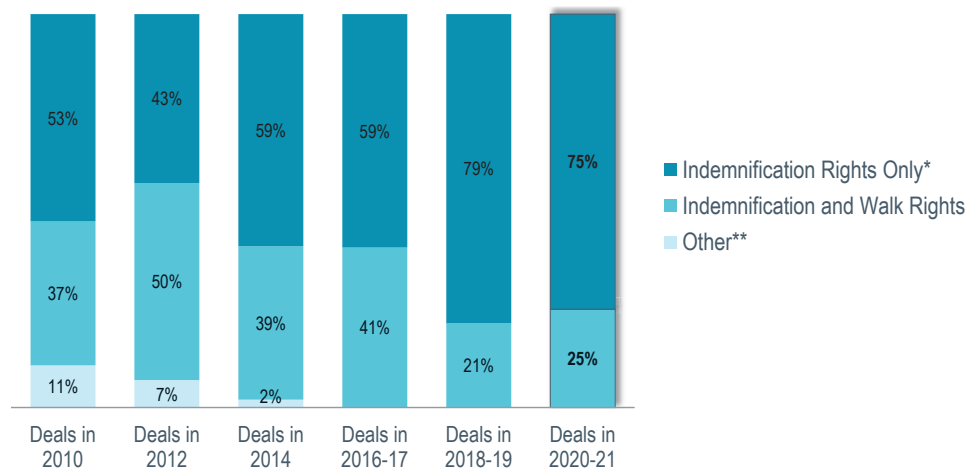
# “SANDBAGGING”



\* For purposes of this Study, “benefit of the bargain/pro-sandbagging” excludes clauses that merely state, for example, that Target’s representations and warranties “survive Buyer’s investigation” unless they include an express statement regarding the impact of Buyer’s knowledge on Buyer’s post-closing indemnification rights.

# “SANDBAGGING” – SCOPE OF BENEFIT OF THE BARGAIN / PRO-SANDBAGGING PROVISIONS

(Subset: deals with benefit of the bargain/pro-sandbagging provisions)



\* No deals in any of the given years included walk rights only.

\*\* E.g., “any other remedy based on representations, warranties, covenants, and agreements in this Agreement.”



# NON-RELIANCE / NO OTHER REPRESENTATIONS

(All deals: includes simultaneous sign-and-close deals)

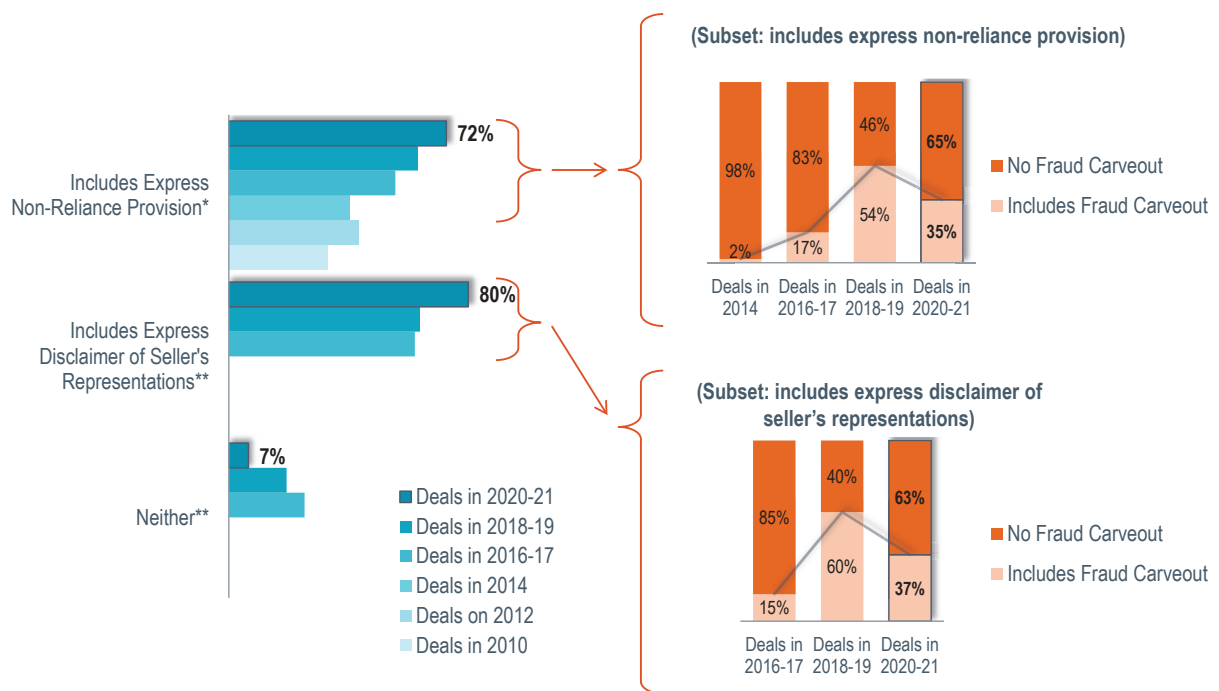
## Express Non-Reliance

Buyer acknowledges and agrees that 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 in Section 3.

## Express Disclaimer of Seller's Representations

Buyer acknowledges and agrees that Target 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 Section 3.

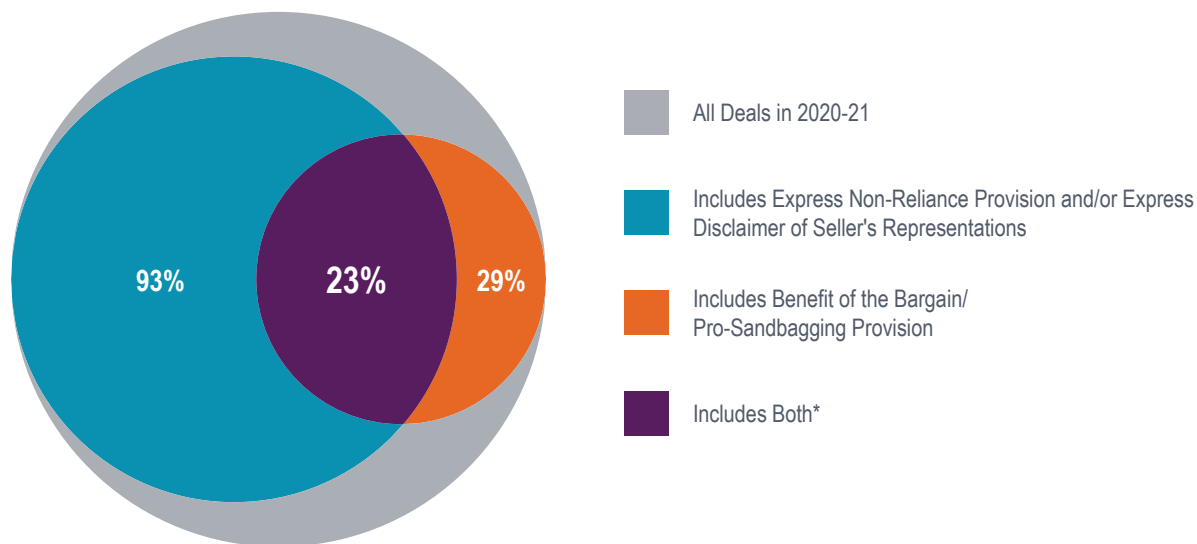
# NON-RELIANCE / NO OTHER REPRESENTATIONS



\* May include deals that do not use a form of the word "reliance" in the non-reliance provision. See IAC Search, LLC v. Conversant LLC, C.A. No. 11774-CB (Del. Ch. Nov. 30, 2016)

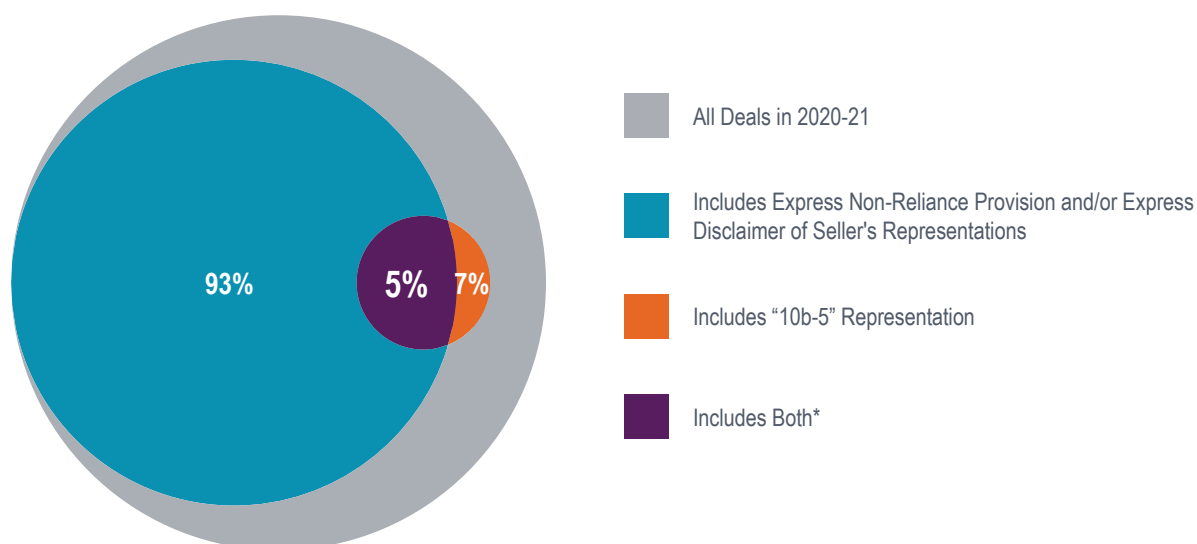
\*\* Not measured before deals in 2016-17.

# NON-RELIANCE/DISCLAIMER OF SELLER'S REPRESENTATIONS AND "SANDBAGGING" – CORRELATION



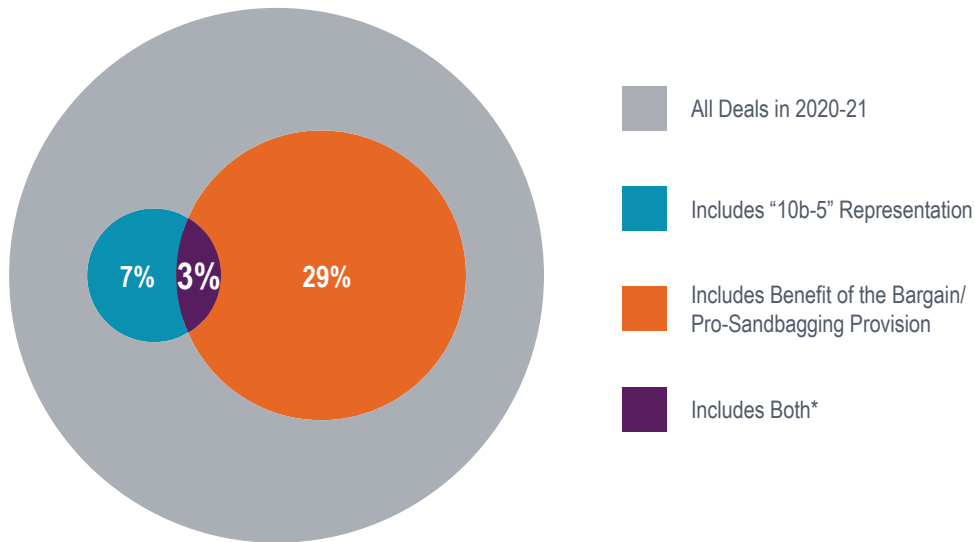
\* Represents 24% of deals including express non-reliance provisions and/or express disclaimers of seller's representations and 78% of deals including benefit of the bargain/pro-sandbagging provisions.

# NON-RELIANCE/DISCLAIMER OF SELLER'S REPRESENTATIONS AND "10b-5" REPRESENTATION – CORRELATION



\* Represents 5% of deals including express non-reliance provisions and/or express disclaimers of Seller's representations and 67% of deals including "10b-5" representations; includes both "10b-5" and "full disclosure" formulations.

# “SANDBAGGING” AND “10b-5” REPRESENTATION – CORRELATION



\* Represents 44% of deals including “10b-5” representations and 11% of deals including benefit of the bargain/pro-sandbagging provisions; includes both “10b-5” and “full disclosure” formulations.

## INDEMNIFICATION\*

\* Excludes 9 deals in which only *fundamental* representations survive closing.

## SURVIVAL/TIME TO ASSERT CLAIMS

### 11.1 SURVIVAL ...

All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, and any certificate, document, or other writing delivered pursuant to this Agreement will survive the Closing and the consummation and performance of the Contemplated Transactions.

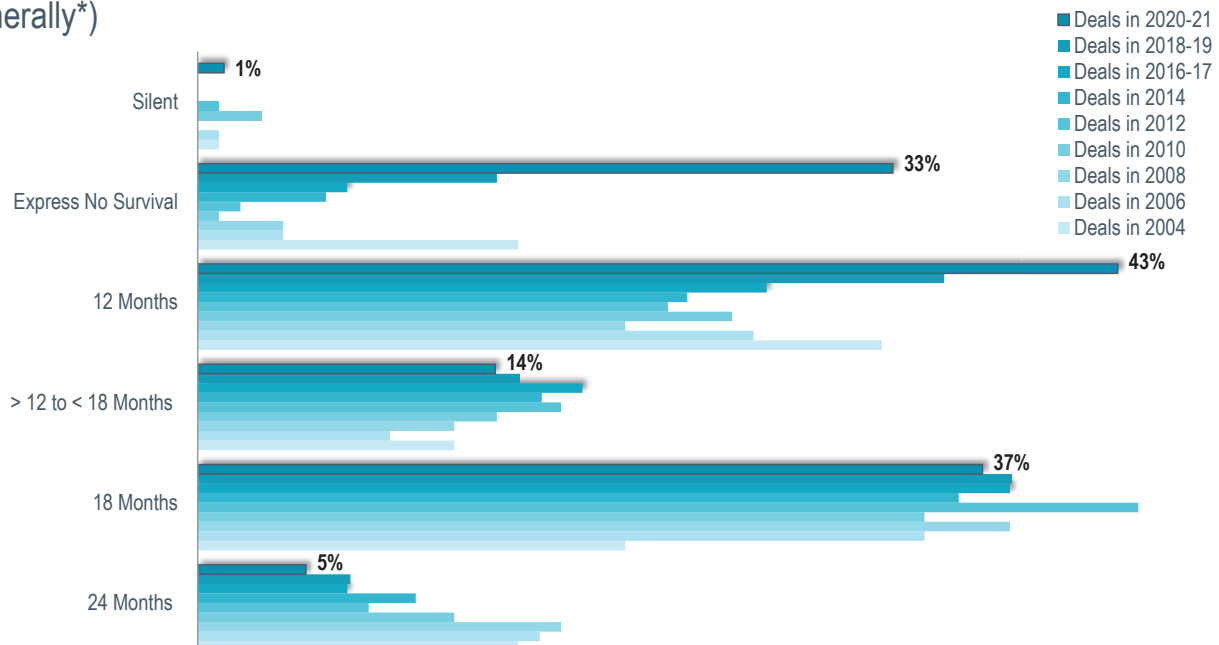
### 11.5 TIME LIMITATIONS

If the Closing occurs, Sellers shall have liability under Section 11.2(a) with respect to any Breach of a representation or warranty (other than those in Sections..., as to which a claim may be made at any time), only if on or before the date that is \_\_\_ years after the Closing Date, Buyer notifies [Target's representative] of a claim, specifying the factual basis of the claim in reasonable detail to the extent known by Buyer.

(ABA Model Stock Purchase Agreement, Second Edition)

## SURVIVAL/TIME TO ASSERT CLAIMS

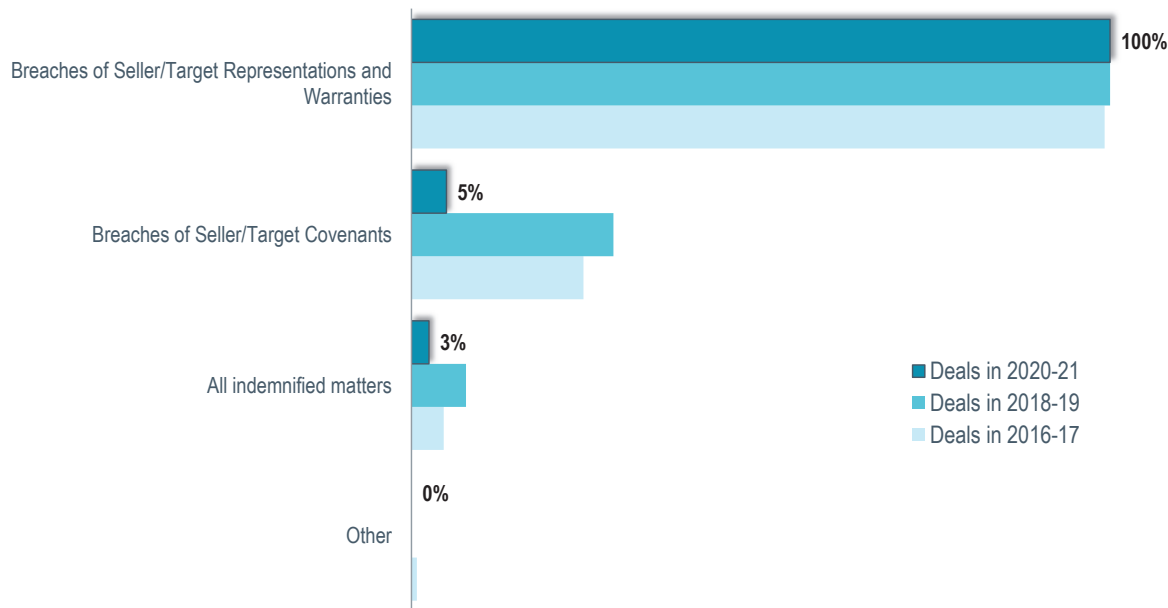
(generally\*)



\* These periods apply to most representations and warranties; certain representations and warranties may be carved out in order to survive for other specified periods. Excludes two deals with redacted or indeterminable survival periods. Only includes categories reflected in deals in 2020-21 (not shown: < 6 Months, 6 Months, > 7 to < 12 Months, > 18 to < 24 Months, Statute of Limitations). Percentages shown for survival periods are of deals with expressed survival periods.

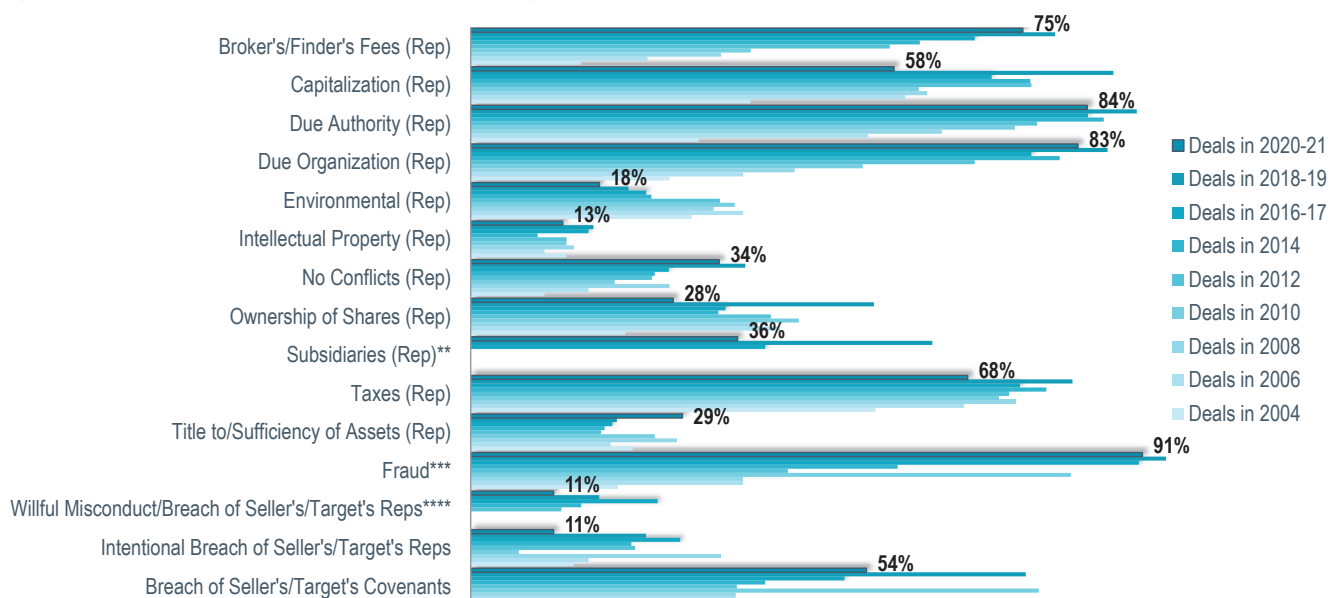
# SURVIVAL/TIME TO ASSERT CLAIMS – GENERAL COVERAGE OF SURVIVAL PROVISIONS

(Subset: deals with survival provisions)



# SURVIVAL/TIME TO ASSERT CLAIMS – CARVE OUTS TO SURVIVAL LIMITATIONS\*

(Subset: deals with survival provisions)



\* Matters subject to carve outs typically survive longer than time periods generally applicable to representations. Only those categories appearing more than 10% of the time for deals in 2020-21 are shown.

\*\* Not measured before deals in 2016-17.

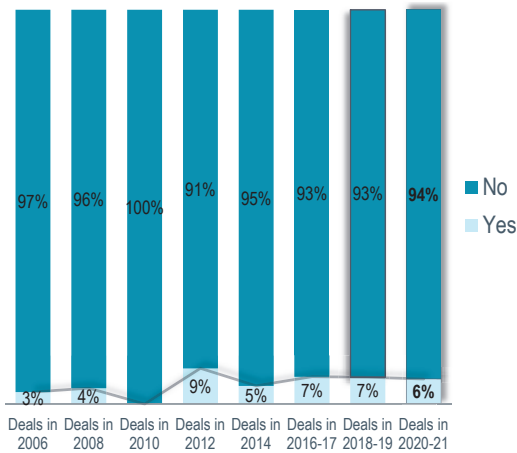
\*\*\* Includes deals with a fraud carve out in an exclusive remedy provision that has general applicability to all indemnification limitations.

\*\*\*\* Not measured before deals in 2012.

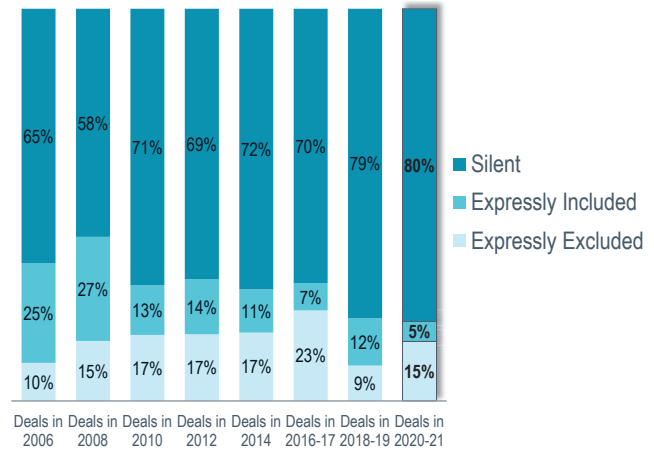
# TYPES OF DAMAGES/LOSSES COVERED

(Subset: deals with survival provisions)

Limited to "Out of Pocket" Damages?



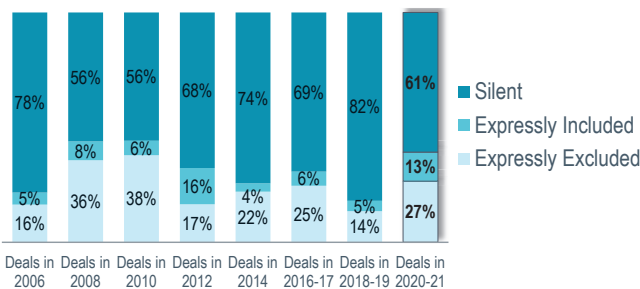
Diminution in Value



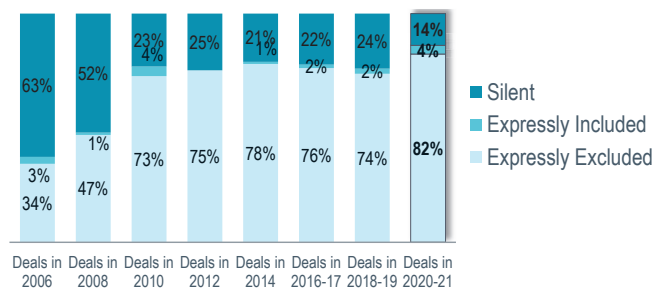
# TYPES OF DAMAGES/LOSSES COVERED\*

(Subset: deals with survival provisions)

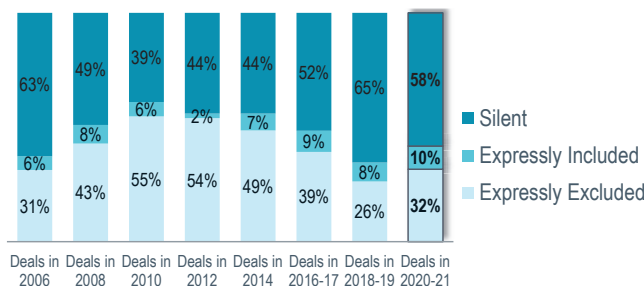
Incidental Damages



Punitive Damages



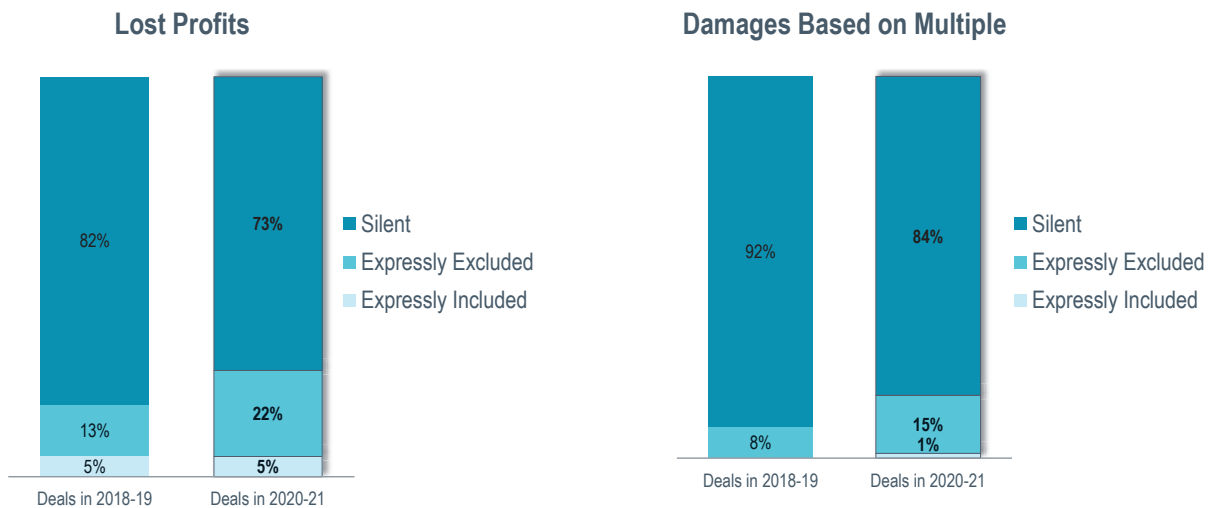
Consequential Damages



\* "Excluded" categories may include deals with exceptions providing that such damages are recoverable if paid to a third party.

# TYPES OF DAMAGES/LOSSES COVERED\*

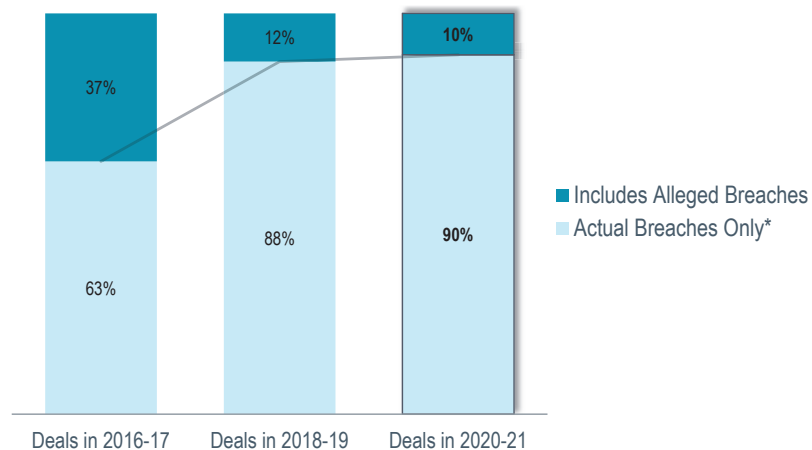
(Subset: deals with survival provisions)



\* "Excluded" categories may include deals with exceptions providing that such damages are recoverable if paid to a third party.

# INDEMNIFICATION FOR CLAIMS "IF TRUE"

## Is Buyer's Right to Indemnification for Representations Limited to Actual Breaches?



\* May include deals to invoke indemnification right with additional bases for indemnification beyond breaches of representations and covenants where claims alone may be sufficient (such as claims related to Excluded Assets or Excluded Liabilities).

# BASKETS

## DEDUCTIBLE

Sellers 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 Sellers shall be responsible **only for Losses exceeding the Deductible**.

## FIRST DOLLAR

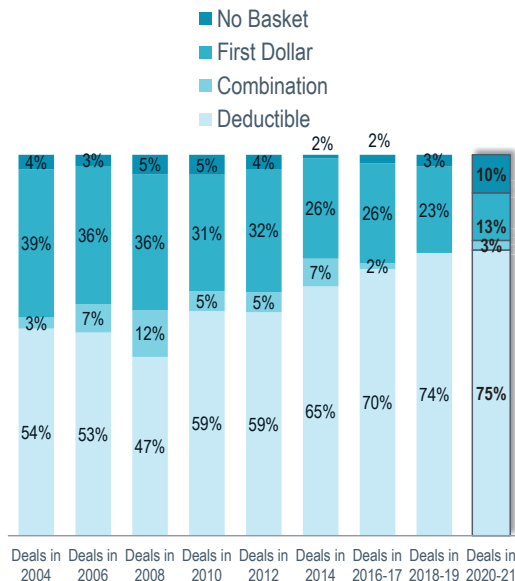
Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds **\$500,000 (the "Threshold")** in which event Sellers shall be responsible for the **aggregate amount of all Losses, regardless of the Threshold**.

## COMBINATION

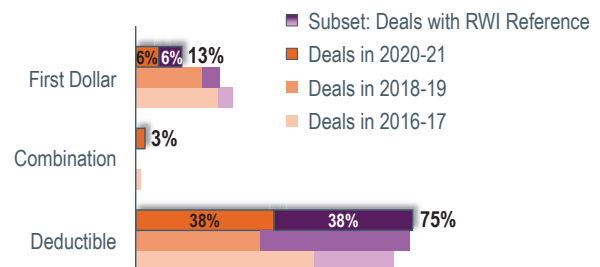
Sellers shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds **\$500,000 (the "Threshold")** in which event Sellers shall be responsible **only for Losses in excess of \$300,000 (the "Deductible")**.

# BASKETS

(Subset: deals with survival provisions\*)



Correlation with References to Representations and Warranties Insurance ("RWI")\*\*: Includes Basket



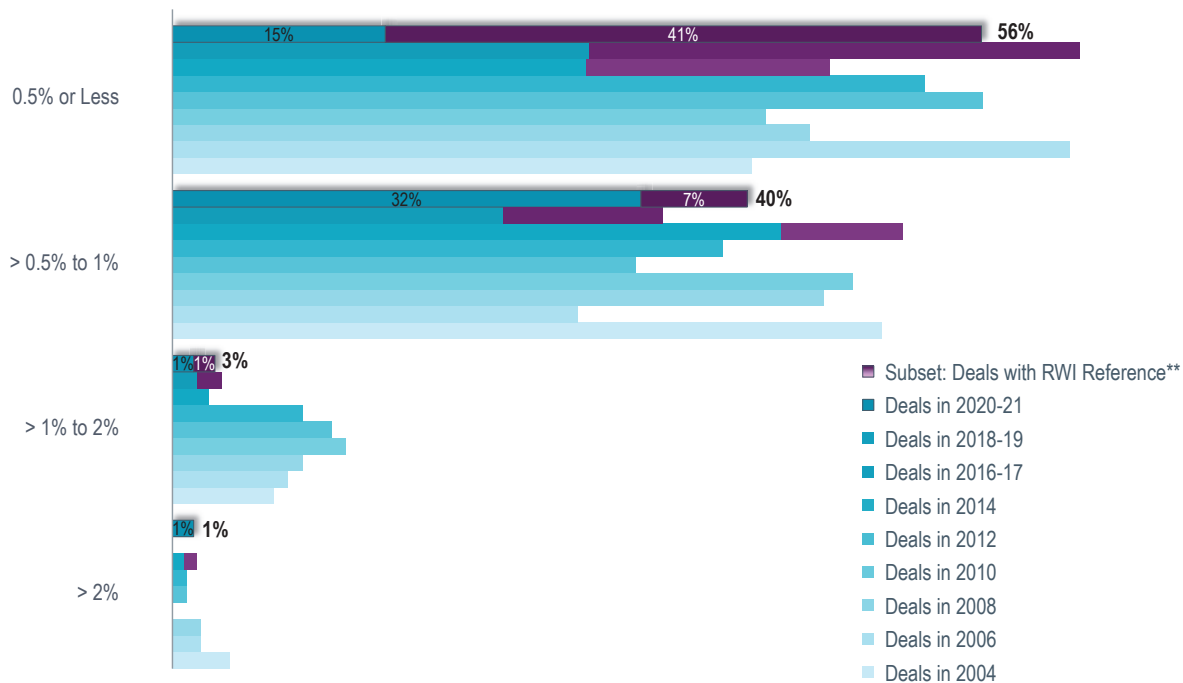
\* Excludes one deal with indeterminable basket type.

\*\* See page 123.



## BASKETS AS % OF TRANSACTION VALUE

(Subset: deals with baskets\*)



\* Excludes five deals with redacted basket amounts.

\*\* Not measured before deals in 2016-17.

## BASKETS AS % OF TRANSACTION VALUE

(statistical summary and correlation with references to RWI)

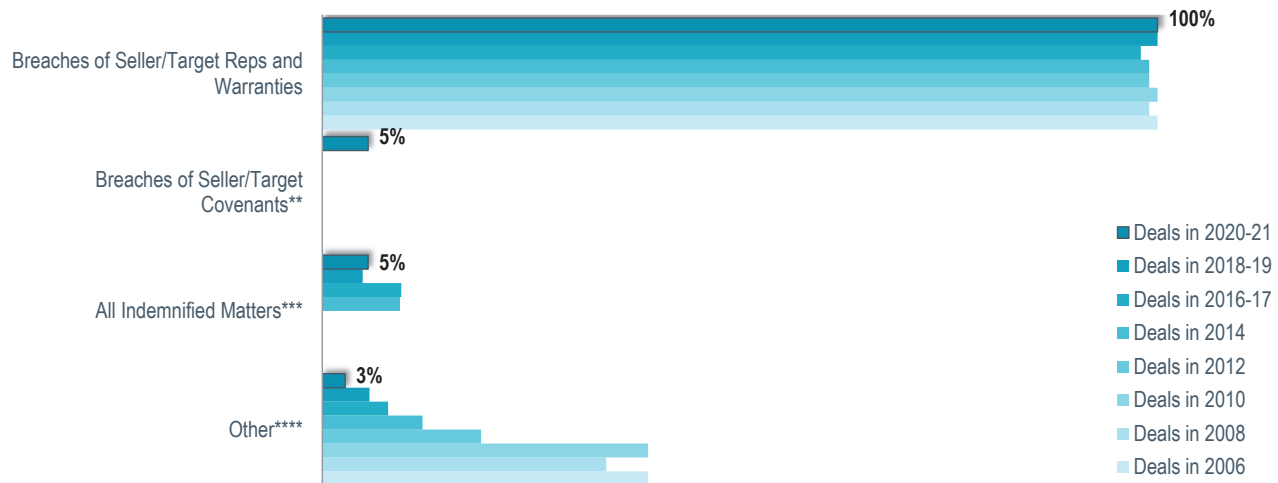
(Subset: deals with baskets\*)

Basket Type	Mean	Median	Minimum (> 0)	Maximum
<b>All Deductibles:</b>	.64%	.50%	.05%	4.35%
Without RWI Reference:	.81%	.73%	.13%	4.35%
With RWI Reference:	.48%	.50%	.05%	2.00%
<b>All First Dollar:</b>	.40%	.39%	.07%	.86%
Without RWI Reference:	.41%	.20%	.07%	.86%
With RWI Reference:	.39%	.50%	.16%	.50%
<b>All Baskets</b>				
Without RWI Reference:	.60%	.50%	—	—
With RWI Reference:	.75%	.69%	—	—
	.47%	.50%		

\* Excludes deals with Combination baskets and one deal with redacted basket amount.

# BASKETS – GENERAL COVERAGE\*

(Subset: deals with baskets)



\* Carve outs for individual representations and warranties, fraud, and intentional breaches of representations and warranties addressed on next page.

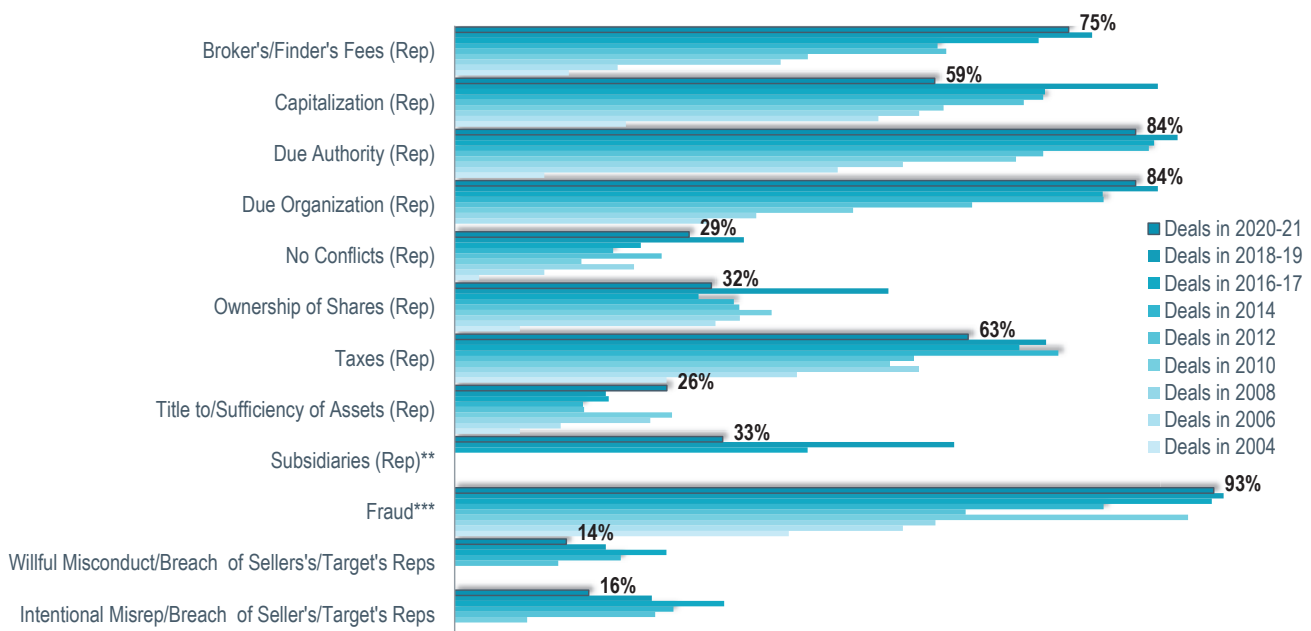
\*\* Covenants data before deals in 2020-21 not presented due to change in methodology.

\*\*\* Not measured before deals in 2014.

\*\*\*\* Includes deals with baskets that cover one or both of reps/warranties and covenants as well as other specified indemnity items, but less than all indemnified matters (for example, reps/warranties and pre-closing tax matters).

# BASKETS – CARVE OUTS\*

(Subset: deals with baskets)



\* Only those categories appearing more than 10% of the time for deals in 2020-21 are shown. Carve outs for breaches of Seller/Target covenants taken into account on prior page.

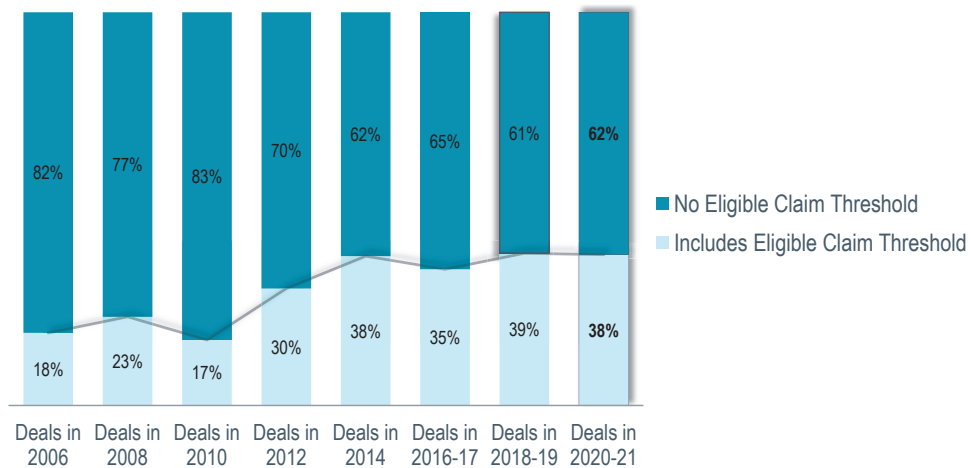
\*\* Not measured before deals in 2016-17.

\*\*\* Includes deals with a fraud carve out in an exclusive remedy provision that has general applicability to all indemnification limitations.

## ELIGIBLE CLAIM THRESHOLD

(Subset: deals with baskets)

Sellers 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 \$\_\_\_\_\_.



## MATERIALITY SCRAPE

(materiality qualification in reps disregarded)

### MATERIALITY QUALIFICATION IN REPS DISREGARDED FOR ALL INDEMNIFICATION-RELATED PURPOSES

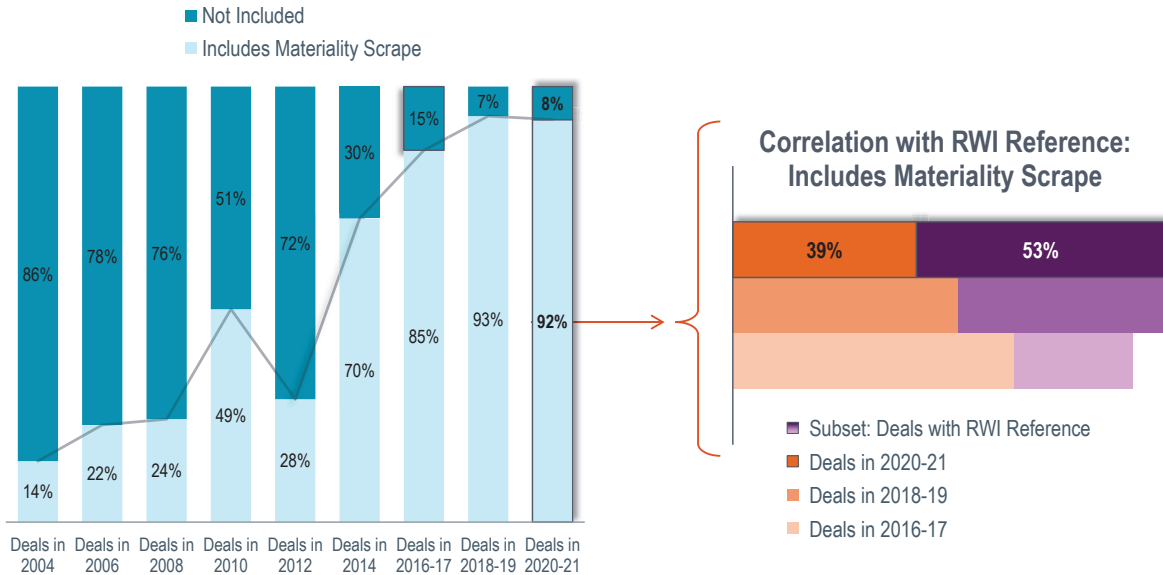
**For purposes of this Article VIII (Indemnification)**, the representations and warranties of Target shall not be deemed qualified by any references to [Seller's Knowledge], materiality or to Material Adverse Effect.

### MATERIALITY QUALIFICATION IN REPS DISREGARDED FOR CALCULATION OF DAMAGES/LOSSES ONLY

**For the sole purpose of determining Losses (and not for determining whether or not any breaches of representations or warranties have occurred)**, the representations and warranties of Target shall not be deemed qualified by any references to [Seller's Knowledge], materiality or to Material Adverse Effect.

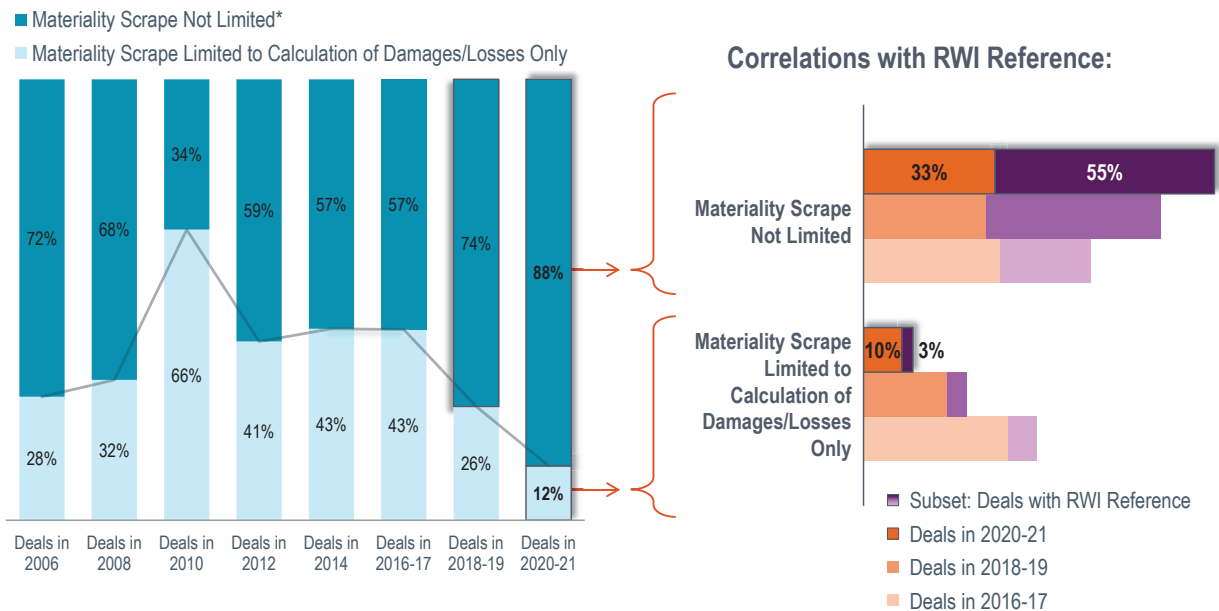
# MATERIALITY SCRAPE

(materiality qualification in reps disregarded)  
 (Subset: deals with baskets)



# MATERIALITY SCRAPE – EXPRESS LIMITATION

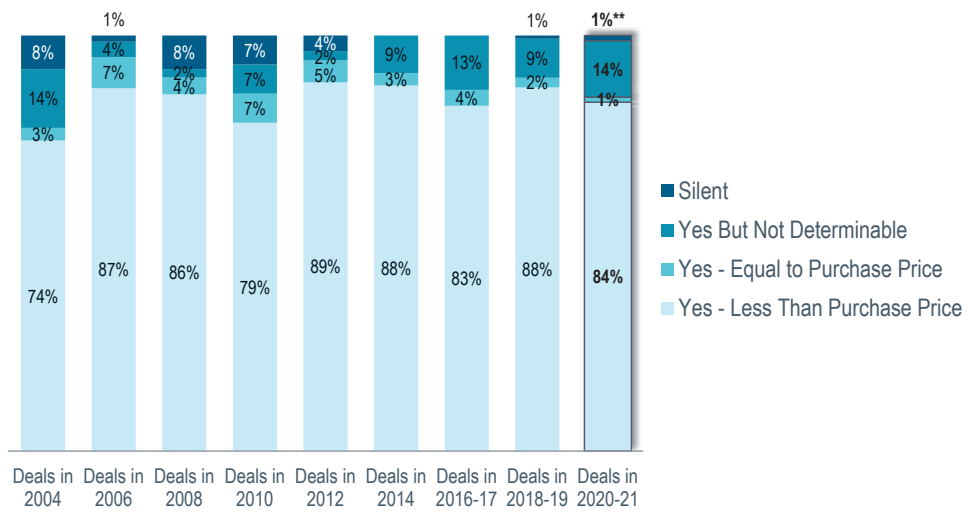
(materiality qualification in reps disregarded)  
 (Subset: materiality scrape included)



\* Includes agreements that are silent on this issue.

# CAPS\*

(Subset: deals with survival provisions)

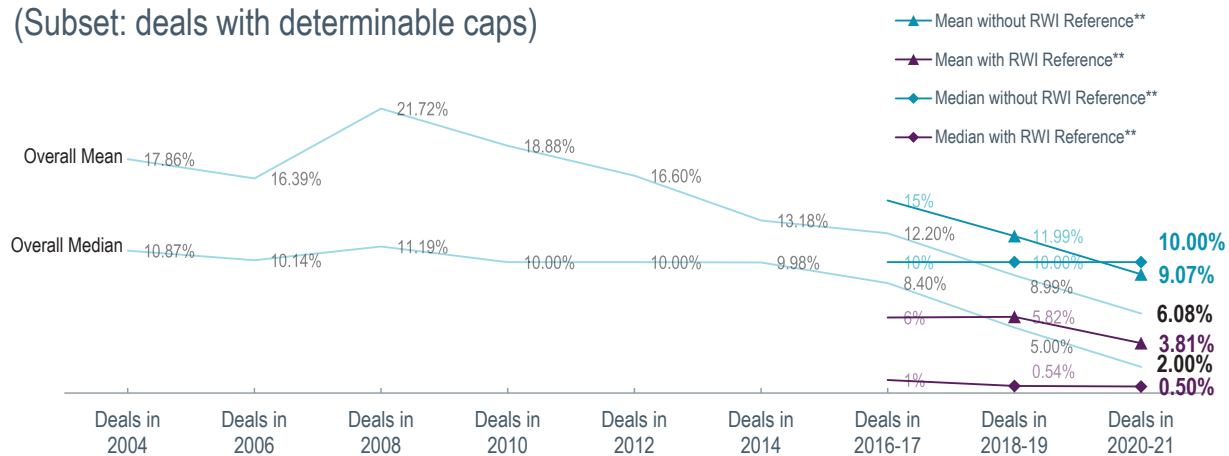


\* Caps generally applicable to contractual indemnification obligations or indemnity for general representations; does not take into account different caps for specific items (see “Cap Carve Outs”).

\*\* Reflects one deal that has a purchase price cap on fraud but is silent as to any other cap.

# CAPS – AMOUNTS AS % OF TRANSACTION VALUE\*

(Subset: deals with determinable caps)



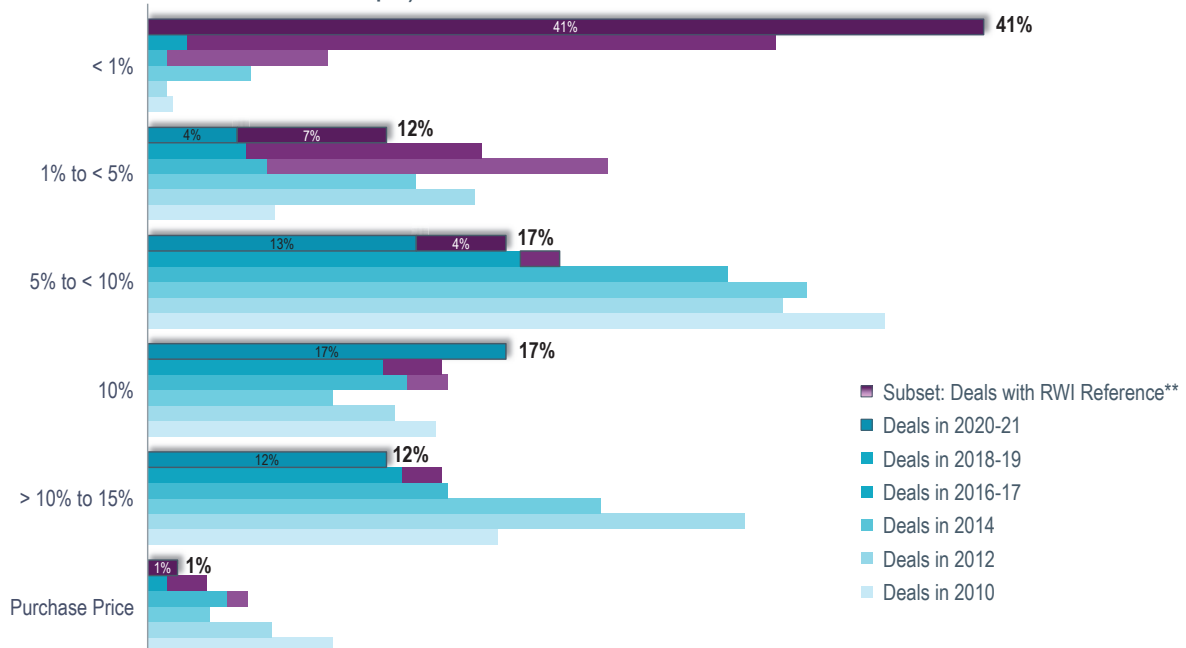
Deals in:	2004	2006	2008	2010	2012	2014	2016-17		2018-19			2020-21			
	All Deals	All Deals	All Deals	All Deals	All Deals	All Deals	All Deals	Without RWI Reference**	With RWI Reference**	All Deals	Without RWI Reference**	With RWI Reference**	All Deals	Without RWI Reference**	With RWI Reference**
Minimum	1.7%	1%	1.23%	1.23%	2.7%	0.33%	0.01%	0.01%	0.50%	0.14%	0.14%	0.38%	0.38%	1.88%	0.38%
Maximum	137.04 %	80%	100%	100%	114.7%	114.7%	100%	100%	100%	100%	100%	100%	100%	15.00%	100%

\* Caps generally applicable to contractual indemnification obligations or indemnity for general representations; does not take into account different caps for specific items (see “Cap Carve Outs”).

\*\* Not measured before deals in 2016-17.

# CAPS – AMOUNTS AS % OF TRANSACTION VALUE\*

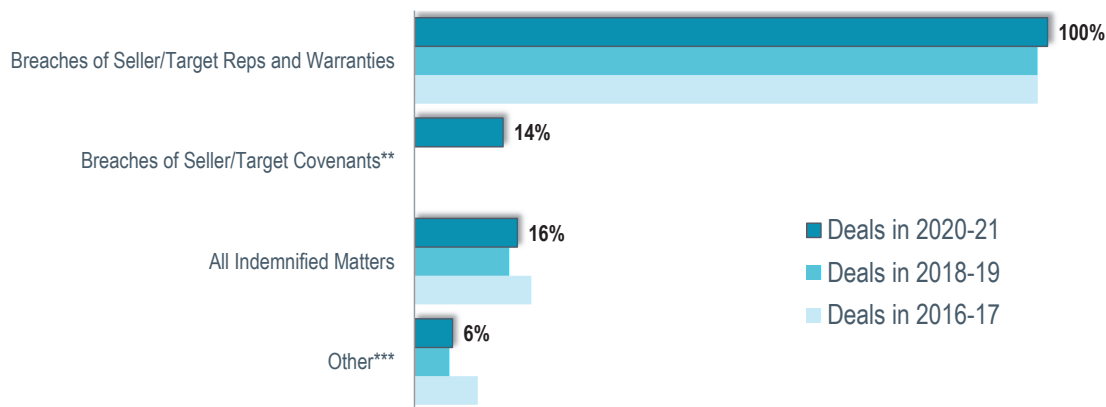
(Subset: deals with determinable caps)



\* Caps generally applicable to contractual indemnification obligations or indemnity for general representations; does not take into account different caps for specific items (see “Cap Carve Outs”). Only categories reflected in deals in 2020-21 are shown (not shown: > 15% to 25%, > 25% to 50%, and > 50% to Purchase Price).  
 \*\* Not measured before deals in 2016-17.

# CAPS – GENERAL COVERAGE\*

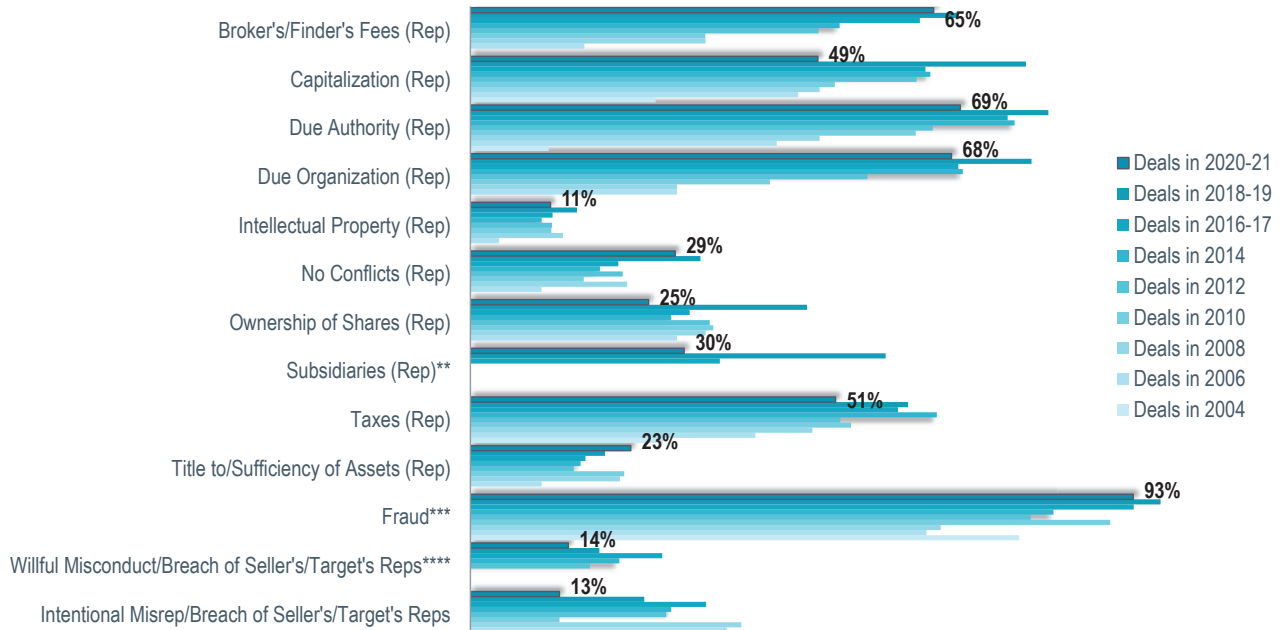
(Subset: deals with caps)



\* Carve outs for individual representations and warranties, fraud, and intentional breaches of representations and warranties addressed on next page.  
 \*\* Covenants data before deals in 2020-21 not presented due to change in methodology.  
 \*\*\* Includes deals with caps that cover one or both of reps/warranties and covenants as well as other specified indemnity items, but less than all indemnified matters (for example, reps/warranties and pre-closing tax matters).

# CAPS – CARVE OUTS\*

(Subset: deals with caps)



\* Only those categories appearing 10% of the time or more for deals in 2020-21 shown. Carve outs for breaches of Seller/Target covenants taken into account on prior page.

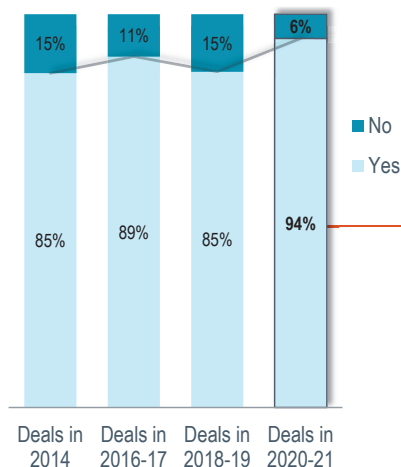
\*\* Not measured before deals in 2016-17.

\*\*\* Includes deals with a fraud carve out in an exclusive remedy provision that has general applicability to all indemnification limitations.

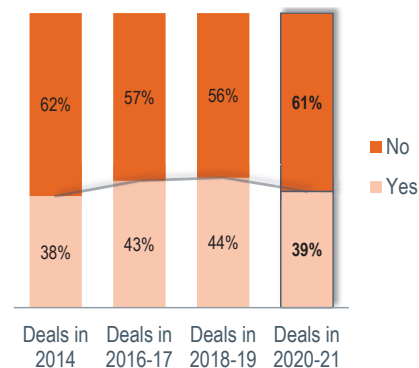
\*\*\*\*Not measured before deals in 2014.

# THIRD PARTY CLAIMS: CONTROL OF DEFENSE

Can Indemnifying Party Control Defense of Third Party Claims?

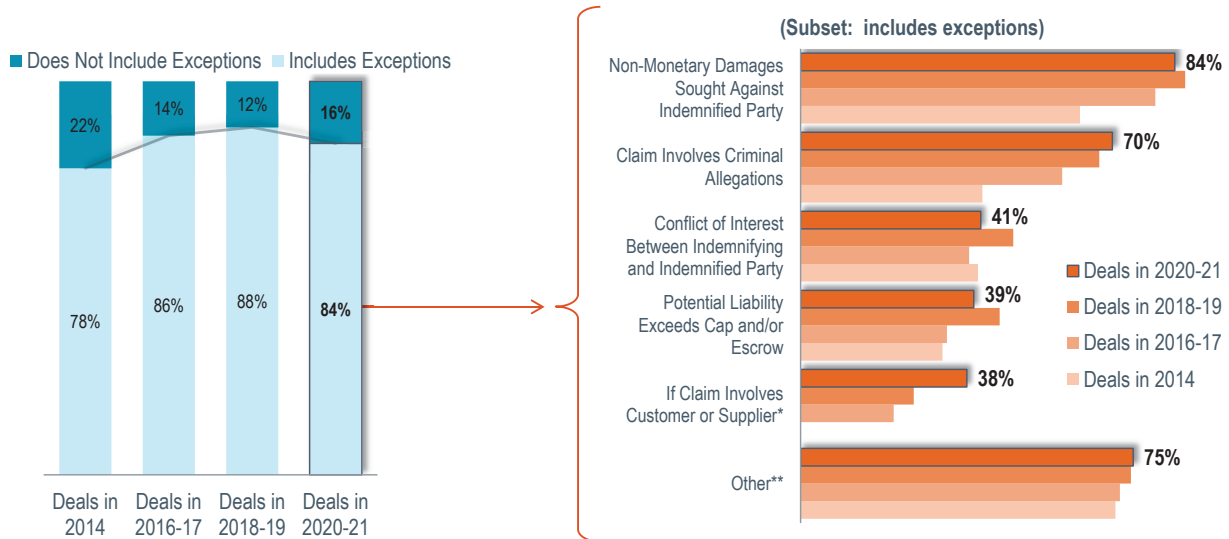


(Subset: indemnifying party can control)  
Is Indemnifying Party First Required to Acknowledge Liability?



# THIRD PARTY CLAIMS: CONTROL OF DEFENSE – EXCEPTIONS TO INDEMNIFYING PARTY’S ABILITY TO CONTROL DEFENSE

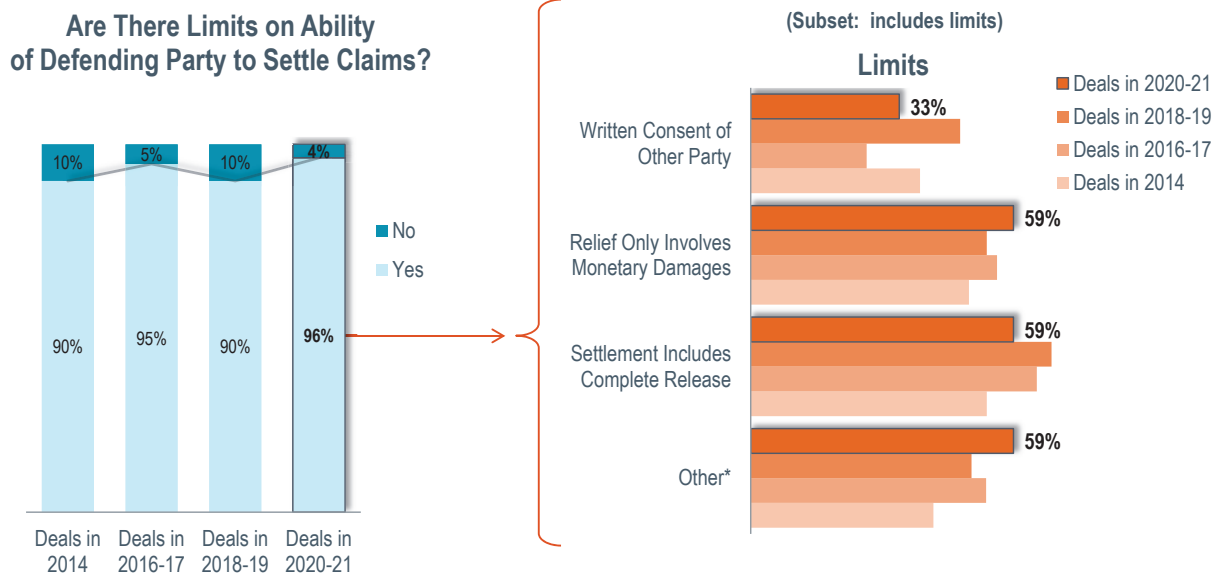
(Subset: deals in which Indemnifying Party can control defense of claims)



\* Not measured before deals in 2016-17.

\*\* Includes exceptions such as for failure to defend, material adverse effect and claims related to taxes.

# THIRD PARTY CLAIMS: CONTROL OF DEFENSE – LIMITS

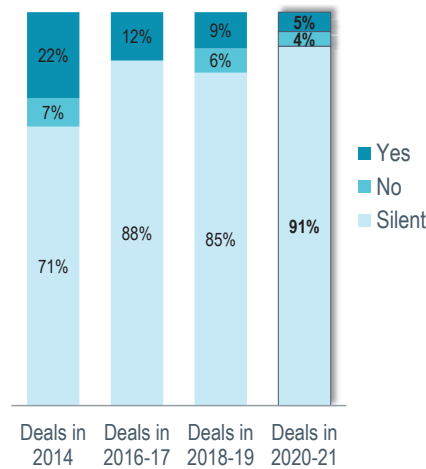


\* Includes limits such as cannot settle without consent and no admission of law or wrongdoing.



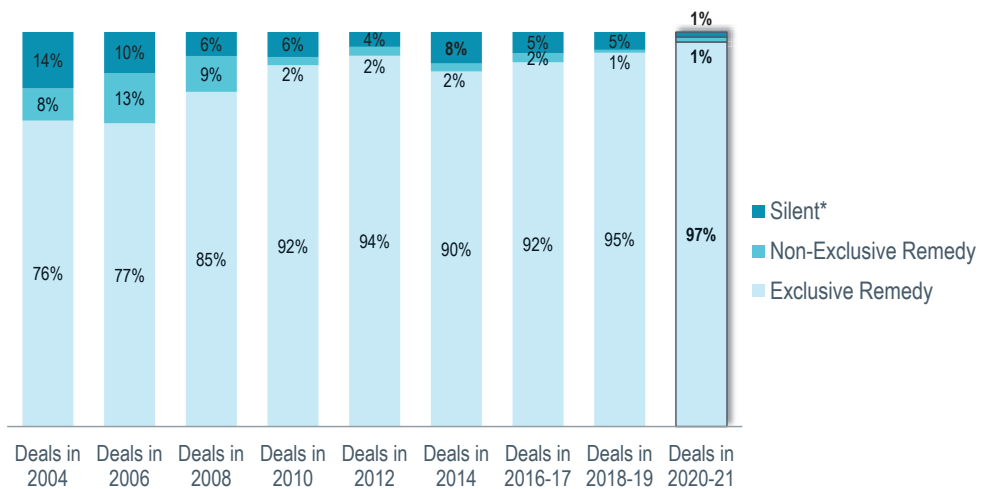
# THIRD PARTY CLAIMS: CONTROL OF DEFENSE – COSTS

Is Indemnifying Party Responsible for Indemnified Party's Defense Costs for Claims on Which It Ultimately Prevails?



# INDEMNIFICATION AS EXCLUSIVE REMEDY

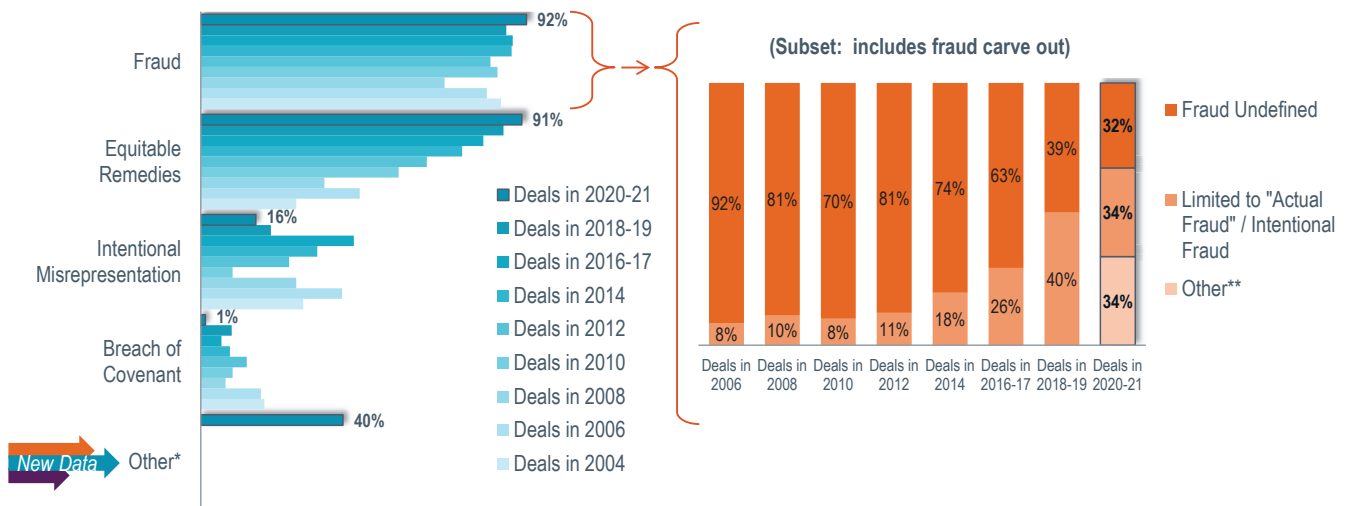
(Subset: deals with survival provisions)



\* May include deals with language making the escrow/holdback the sole and exclusive remedy in the absence of such language regarding the indemnity provisions generally.

# INDEMNIFICATION AS EXCLUSIVE REMEDY – CARVE OUTS

(Subset: deals with indemnification as exclusive remedy)

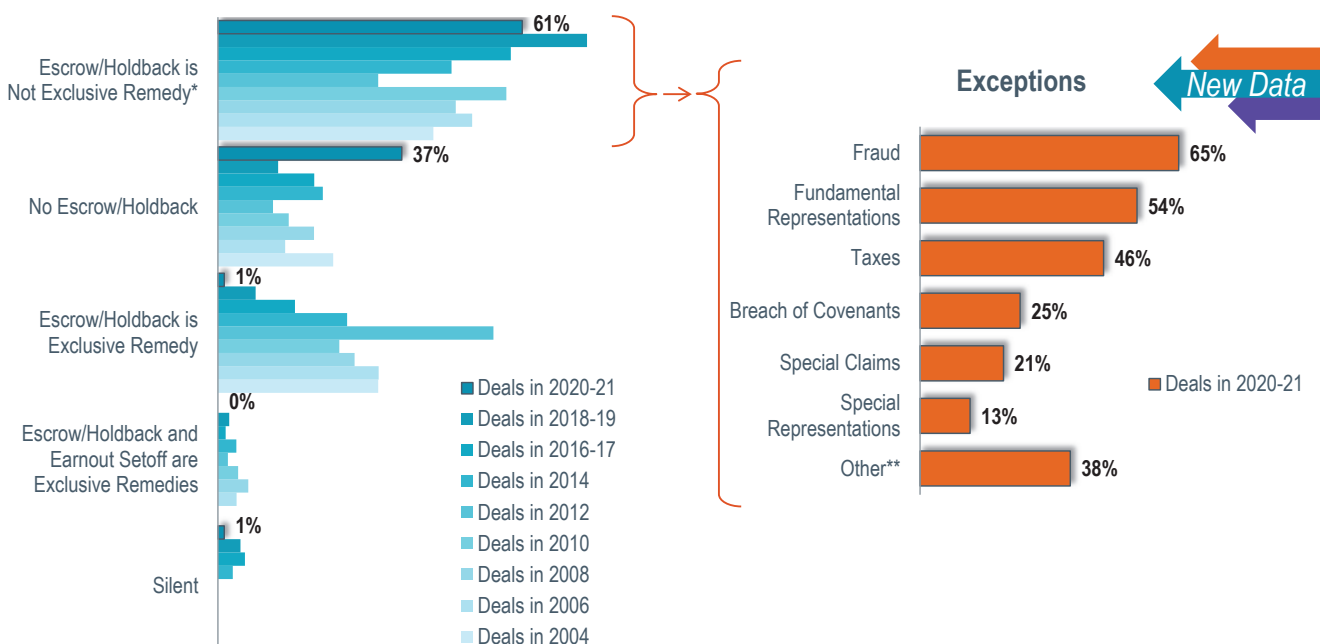


\* Not measured before deals in 2020-21. Includes rights under RWI policies, purchase price adjustments, claims regarding earnout payments, and tax matters.

\*\* Includes definitions referencing common law fraud, reckless indifference to the truth, intentional misrepresentation, and knowledge of or reckless disregard as to falsity.

# ESCROWS/HOLDBACKS

(Subset: deals with survival provisions)

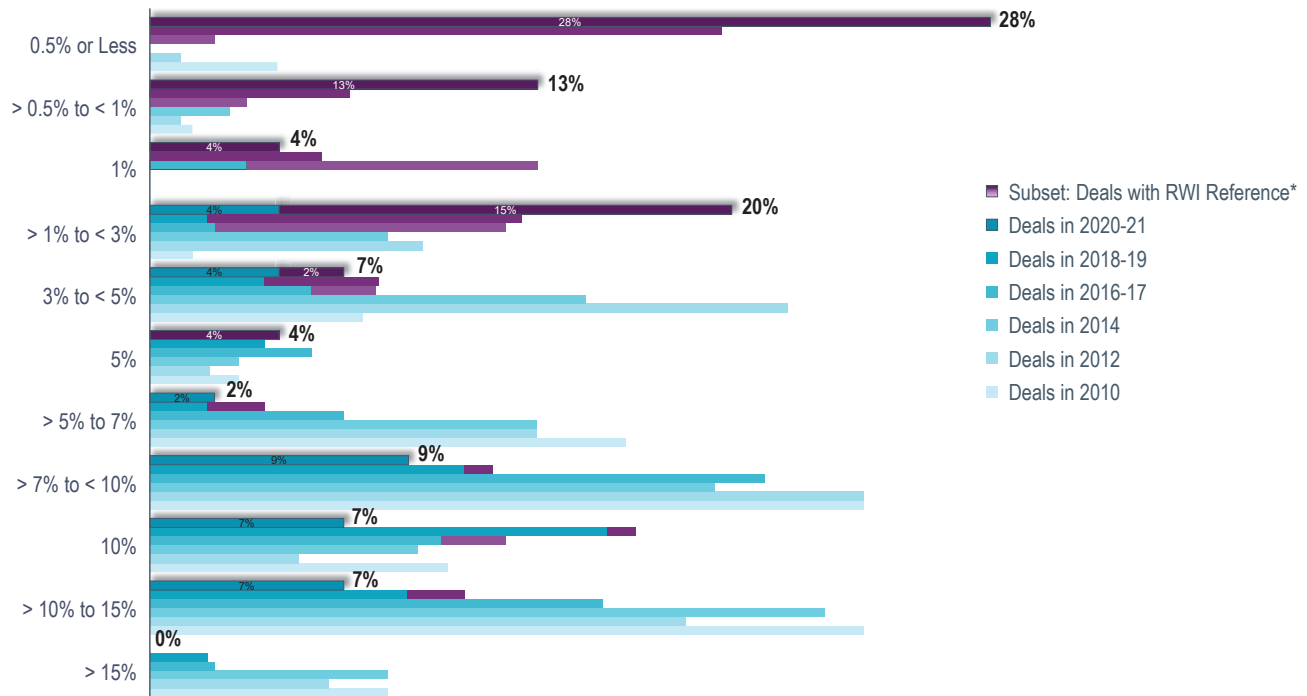


\* May include deals that state that the escrow/holdback is the exclusive remedy but provide for one or more exceptions.

\*\* Includes rights of set off for earnout payments, and special indemnities.

# ESCROWS/HOLDBACKS AS % OF TRANSACTION VALUE

(Subset: deals with determinable escrows/holdbacks)

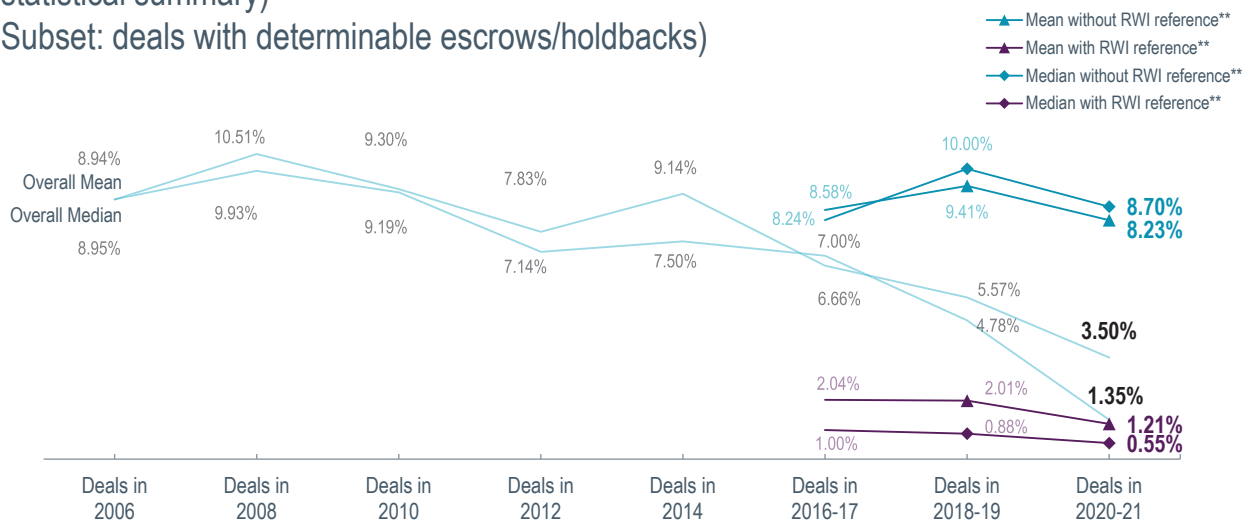


\* Not measured before deals in 2016-17.

# ESCROWS/HOLDBACKS AS % OF TRANSACTION VALUE

(statistical summary)

(Subset: deals with determinable escrows/holdbacks)



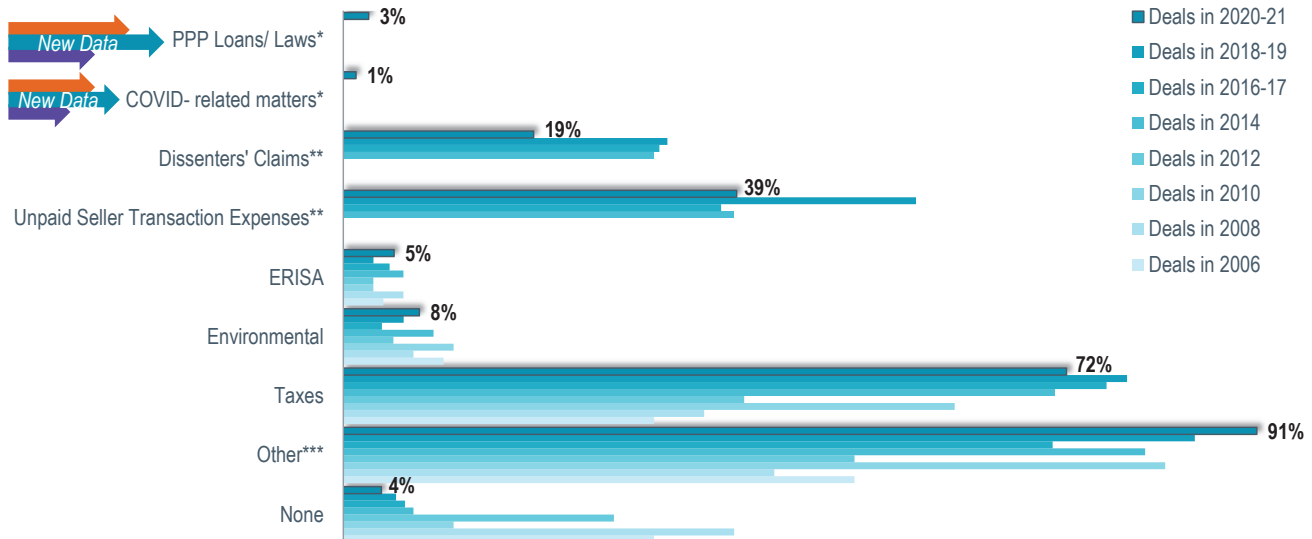
Deals in:	2006	2008	2010	2012	2014	2016-17		2018-19		2020-21				
	All Deals	All Deals	All Deals	All Deals	All Deals	All Deals	Without RWI Reference*	With RWI Reference*	All Deals	Without RWI Reference*	With RWI Reference*	All Deals	Without RWI Reference*	With RWI Reference*
Minimum	1.23%	0.33%	0.33%	0.41%	0.75%	0.50%	1.00%	0.50%	0.11%	1.25%	0.11%	0.36%	1.41%	0.36%
Maximum	25.00%	37.30%	27.34%	25.16%	53.68%	41.18%	41.18%	10.00%	19.59%	19.59%	10.81%	15.00%	15.00%	5.00%

\* Not measured before deals in 2016-17.

# STAND-ALONE INDEMNITIES

(items for which indemnification specifically provided regardless of indemnification for breaches of representations and warranties)

(Subset: deals with survival provisions)



\* Excludes deals signed before March 11, 2020 (the date the World Health Organization declared a global pandemic).

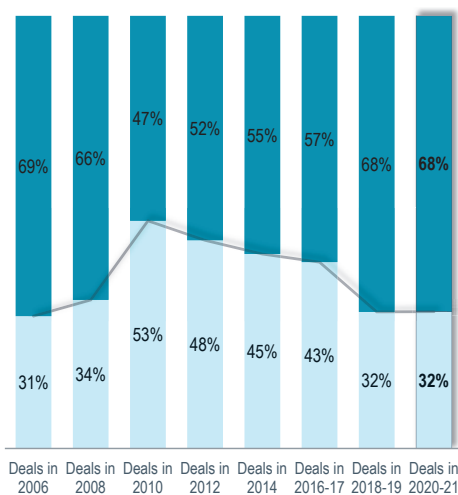
\*\* Not measured before deals in 2014.

\*\*\* Other frequently appearing stand-alone indemnities were fraud, indebtedness, excluded liabilities, and breaches of covenants.

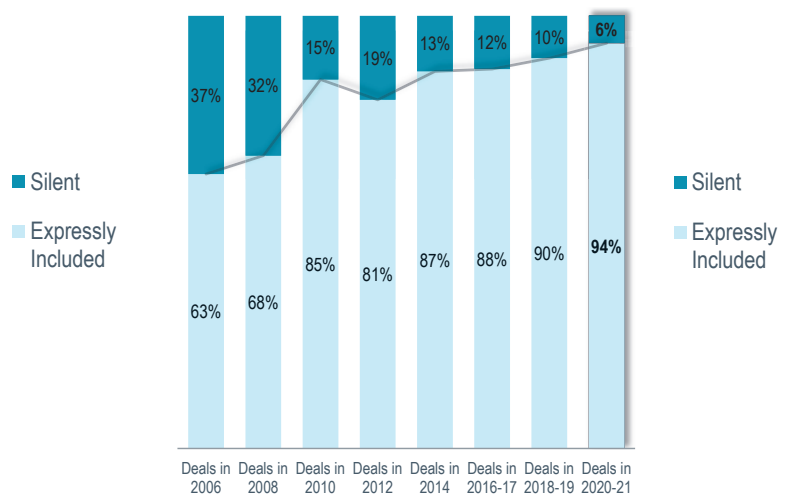
# REDUCTIONS AGAINST BUYER'S INDEMNIFICATION CLAIMS

(Subset: deals with survival provisions)

Reduction for Tax Benefits



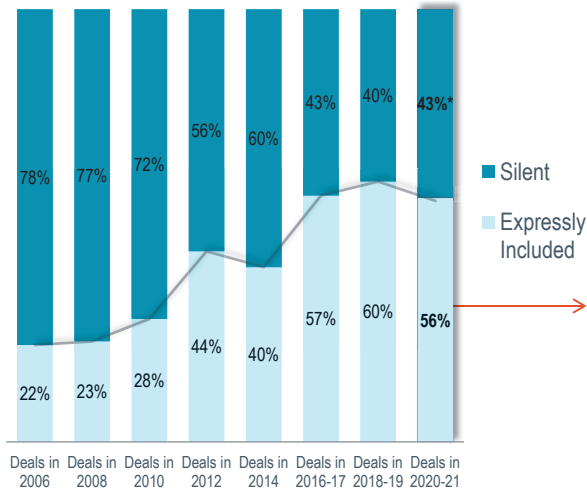
Reduction for Insurance Proceeds



# REDUCTIONS AGAINST BUYER'S INDEMNIFICATION CLAIMS

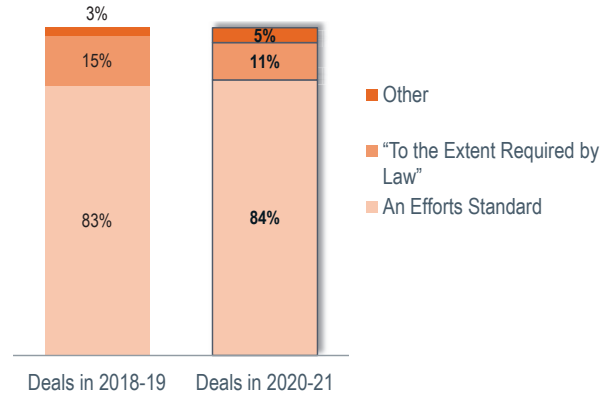
(Subset: deals with survival provisions)

Express Requirement that Buyer Mitigate Losses?



(Subset: includes express mitigation requirement)

Standard Qualifying the Requirement to Mitigate?

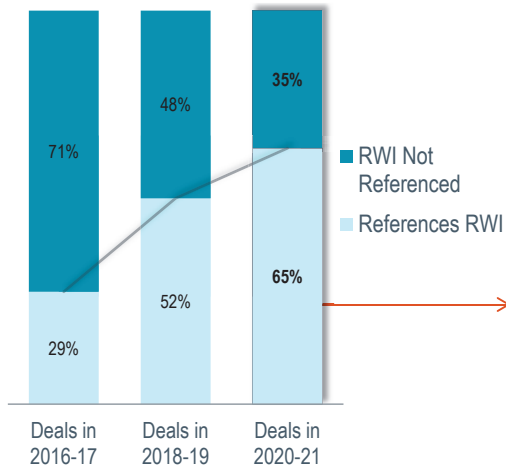


\* Includes one deal with express language that buyer is not required to mitigate losses.

## REPRESENTATIONS AND WARRANTIES INSURANCE

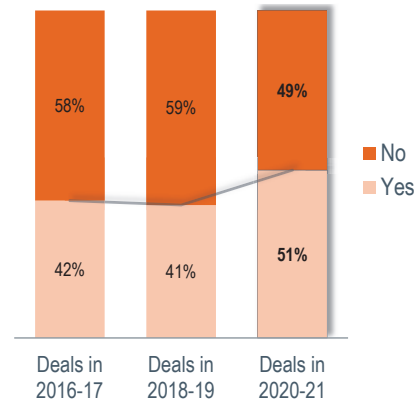
# REPRESENTATIONS AND WARRANTIES INSURANCE (“RWI”) CONTEMPLATED BY DEFINITIVE AGREEMENT\*

Does Agreement Reference RWI?



(Subset: deals with deferred closings that reference RWI)

Expressly Bound at Signing?

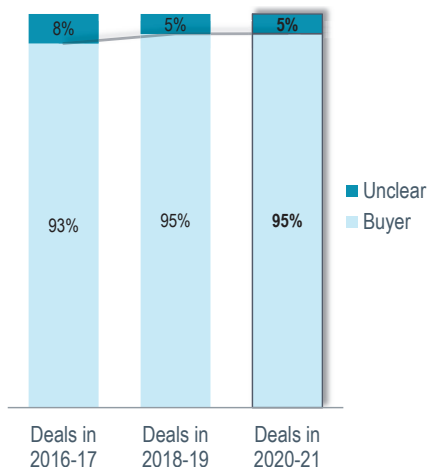


\* All study data regarding RWI does not account for RWI that may have been required or obtained outside of the express terms of the agreement.

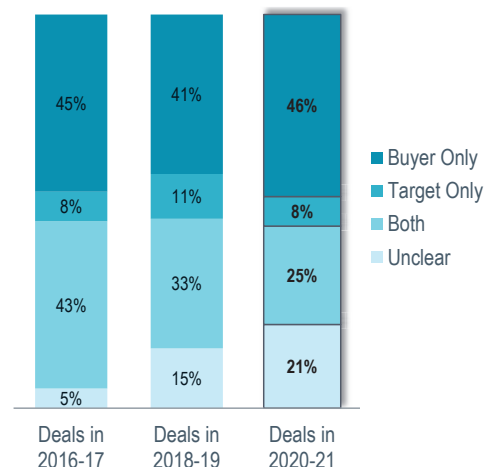
# REPRESENTATIONS AND WARRANTIES INSURANCE (“RWI”): ACQUISITION/PAYMENT

(Subset: deals that reference RWI)

Who Acquires RWI?\*



Who Pays for RWI?



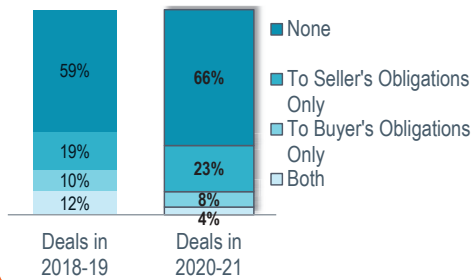
\* No deals provided that Seller acquires RWI.

# REPRESENTATIONS AND WARRANTIES INSURANCE

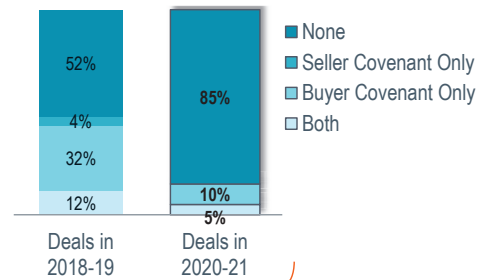
## ("RWI"): SIGNING/CLOSING

(Subset: deals with deferred closings that reference RWI)

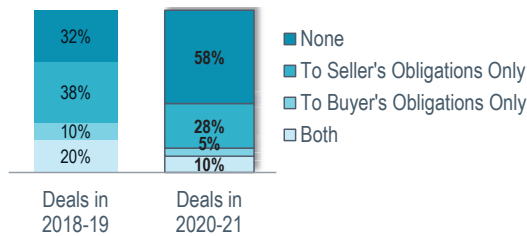
RWI Stand-Alone Closing Condition



Pre-Closing Covenants to Obtain RWI



Correlation: RWI Closing Conditions (Stand-Alone and/or "Back Door")\*



\* Correlates RWI stand-alone closing conditions with the closing condition of fulfillment of the other party's covenants (i.e., that one party complying with its covenant to obtain RWI was a condition precedent to the other party's obligation to consummate the transaction) without regard to materiality qualifiers.

## POST-CLOSING COVENANTS TO MAINTAIN RWI POLICY\*



Buyer will not amend the subrogation or third-party beneficiary provisions contained in the RWI Policy benefitting Seller, or otherwise amend or modify the RWI Policy in a manner adverse to Seller, without Seller's prior written consent.

Includes Post-Closing RWI Covenant(s)



\* Does not include obligations to pursue claims (see page 128).

\*\* In addition to covenants restricting amendments, other post-closing RWI covenants include formulations such as (1) not to terminate, cancel, amend or provide a waiver under a RWI Policy or (2) to maintain the RWI Policy in full force and effect.

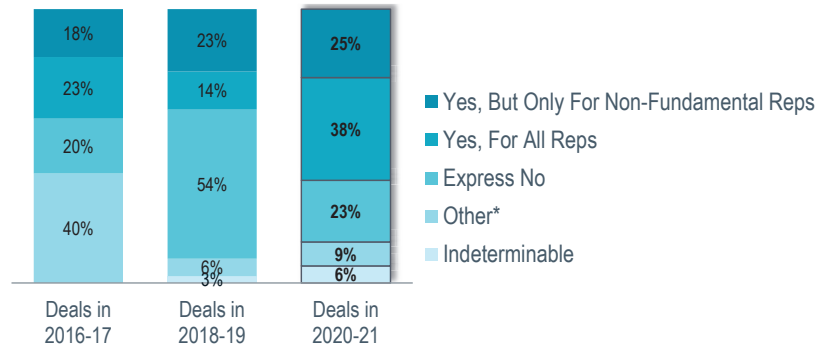
# REPRESENTATIONS AND WARRANTIES INSURANCE

## ("RWI"): RWI SOLE SOURCE OF RECOVERY

(Subset: deals that reference RWI)

Buyer hereby acknowledges and agrees that its sole source of indemnification and recovery for Damages based upon Non-Fundamental Representations shall be the Escrow Amount and the RWI Policy, and Buyer shall not directly or indirectly otherwise pursue any right, claim, or action against Seller under this Article, without regard as to whether Buyer does or may actually recover under the RWI Policy.

Is RWI Buyer's Sole Source of Recovery?



\* Includes one deal permitting recovery of a specified amount for tax or fundamental rep breaches covered by RWI policy, two deals permitting recovery for certain reps if RWI Policy limits exceeded, one deal permitting recovery for excluded liabilities outside the RWI policy and three deals with special escrow/indemnity for certain specified matters.

# REPRESENTATIONS AND WARRANTIES INSURANCE

## ("RWI"): OBLIGATION TO PURSUE CLAIMS

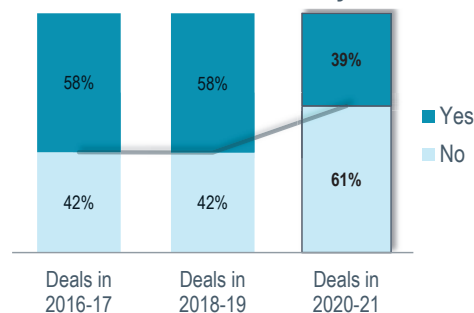
(Subset: deals for which RWI is not Buyer's sole source of recovery for all representations)

Buyer shall have no obligation to first submit a claim, seek to collect, or actually collect under the RWI Policy as a precondition to making an indemnification claim.

or

Buyer may seek recovery for Losses as follows: (a) first, Buyer may pursue recovery from the Escrow; (b) second, only after the RWI Policy's retention has been satisfied, Buyer may pursue recovery by pursuing such Losses under the RWI Policy; and (c) third, only if Buyer has made a valid and timely claim under the RWI Policy and Insurer has notified Buyer in writing that the claim will not be paid, then Buyer may pursue recovery of remaining Losses directly from Sellers, subject to the limitations in this Agreement.

Must Buyer First Pursue Claims Under RWI Policy?





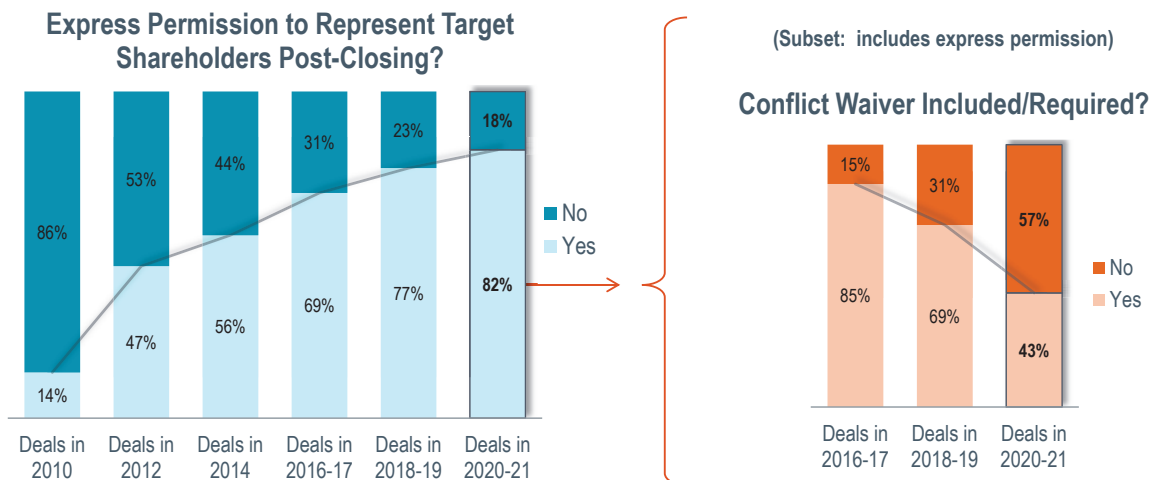
# DISPUTE RESOLUTION

M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, [https://www.americanbar.org/groups/business\\_law/committees/ma/deal\\_points/](https://www.americanbar.org/groups/business_law/committees/ma/deal_points/)

## DISPUTE RESOLUTION

### POST-CLOSING REPRESENTATION OF SHAREHOLDERS\*

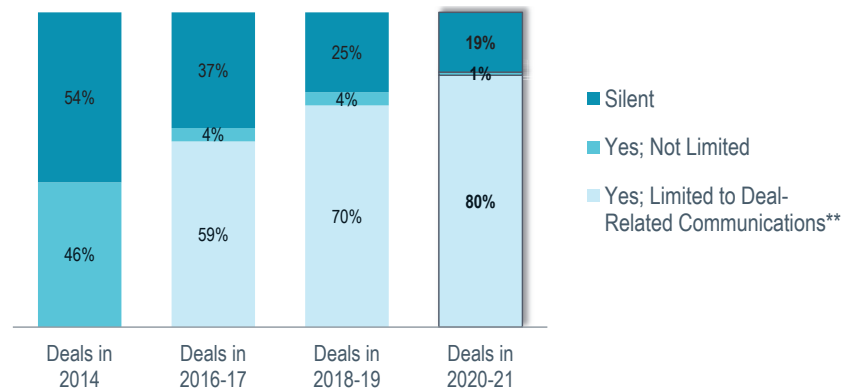
In any dispute or proceeding arising under or in connection with this Agreement after Closing, the Stockholders' Representative will have the right, at its election, to retain ABC LLP to represent it in such matter. Buyer, for itself and the Target and for their respective successors and assigns, hereby waives any conflicts of interest arising from such representation and consents to any such representation in any such matter.



\* Includes deals structured as reverse triangular mergers only.

## ATTORNEY-CLIENT PRIVILEGE CARVE OUT\*

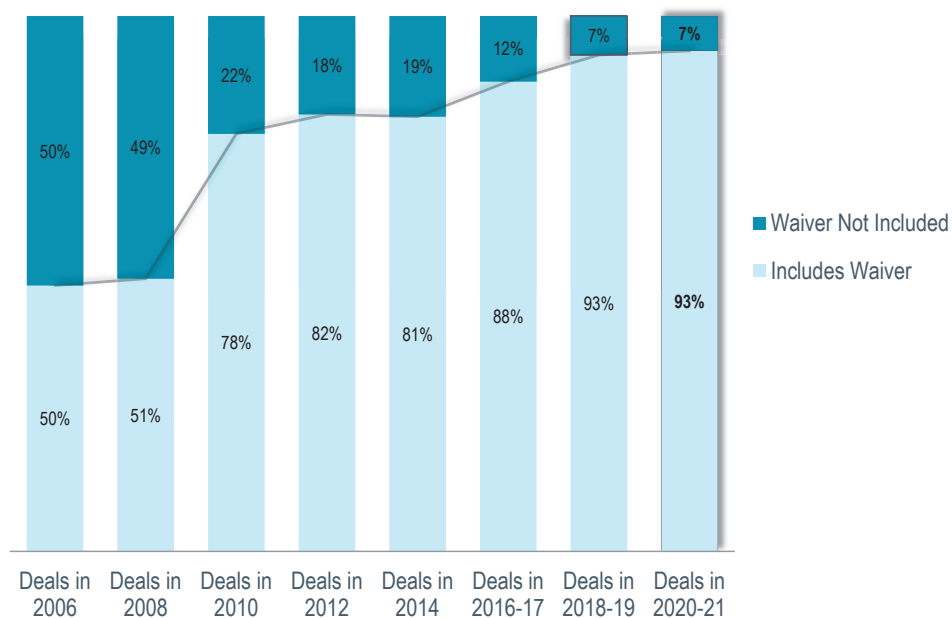
All communications involving attorney-client confidences between Seller, its Affiliates, or Target and ABC LLP in the course of the negotiation, documentation, and consummation of the transactions contemplated hereby shall be deemed to be attorney-client confidences that belong solely to Seller and its Affiliates (and not Target). Accordingly, Target shall not have access to any such communications, or to the files of ABC LLP relating to its engagement by Seller, whether or not Closing shall have occurred.



\* Includes deals structured as reverse triangular mergers or stock sales only.

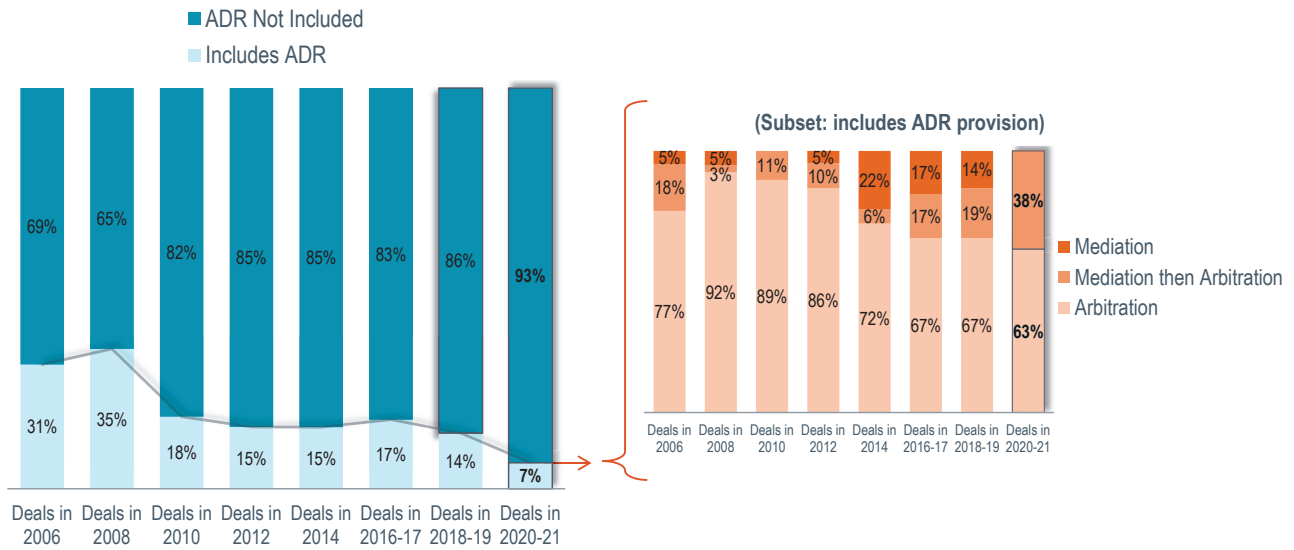
\*\* Not measured before deals in 2016-17.

## WAIVER OF JURY TRIAL\*



\* May include deals in jurisdictions where jury trials are not available or where waivers of jury trials are unenforceable.

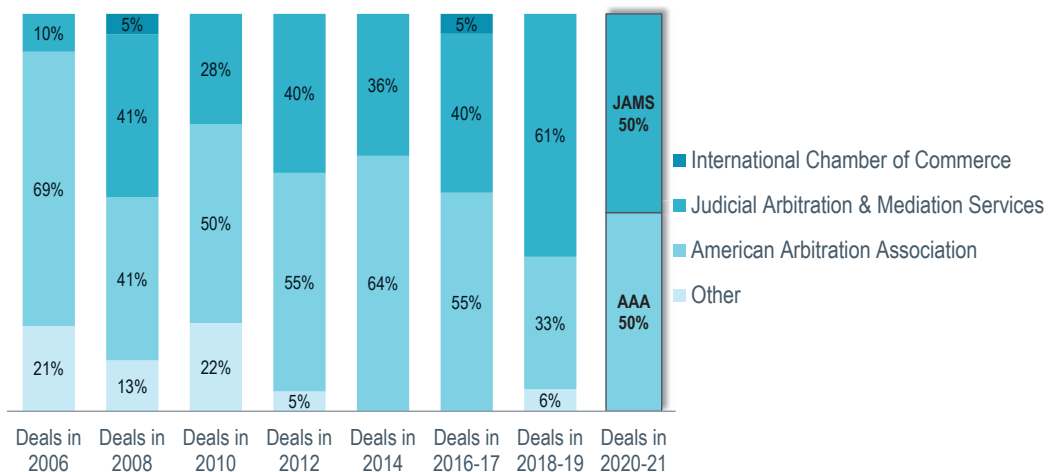
# ALTERNATIVE DISPUTE RESOLUTION (“ADR”)\*



\* ADR provisions that generally cover disputes under acquisition agreement (rather than those limited to specific disputes such as purchase price adjustments or earnouts).

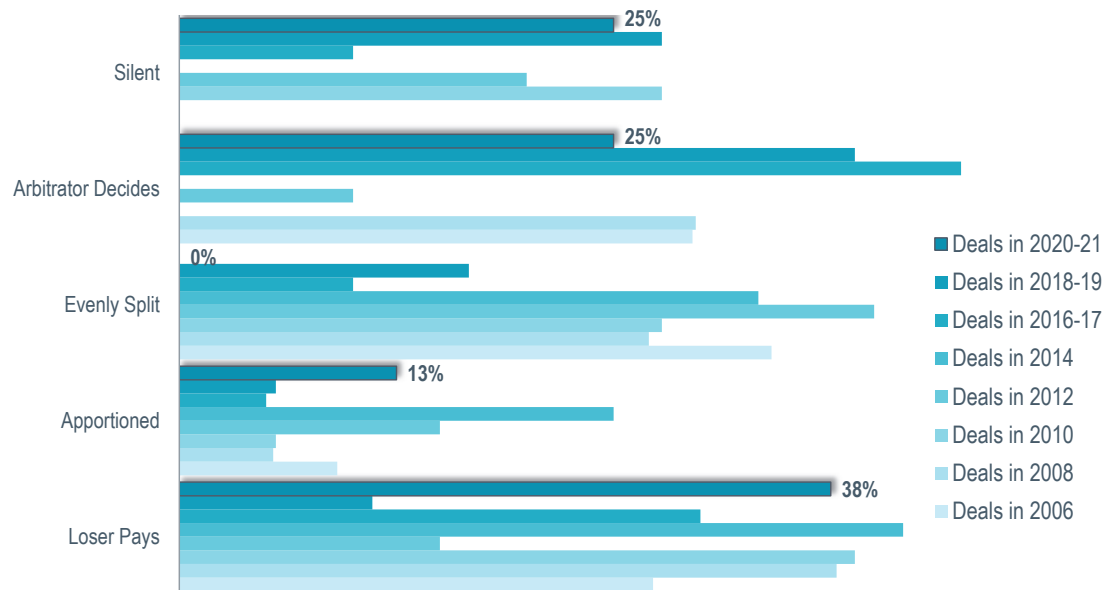
# ALTERNATIVE DISPUTE RESOLUTION (“ADR”) – ARBITRATION

(Subset: deals with general ADR provisions)



# ALTERNATIVE DISPUTE RESOLUTION (“ADR”) – FEES

(Subset: deals with general ADR provisions)



M&A Market Trends Subcommittee, Mergers & Acquisitions Committee, [https://www.americanbar.org/groups/business\\_law/committees/ma/deal\\_points/](https://www.americanbar.org/groups/business_law/committees/ma/deal_points/)

Private Target Study 12/30/2021,  
page 135



## Mergers & Acquisitions Committee

*"Where the World's Leading Dealmakers Meet"*

The Mergers & Acquisitions Committee was founded in the late 1980s and has over 5,000 members, including practitioners from all 50 states, five Canadian provinces, and more than 65 different countries on five continents. The committee is home to the world's leading merger and acquisition (M&A) attorneys and many other deal professionals such as investment bankers, accountants, and consultants. In addition, over ten percent of committee membership includes in-house counsel.

### Market Trends Studies

Get state-of-the-art market metrics in negotiated acquisitions with the committee's benchmark studies covering not only U.S. but also Canadian and EU deals. The studies, produced by the committee's M&A Market Trends Subcommittee, have become **essential resources for deal lawyers, investment bankers, corporate dealmakers, PE investors**, and others interested in "what's market" for critical legal deal points in M&A. The committee regularly produces the Private Target Deal Points Study, the Strategic Buyer/Public Target Deal Points Study, the Private Equity Buyer/Public Target Deal Points Study, the Canadian Private Target Deal Points Study, and the Continental Europe Private Target Deal Points Study. The studies, as well as updates (and Update Alerts), are available free of charge to committee members only.

### Knowledge and Networking

The committee meets three times a year at the Business Law Section Annual Meeting in September, the Mergers & Acquisitions Committee Meeting in January and the Section Spring Meeting in April. All **materials and resources** used in CLE programs on M&A-related topics presented both at ABA meetings and in other forums are accessible to all members via the Section's **online Content Library**. These programs bring together panels of experienced M&A practitioners from law firms and corporate law departments, as well as those in academia and others outside the legal profession who are experts in their field.

### Market Check Video Series

The Market Check Videos are a series of short, advanced educational videos designed to clearly and succinctly teach practicing lawyers everything they need to know to advise clients and negotiate and draft specific provisions in acquisition agreements. Each video is focused on a specific provision and explains the purpose of the provision, talks through sample language, analyzes data from the Deal Points Study, addresses important case law, and covers buyer and seller perspectives on the provision. These videos are created in collaboration with Hotshot and are free for ABA Business Law Section Members. The videos can be accessed at [www.ambar.org/blshotshot](http://www.ambar.org/blshotshot).

**<<< Join the Committee! >>>**

Committee membership is FREE for Business Law Section members. For immediate enrollment in the Section and/or Committee go to [ambar.org/BLSmergersacquisitions](http://ambar.org/BLSmergersacquisitions)