



# PURCHASE AGREEMENTS 201

Healthcare Private Equity Association

Tuesday, May 9

McDermott  
Will & Emery

# PRESENTERS



**ANN MARIE  
BRODARICK**

McDermott Will & Emery  
Partner, Chicago

Ann Marie focuses her practice on mergers and acquisitions, and other general corporate matters. Ann Marie advises financial and strategic buyers, sellers and investors in connection with mergers, acquisitions, divestitures, joint ventures and other private equity investments, corporate restructurings, recapitalizations and similar transactions.



**BERNARDO  
VAZ**

McDermott Will & Emery  
Partner, Chicago

Bernardo advises clients on a variety of corporate transactional matters, representing private equity and other investment funds, private and public companies, family offices and other investors across a wide range of industries. Bernardo's practice is focused on mergers, acquisitions, divestitures, recapitalizations, equity investments, joint ventures and other similar transactions, as well as general corporate and governance matters.



**ALVIN  
REYNOLDS**

Atlantic Global Risk  
Managing Director, Boston

Alvin is a Managing Director and, as head of Atlantic's Boston and Mid-Atlantic practices, is responsible for deal execution and advising clients on healthcare transactions and other complex regulatory matters. Prior to joining Atlantic, Alvin worked in the asset management group of Ropes & Gray LLP. Alvin holds a BBA from the University of Notre Dame and a JD from Boston College Law School.

# MCDERMOTT'S PRIVATE EQUITY PRACTICE

McDermott has a substantial private equity practice comprised of 150+ lawyers across our global platform of 20 offices, allowing us to serve private equity investors with the speed and agility that such transactions demand.

- **Focused on partner-led deal execution** within middle-market private equity; regularly represent 200+ private equity firms.
- **Deal counsel experience in 50+ industry sectors**, including healthcare, manufacturing, industrials, food & beverage, technology, professional services, energy and consumer goods.
- **Go the distance with our PE clients**, partnering with them for the entire lifecycle of an investment, from platform acquisition to add-ons, ongoing advice to portfolio companies and eventual exit.
- **With substantial deal flow every year**, including the completion of 1000+ M&A/private equity transactions in 2021 and 2022 combined, our lawyers are at the forefront of the latest market trends and deliver creative solutions that infuse our commercial awareness into your long-term investment strategies.
- **Success as deal counsel for U.S. funds** on cross-border transactions, as well as international capabilities across Europe advising sponsors and management teams on domestic and cross-border deals.
- **Serve as general counsel for portfolio companies**, advising on major transactions and day-to-day legal matters and providing efficiency and continuity for platform acquisitions, bolt-on transactions, operational and compliance issues and sales.
- **When the need arises, specialized teams within our PE practice** round out the services we offer, including a dedicated Fund Formation team which offers market-leading expertise across the full spectrum of funds issues.

## SCOPE OF SERVICES

- Buyouts and add-on acquisitions
- Financings and recapitalizations
- Growth investments
- Distressed transactions
- Exit strategy and execution
- Management team representation
- Portfolio company counsel
- Regulatory compliance

## Top 5

for six years running in healthcare private equity, *PitchBook* Full Year 2017, 2018, 2019, 2020, 2021 & 2022

## Ranked #7

in private equity by global & U.S. deal count, *PitchBook* Full Year 2022

## Top 10

private equity law firm ranked by deal count, *The Deal* Q4 2022

# REPRESENTATIVE PRIVATE EQUITY CLIENTS



# IF YOU ONLY HAVE ONE HOUR WITH A PURCHASE AGREEMENT, YOU SHOULD FOCUS ON:

- Structure
- Economic terms including purchase price components and adjustment mechanics
- Incorporation of your diligence into the agreement
- Closing issues including timing, conditions and consequences
- Indemnification package

*Stay tuned for upcoming presentations that will include more detailed tax concepts and debt financing arrangements!*

# STRUCTURING TRANSACTIONS AND ANATOMY OF A PURCHASE AGREEMENT

# BASIC TYPES OF TRANSACTIONS

## 1. Asset Purchase

- Buyer acquires assets and assumes specified liabilities of the Target

## 2. Equity Purchase (stock, membership interest, etc.)

- Buyer acquires equity of the Target directly from its equityholders

## 3. Merger

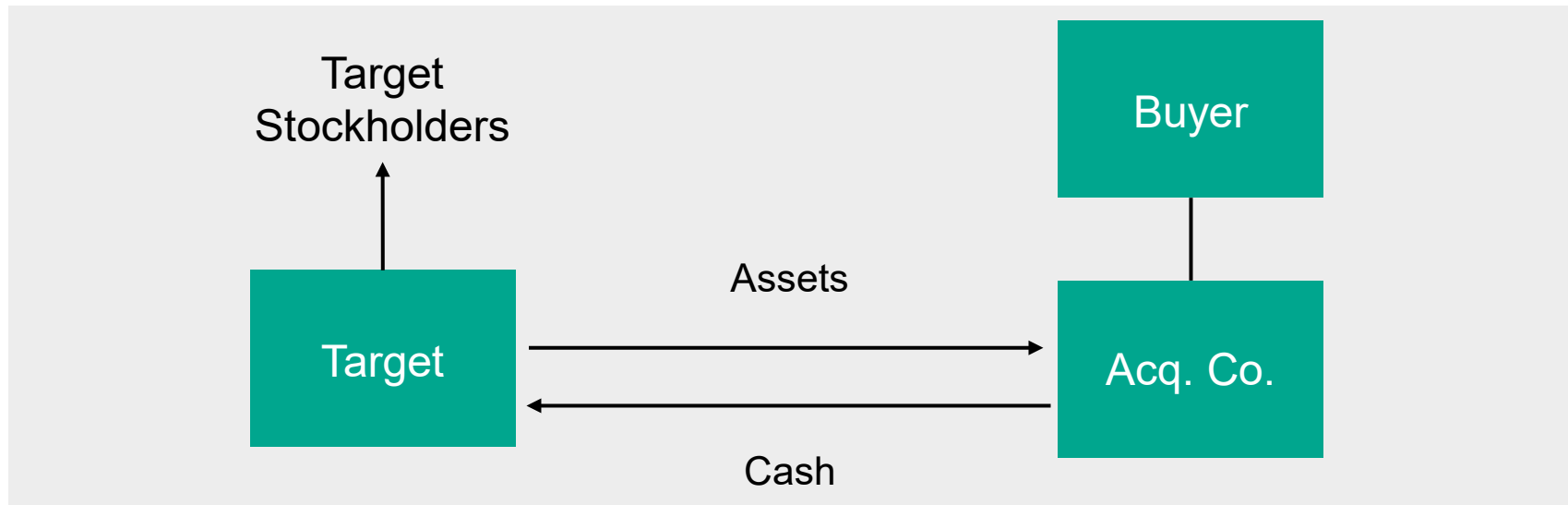
- Target merges with Buyer (or one of its subsidiaries) under state law
- Equityholders of the Target receive consideration (cash and/or stock/equity of Buyer)

# DRIVERS OF TRANSACTION STRUCTURE

- Ease of execution (e.g., asset transactions typically require more third-party consents & may need new permits/licenses)
- Allocation of risk (e.g., asset transactions often leave most pre-closing liabilities with seller)
- Tax planning/strategy (e.g., an asset transaction often has advantageous tax treatment for buyer & disadvantageous tax treatment for seller)
- Structure is a letter of intent issue



# ASSET SALE

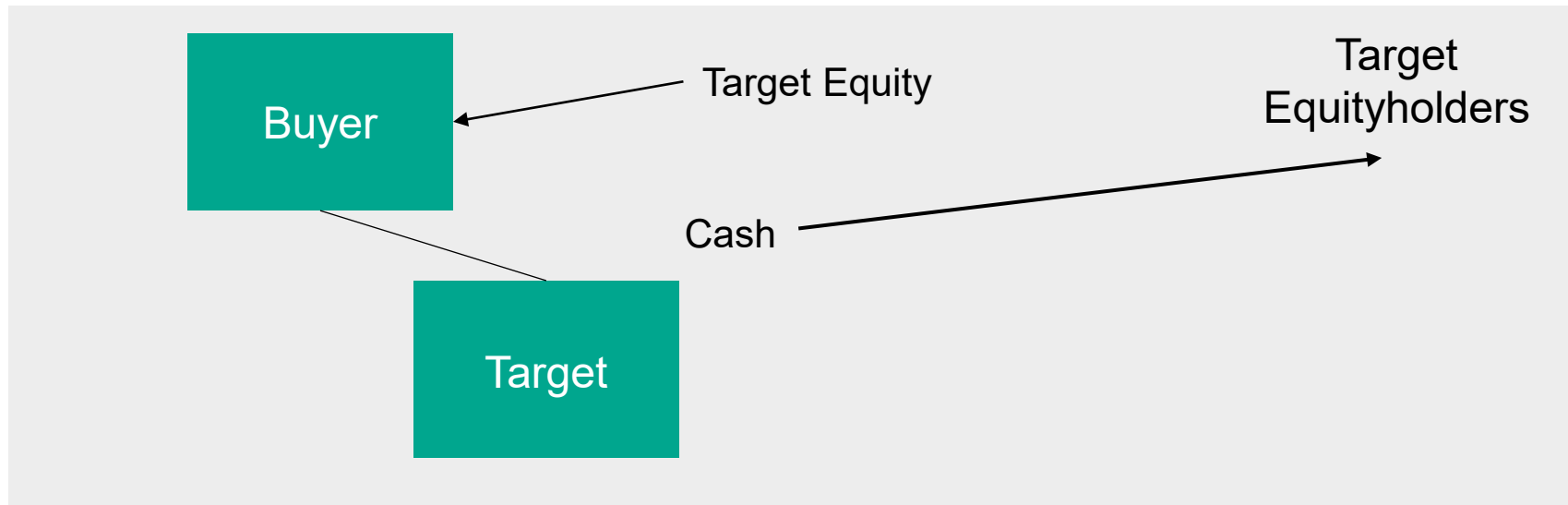


## Results

(can achieve same tax results for equity acquisition of 100% of LLC or S corporation through tax elections)

- Buyer limits liabilities assumed
- Gain recognized by Target
- Second tax - capital gain to Target Equityholders if Target is a C corporation
- Buyer obtains a stepped up basis in assets

# SALE OF EQUITY



## Results

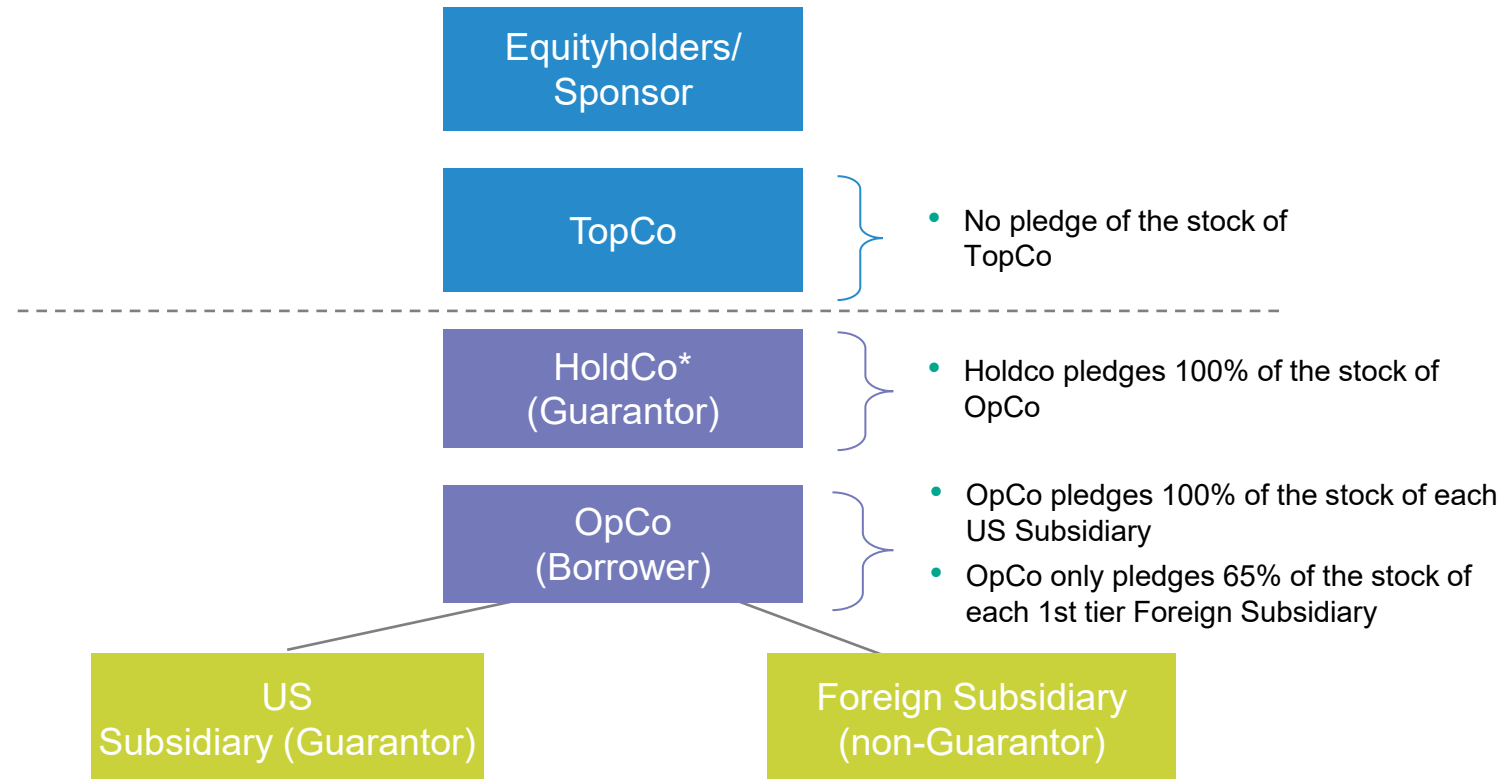
- Subject to indemnification, all liabilities are retained by Target and become Buyer's responsibility
- Generally capital gain to Target stockholders
- Carryover basis in assets (unless Target is an LLC/Partnership)
- Target tax attributes retained

# SUMMARY OF BASIC STRUCTURES FOR CORPORATE ACQUISITIONS TAX CONSEQUENCES

Stock Purchase/Merger		Asset Purchase	
Seller	Buyer	Seller	Buyer
<ul style="list-style-type: none"> <li>• One level of tax</li> <li>• Capital gain (higher or lower rate depending on holding period)</li> </ul>	<ul style="list-style-type: none"> <li>• No step-up in asset basis unless LLC/Partnership target or S corp. target with 338(h)(10) election</li> <li>• Inherit target tax attributes and audit risk</li> <li>• Subject to certain limitations, Buyer acquires benefit of the Target's net operating losses</li> </ul>	<ul style="list-style-type: none"> <li>• Potentially two levels of tax for Seller (for C corp targets)</li> <li>• Potential ordinary income tax rates applied to a portion of the gain (for pass-through targets)</li> </ul>	<ul style="list-style-type: none"> <li>• Asset basis step-up</li> <li>• Amortization deductions (intangibles amortized over 15 years)</li> <li>• Anti-churning rules where Target is a pre-1993 business and rollover equity is involved</li> </ul>

# FINANCING STRUCTURES

## Leveraged Buyout Financing Typical Structure



\*There is often one or more holding companies between the Sponsor and the HoldCo—this may be done for tax reasons or to create a “clean” investment vehicle that is separate from the credit (and to provide flexibility for TopCo debt). Management incentive equity is often issued at TopCo.

# WHAT STRUCTURAL ELEMENTS ARE PARTICULARLY IMPORTANT TO PRIVATE COMPANY SELLERS?

- Disproportionate Allocation of Forms and Amounts Consideration
  - Forms of consideration (cash/rollover equity)
  - Amounts of consideration (i.e., non-pro rata)
- Maximizing long-term capital gains
- Transaction consideration for non-owners
  - Profits interest planning
- Estate planning considerations
- Perception of being paid for tax attributes

# ROLLOVER EQUITY

- Private equity fund buyers often want the seller and/or management to have “skin in the game”
- As part of the consideration received by selling owners equity is issued in the new company following closing – typically on a tax deferred basis
- Typically 10-30% (or higher) of the Company
  - Subject to size of transaction
- Considerations
  - Founders’ cash consideration received
  - Control rights
  - Option Plan or other incentives

# PURCHASE AGREEMENT OVERVIEW

- **Sets forth the basic terms** and structure of the purchase of the Target's business
- **Confirms Buyer's due diligence review** through the Target's representations and disclosure schedules
- **Governs the conduct of the Parties** both pre- and post-Closing
- **Establishes the Parties' rights to terminate** the Agreement and the consequences of such termination
- **Allocates post-Closing risks** of the Target's business

# THE BIG PICTURE

Sellers Want:	Buyers Want:
<p>Maximize price Quick closing Minimal risk of not Closing Sail off into the sunset</p>	<p>Exclusivity Time and process to obtain financing Minimal exposure if they fail to close Minimal assumption of risk Indemnification (flip side of assuming risk) Restrictions on sellers' ability to compete post-closing</p>



# PURCHASE AGREEMENT STRUCTURE...

## BIFURCATED VS. SIMULTANEOUS SIGN AND CLOSE

Simultaneous	Bifurcated
<ul style="list-style-type: none"><li>• Simpler process but no one is bound to terms</li><li>• Highly negotiated purchase agreement provisions can be ignored (e.g., pre-closing covenants, closing conditions, termination)</li></ul>	<ul style="list-style-type: none"><li>• May be required for regulatory reasons (government approvals – e.g., antitrust, energy, healthcare, insurance, etc.)</li><li>• Buyer may prefer to raise financing after signing the Agreement</li><li>• Negotiations/documentation more complex &amp; Target must comply with operational and other covenants during interim pre-closing period</li></ul>

# PURCHASE PRICE

*Comprised of a combination of these components...*

<b>Cash Consideration</b>		<b>Payoff/Assumption of Indebtedness</b>	
<b>Working Capital Adjustment</b>	<b>Escrow Amount</b>		<b>Seller Note</b>
<b>Rollover Equity</b>		<b>Earnout</b>	

# PURCHASE PRICE ADJUSTMENTS

Private company deals are typically done on a cash free and debt free basis with normalized levels of working capital

- Accomplished by adjustments to “headline” purchase price (i.e., enterprise value) which may be done based on estimates pre-closing and **actuals** post-closing
- Purchase price is:
  - **Increased** by cash of the Company at closing
  - **Decreased** by debt of the Company at closing
  - **Increased** or **decreased** by working capital of the Company at closing in relation to agreed upon target

Example:

Headline Price:	\$100,000,000
Less Debt:	\$15,000,000
Working Capital Target:	\$4,000,000
Actual Working Capital:	<u>\$3,500,000</u>
<b>Actual Cash to Seller:</b>	<b>\$84,500,000</b>

# PURCHASE PRICE ADJUSTMENTS

- **Working Capital**

- Current Assets of the Company **less** Current Liabilities of the Company (i.e., a balance sheet test)
- Method for calculating working capital is often a key area of negotiation (e.g., consistent with GAAP? Or with the company's prior practices?)
- Parties agree on target, and the purchase price is adjusted upwards or downwards based on the difference between the actual and the target

- **Cash**

- How to treat restricted cash (e.g., landlord deposits) or trapped cash (i.e., excess cash held offshore)

- **Debt**

- Not just borrowed money – often includes letters of credit, out-of-the-money derivative instruments, deferred revenue, prepayments by customers and other debt-like items

# REPRESENTATIONS AND WARRANTIES

Reps & Warranties	Disclosure Schedules
<ul style="list-style-type: none"><li>• A series of factual statements and promises regarding the Parties, the transaction and the condition, nature and scope of the business being acquired</li></ul>	<ul style="list-style-type: none"><li>• A disclosure schedule is a list attached to an agreement setting forth exceptions to the factual statements and promises made by a party in the purchase agreement</li></ul>

***Together...the Reps and Warranties and Disclosure Schedules provide the relevant statements made by Seller regarding the Target business***

# INCORPORATING DILIGENCE RESULTS INTO CERTAIN ASPECTS OF THE PURCHASE AGREEMENT

Reps & Warranties	Disclosure Schedules
<ul style="list-style-type: none"><li>• Adjust scope of reps and warranties based on nature of business and diligence findings.</li></ul> <p><b><i>For example:</i></b></p> <ul style="list-style-type: none"><li>• More expansive health care representations (payors, HIPAA, Stark, data privacy) in a business where health care is a major portion of the business</li><li>• Inversely, other representations may be shortened due to less importance to the business (i.e. environmental, intellectual property, real estate)</li></ul>	<ul style="list-style-type: none"><li>• Can reveal additional information that potentially impacts negotiation of reps, warranties and covenants</li><li>• Schedules may disclose findings that are inconsistent with diligence findings</li><li>• Disclosure may impact indemnification rights</li></ul>

# CLOSING CONDITIONS

*Closing conditions are commonly negotiated and can include...*

Buyer obtaining financing		Employment agreements/incentive equity plan	
Consent under certain contracts or permits	Regulatory approvals (e.g., HSR)		Customer calls
No “Material Adverse Effect” has occurred and the reps and warranties made at signing remain accurate (to some standard)			

# TERMINATION

- **In a bifurcated sign and close**, sets forth when the agreement can be terminated (e.g., drop dead dates, breaches of closing conditions, absence of financing following a marketing period)
- **Implications of Termination**
  - What provisions survive (including indemnification obligations)
  - Reverse termination fees



# COVENANTS...BY THE SELLER

<b>Pre-closing operation of the business</b>	<b>Non-competition</b>
<b>General release</b>	<b>Financing covenants</b>
<b>Non-solicitation (employee and customer) and no-hire</b>	<b>Confidentiality (non-disclosure and non-use)</b>

# FINANCING ISSUES IN ACQUISITION AGREEMENT

- **Primary issue:** Allocation of risk between Buyer and Seller if financing fails to materialize between signing and closing
- **Financing provisions** in Agreement may include:
  - Buyer's representation to Seller concerning the terms of its committed debt financing and/or equity financing
  - Covenant of Buyer to obtain financing prior to Closing
  - Covenant of Seller to cooperate with Buyer in obtaining financing
  - Financing condition to Buyer's obligation to close (and alternative provisions, such as reverse breakup fee)

# INDEMNIFICATION...WHAT IS IT?

*Indemnification is the obligation of a party (e.g., Seller) to bear the costs and expenses of specified losses incurred by another party (e.g., Buyer)*

# WHO INDEMNIFIES?

**Buyers. Sellers.** And sometimes parent entities...

Typically each indemnify each other for damages caused by such party's breach of its representations, warranties or covenants

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**Who is really at risk? The Seller.**

It is much more likely that a Buyer will have an indemnification claim against a Seller than vice versa

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Also...Joint & Several Liability vs. Several (and not joint) Liability

- Buyer prefers for Seller's stockholders to be jointly and severally liable
- Seller's stockholders prefer for their liability to be several and not joint

# WHAT IS COVERED?

**Breaches of rep & warranties**

**Breaches of covenants**

**Pre-closing taxes**

**Specific indemnities**

# INDEMNIFICATION FOR... REPRESENTATIONS AND WARRANTIES BREACH

- **Representation and Warranty**
  - Example: “Except as set forth on Section 3.12 of the Disclosure Schedule, the Company and its Subsidiaries are, and during the last 3 years have been, in compliance in all material respects with all Laws.”
- **Disclosure Schedule**
  - Example: “On April 11, 2021, the Company received notice that certain of its employees made illegal payments to zoning officials in connection with 6 distribution centers located in Mexico.”

## Impact of Disclosure on Indemnification Rights

Since disclosure modifies the representations and warranties, if a liability is disclosed then there is no breach and thus no indemnification.

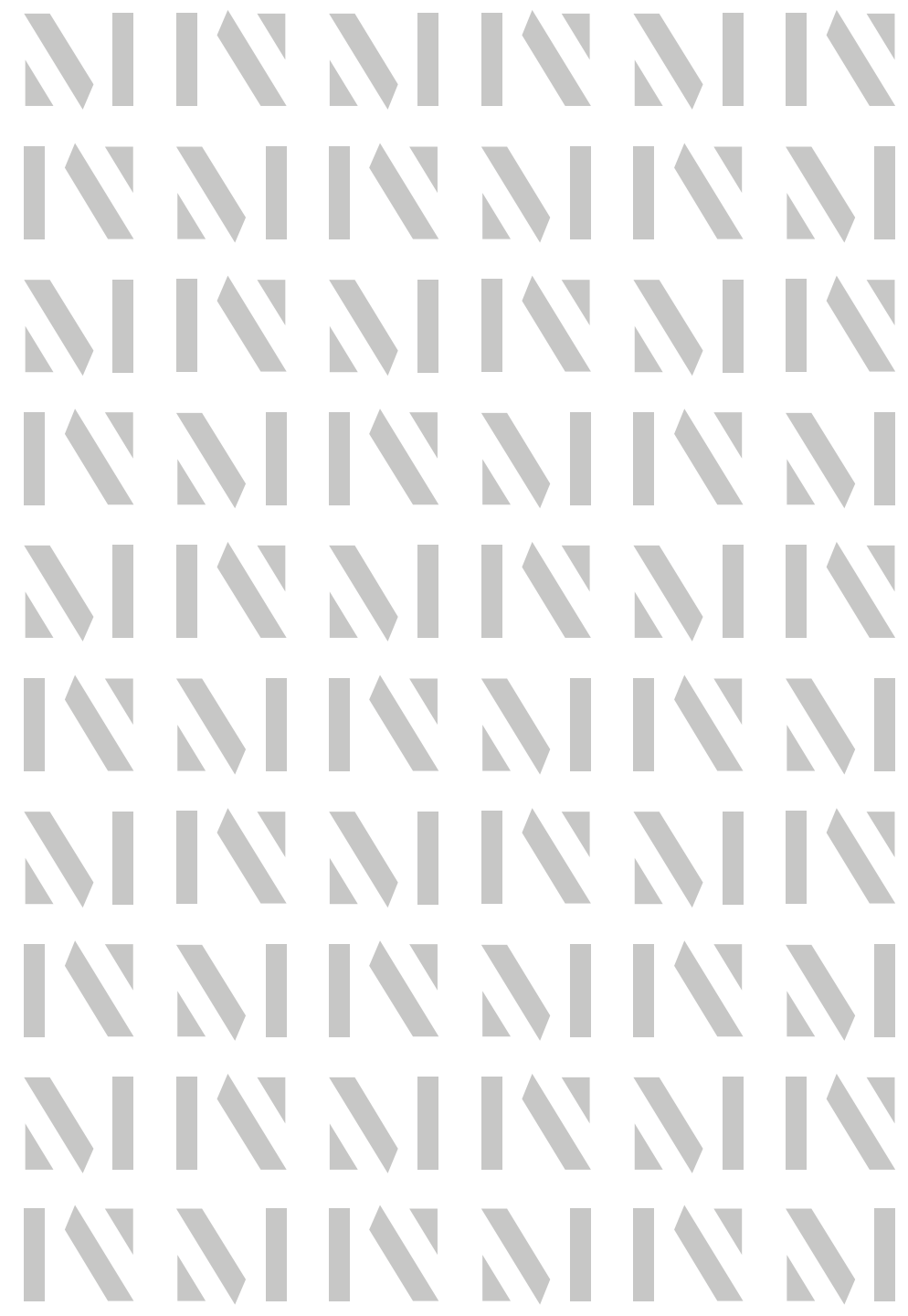
To be indemnified, Seller would need to seek a specific indemnity with respect to the disclosed item.

# LIMITATION ON INDEMNIFICATION

*Parties will negotiate over various terms to limit or expand indemnification obligations*

<b>Definition of “Damages”</b>	<b>Dollar Limitation</b> (deductibles, baskets and caps)	<b>Time Limitations</b>
<b>Substantive Limitations</b> (tax benefits, insurance proceeds)	<b>Line-Item Indemnities</b>	<b>Sand Bagging</b>

# REPRESENTATION AND WARRANTY INSURANCE





# BENEFITS OF RWI

## Seller Benefits

### Unlocks Negotiations

Ease your negotiations with prospective buyers by presenting a more fulsome rep package



### Clean Exit

Eliminate/minimize post-closing liabilities including the need for escrow, bank guarantees or other post-closing security



### Boost Returns / IRR

Higher / quicker realization of proceeds due to minimized liabilities at closing



## Buyer Benefits

### Competitiveness

Increase strength of a bid by enhancing coverage beyond the Purchase Agreement in the RWI Policy



### Preserve Relationships

Preserve relationships with management or rollover sellers who are retaining with the business after closing by claiming directly against an insurer

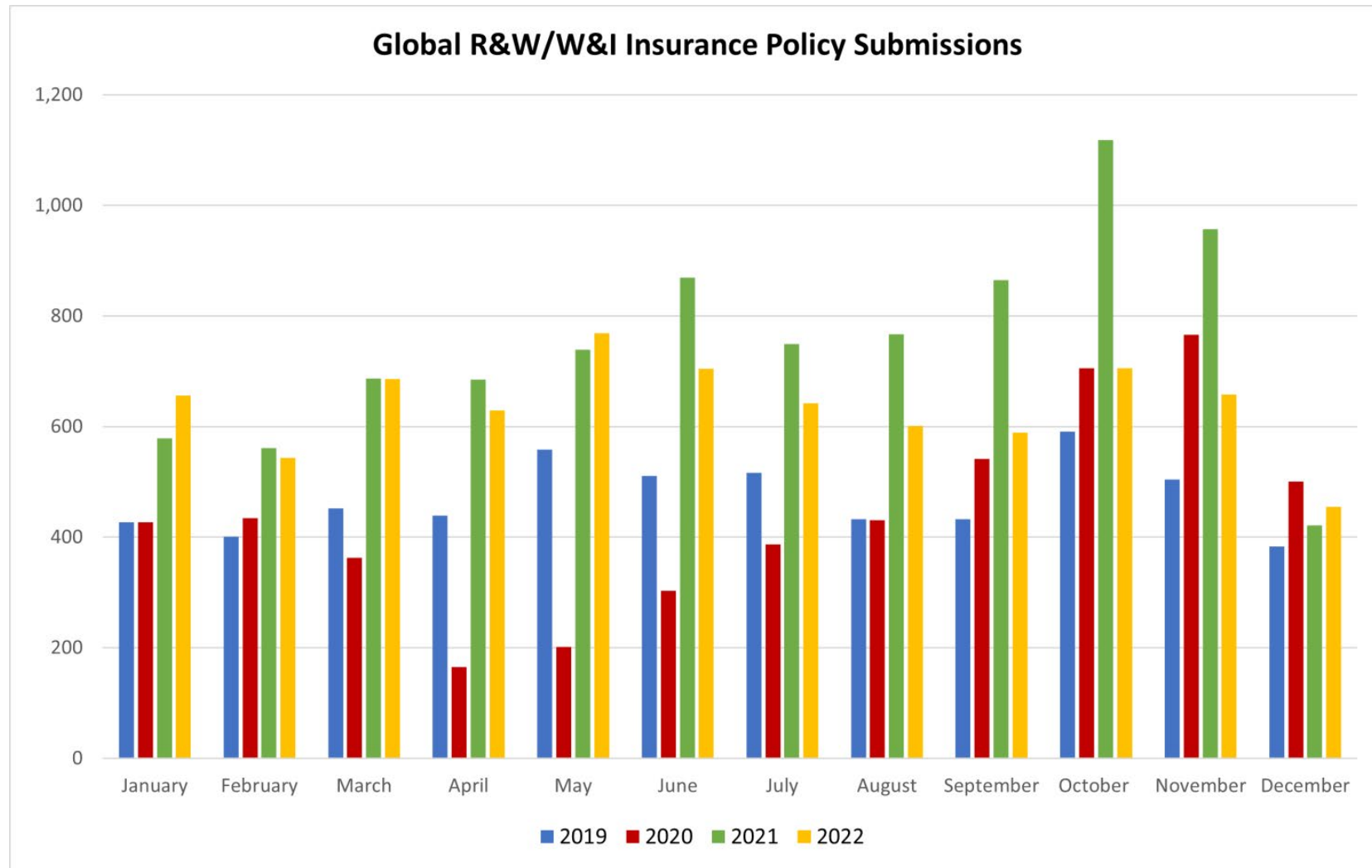


### Synthetic Indemnification

Obtain your desired amount of coverage for your required period of time from an A-rated counterparty



# MARKET TRENDS – DEAL VOLUME



\*Euclid Transactional data on the volume of M&A deals seeking R&W insurance in North America or W&I insurance EMEA.

# TRANSACTIONAL INSURANCE UNDERWRITERS (US)

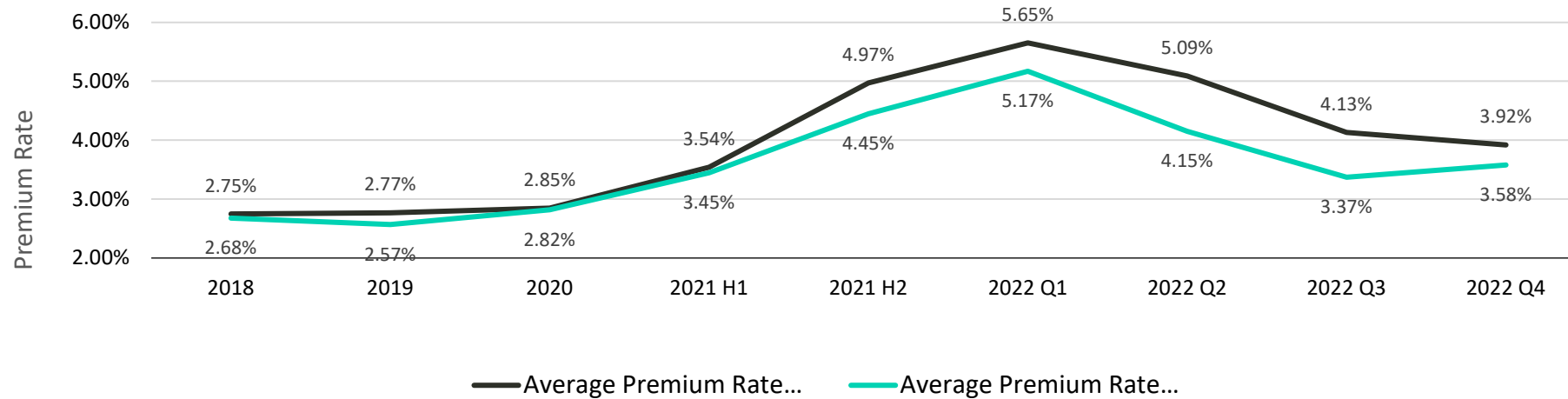


XL Insurance  
Reinsurance



# MARKET TRENDS – PRICING

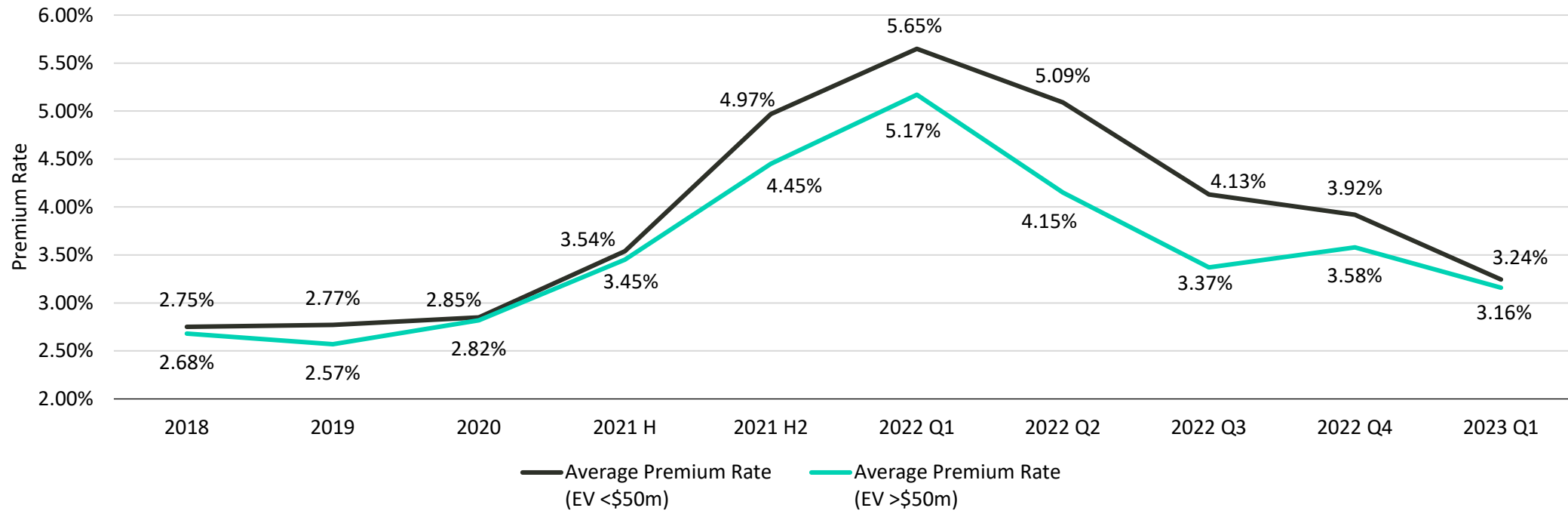
## 5-Year Premium Rate History – Bound Deals



### Sector Breakdown\*

Sector	Q3 ROL (%)	Q4 ROL (%)	QoQ % Change
Business Goods & Services	3.8	3.4	11
Consumer Goods & Services	3.6	3.3	8
Energy & Infrastructure	3.9	3.5	10
Financial Services	3.6	3.4	6
Healthcare & Life Sciences	4.0	3.6	10
Manufacturing	3.7	3.4	8
Technology	3.8	3.4	10
Real Estate	3.6	2.6	27

# 2023 Q1 RWI PRICING UPDATE

**3.19%**

Avg Premium  
Rate on Line (%  
of Limit)

**10+**

Avg # of Insurer  
Quotes (All Deals)

**0.88%**

Avg Initial  
Retention (% of  
EV)

**0.50%**

Avg Dropdown  
Retention (% of  
EV)

# JANUARY MARKET UPDATE – INSURER DATA

**Average Number of Markets  
Providing Terms per Submission**

Quarter	# of Insurers	Quarter	# of Insurers
		2022 Q1	5.0
2021 Q2	3.5	2022 Q2	5.6
2021 Q3	2.2	2022 Q3	7.6
2021 Q4	1.9	<b>2022 Q4</b>	<b>8.4</b>

**Insurer Breakdown 2022 Q4\***

Insurer	Average ROL (%)	QoQ % Change	Lowest ROL (%) (EV Size Range)	Minimum Retention (%) (EV Size Range)
Insurer 1	3.5	5 ↓	2.34 (\$51m-\$100m)	0.50 (>\$1b)
Insurer 2	3.1	11 ↓	2.63 (\$51m-\$100m)	0.50 (\$251m-\$500m)
Insurer 3	3.4	3 ↓	2.78 (\$101m-\$250m)	0.50 (>\$1b)
Insurer 4	3.4	8 ↓	2.48 (\$101m-\$250m)	0.75 (\$501m-\$1b)
Insurer 5	3.4	8 ↓	3.02 (\$51m-\$100m)	0.50 (>\$1b)
Insurer 6	3.3	8 ↓	2.74 (\$51m-\$100m)	0.75 (\$251m-\$500m)
Insurer 7	3.3	20 ↓	2.65 (<\$50m)	0.50 (\$251m-\$500m)
Insurer 8	3.5	3 ↓	3.10 (<\$50m)	0.75 (multiple)
Insurer 9	3.6	14 ↓	3.10 (\$51m-\$100m)	0.75 (\$101m-\$250m)
Insurer 10	3.6	3 ↓	2.90 (\$51m-\$100m)	0.75 (\$251m-\$500m)
Insurer 11	3.5	14 ↓	2.66 (\$51m-\$100m)	0.50 (>\$1b)
Insurer 12	3.6	10 ↓	3.00 (\$51m-\$100m)	0.75 (multiple)
Insurer 13	3.3	6 ↓	2.50 (\$51m-\$100m)	0.85 (\$51m-\$100m)
Insurer 14	3.2	11 ↓	2.53 (\$51m-\$100m)	0.75 (multiple)
Insurer 15	3.2	20 ↓	2.80 (\$51m-\$100m)	0.65 (>\$1b)
Insurer 16	3.4	-	2.69 (\$51m-\$100m)	0.60 (>\$1b)
Insurer 17	3.6	12 ↓	3.05 (\$51m-\$100m)	0.65 (>\$1b)
Insurer 18	3.1	14 ↓	2.65 (\$51m-\$100m)	0.75 (\$501m-\$1b)
Insurer 19	2.9	-	2.40 (\$51m-\$100m)	0.50 (multiple)
Insurer 20	3.4	15 ↓	2.90 (\$101m-\$250m)	0.70 (>\$1b)
Standard Deviation - 0.18%				

# PURCHASE AGREEMENT: KEY CONSIDERATIONS

Purchase Agreement Considerations	
Key terms	<ul style="list-style-type: none"> <li>• Purchase price adjustment caps</li> <li>• Push-out election covenants</li> <li>• Termination rights</li> </ul>
Interim Period	Conditions to cover of restated representations at closing beyond 180 days
Location of Bid Co.	Where the bidco has a registered address outside of the US, this could impact the appetite from insurers to support the deal since the insurers will need the requisite licensing and regulatory approvals to issue to a non-US insured
Representations and Warranties	<ul style="list-style-type: none"> <li>• Due diligence</li> <li>• Appropriate qualifiers: knowledge, materiality</li> <li>• Appropriate drafting: subjectivity</li> <li>• No undisclosed liabilities, customer contracts, MAE</li> </ul>
Survival Periods & Financial Limitations	Notwithstanding what the parties agree in the purchase agreement, the R&W policy can disregard any financial limitation and survival periods for the purpose of recovery under the R&W policy.
Definition of Loss and Types of Damages	Insurers will generally match silence with respect to the recovery of certain types of damages (multiplied damages, consequential or indirect losses, DIV) in the purchase agreement, with silence in the R&W policy. Sometimes standalone definitions of loss / damages are obtainable
Materiality Scrape	Impact of seller liability vs. nil seller liability and mismatch in the approach to disclosure with cover under the policy
Fraud	Insurer will only subrogate against the seller in the event of seller fraud but need the seller's limitations on liability to not apply in the event of seller fraud
Governing Law	Non-US governing law could give rise to reduced interest from insurers or, in certain circumstances, prevent insurers from underwriting the deal. For LatAm transactions, it is preferable for a US bid co. and a US law governed agreement

# MATERIAL CONTRACTS REPRESENTATION

Example representation in light of *Novolex Holdings, LLC v. Illinois Union Ins. Co. and Zayo Group v. Latisys Holdings, LLC*

Except as disclosed on Schedule [ ], no party to any Material Contract has given the Company or any of its Subsidiaries written notice or, **to the Company's Knowledge, oral** notice of its intention to: (i) cancel, terminate, renegotiate or change the scope of rights or obligations under any Material Contract; (ii) materially reduce or alter the frequency or volume of **purchase orders** (or similar documents) submitted to the Company or any of its Subsidiaries; (iii) **fail or refuse to renew** any Material Contract.



# CLAIM TRENDS

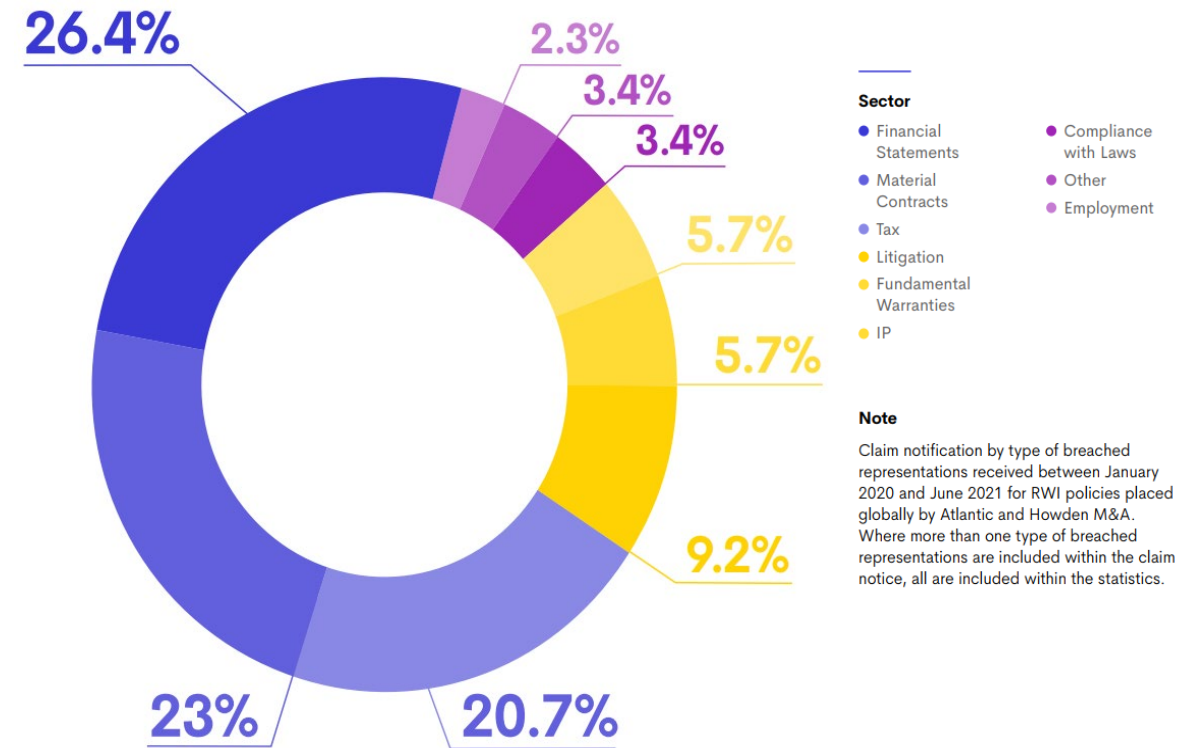
## KEY CONSIDERATIONS

- Tailored underlying representations
- Multiplied damages – permanent vs. temporary
- Basis of valuation to support a multiplied damages claim

## ATLANTIC'S EXPERIENCE

- Claims notifications on 9% of policies placed
- 85% of claims paid
- 18% of claims denied are eventually paid after our team's involvement
- No formal dispute resolution processes with insurers and insureds going to arbitration or courts
- Experience in handling both first-party (including recovery of DIV) and third-party M&A claims

## Claims by Type of Breach



# KEY SOLUTIONS

A full suite of solutions to cover **unknown** and **known** risks arising throughout the investment lifecycle

Unknown Risk	Representations & Warranties	<ul style="list-style-type: none"> <li>• <b>Cover:</b> unknown risks arising from: (i) breach of seller / company reps and (ii) pre-closing taxes</li> <li>• <b>Parameters:</b> (i) policy limit is typically 5 - 20% of purchase price (ii) deductible is ~0.75 - 1% of purchase price and (iii) one-off premium is 3.0 - 4.5% of policy limit for 3/6-year policy period</li> </ul>
Known Risk	Tax	<ul style="list-style-type: none"> <li>• <b>Cover:</b> identified tax risks (credits ITC / PTC / 45Q, transfer taxes and pricing, tax treaty qualification, s-corp status, live audits)</li> <li>• <b>Parameters:</b> (i) policy limit set at estimated tax liability and (ii) one-off premium is 1.75 - 8% of policy limit for 6-year policy period</li> </ul>
	Environmental	<ul style="list-style-type: none"> <li>• <b>Cover:</b> (i) unknown and identified pollution for pre-existing conditions and (ii) can be extended to cover ongoing operations (new conditions)</li> <li>• <b>Parameters:</b> (i) policy limit is typically \$5m - \$20m and (ii) premium is determined by nature of exposure and number of sites</li> </ul>
	Structured Solutions	<ul style="list-style-type: none"> <li>• <b>Cover:</b> outcome based practice leveraging insurance to protect against identified risks such as ongoing (<i>i.e.</i>, appellate stage) / potential litigation</li> <li>• <b>Parameters:</b> (i) policy limit set at estimated exposure and (ii) premium determined by nature of litigation and stage of proceedings</li> </ul>
Credit	Credit	<ul style="list-style-type: none"> <li>• <b>Cover:</b> debt payments and/or tax equity payments arising from offtaker default on contracted payment obligations due to financial insolvency</li> <li>• <b>Parameters:</b> (i) policy limit up to in the amount of projected debt (principal and interest) payments plus tax equity payments (ii) one-off premium is 1%-3% (portfolios) or 5%-7% (single risks) of policy limit for up to 10-year policy period</li> </ul>
Other	End of Fund Life	<ul style="list-style-type: none"> <li>• <b>Cover:</b> residual liabilities (both contractual and fund level liabilities) of private equity fund structures to facilitate quicker distribution of holdback</li> <li>• <b>Parameters:</b> (i) policy limit typically driven by amount of residual liabilities and (ii) premium determined by the nature of the liabilities</li> </ul>

# RWI COVERAGE BASICS

RWI supplements / replaces contractual indemnity and protects against unknown risks (subject to policy exclusions)

## Scope of Cover

- ✓ Representations and warranties of the seller and/or company given in the underlying purchase agreement
- ✓ Pre-closing taxes (but narrower than typical contractual indemnity)
- ✗ Known matters (scheduled and actual knowledge of buyer's deal team)
- ✗ Market and deal specific exclusions – **SEE RIGHT COLUMN**

## Considerations

- Insurers require an arms' length process, requiring the seller to negotiate the representations and engage in a thorough disclosure exercise
- Quality of buyer's access to information and how diligence findings are presented to insurer greatly influences the policy outcome

## Market and Deal Specific Exclusions

### Customary Exclusions

- Actual knowledge of the buyer's internal deal team
- Interim Breaches
- Fines / penalties uninsurable by law
- Purchase price adjustments
- Underfunding of defined benefit schemes
- Asbestos / PCBs or recognized environmental conditions
- Non-availability of carry-forward NOLs and tax assets
- Transfer pricing
- Medical malpractice
- COVID-19 / CARES Act
- Specific indemnities (case-by-case)

### Focus of insurers' underwriting (covered subject to underwriting)

- Healthcare compliance
- Billing / coding
- Cybersecurity / data protection (including HIPAA matters)
- Product liability
- Financial matters (e.g., GAAP compliance)
- FLSA / wage & hour matters
- E&O / professional services liability

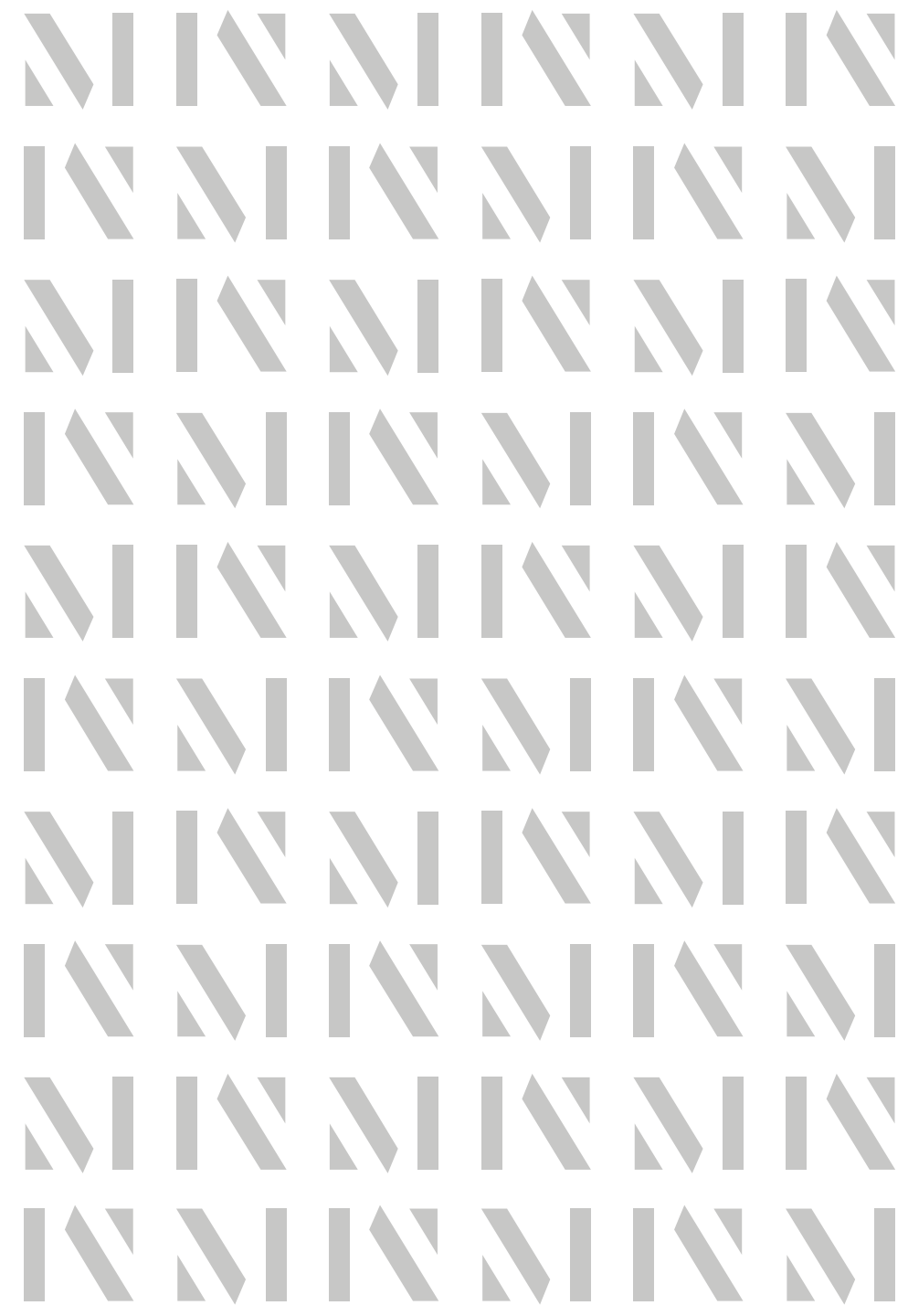
# GP-LED RESTRUCTURINGS – RWI OPTIONALITY

Atlantic has shaped the insurance market to provide innovative transactional insurance solutions for GP-led transactions that fit any transaction structure. Our solutions give GPs and LPs optionality at each stage of a transaction to ensure smooth processes, cleaner exits and greater investor comfort. The options fall into the three broad categories outlined below, but as these policies are bespoke, we think of them as more a continuum to maximize flexibility.

	Standard GP-led Reps ROL 1.50% – 2.30%	GP-led+ Reps ROL 2.30% – 3.00%	Direct Buyout Style Reps ROL 3.00% - 4.50%
<b>Reps and Warranties</b>	<ol style="list-style-type: none"> <li>1. Fund level reps on a flat basis</li> <li>2. Select portfolio company reps, all on a knowledge basis</li> </ol>	<ol style="list-style-type: none"> <li>1. Fund level reps on a flat basis</li> <li>2. Broad portfolio company reps, on a knowledge basis</li> <li>3. Select company reps on a flat basis</li> </ol>	Broad reps at fund and portfolio company levels, the vast majority being flat, other than certain rep formulations (such as forward looking and acts of third parties reps)
<b>Required Diligence and Disclosure</b>	<ol style="list-style-type: none"> <li>1. Title and transferability report/analysis. Typically, from the GP's counsel</li> <li>2. Seller's knowledge pool disclosing against reps</li> </ol>	<ol style="list-style-type: none"> <li>1. Title and transferability report/analysis. Typically, from the GP's counsel</li> <li>2. Seller's knowledge pool disclosing against reps and possibly a Q&amp;A process</li> <li>3. Documentary disclosure/DD in specific/narrowly scoped areas, scoped by Atlantic to ensure broad cover</li> </ol>	Full data room disclosure and diligence into all areas warranted and reports from external counsel on at least legal, financial and tax
<b>Policy Cover</b>	All reps typically covered as drafted, subject to standard exclusions and wording amendments	Provided DD and disclosure is structured according to Atlantic's scope, all reps typically covered as drafted, subject to standard exclusions and wording amendments	All reps typically covered as drafted, subject to standard exclusions and wording amendments

INCREASE IN COVER AND DILIGENCE

# QUESTIONS?



# THANK YOU.

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