



2008 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study (For Transactions Announced in 2007)

**A Project of the Mergers & Acquisitions Market Trends Subcommittee
of the
Committee on Negotiated Acquisitions
of the
American Bar Association's Section of Business Law**

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DISCLAIMERS

The findings presented in this Study do not necessarily reflect the personal views of the 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 particular provisions. As a result, the conclusions presented in this Study may be subject to important qualifications that are not expressly articulated in this Study. The sample provisions included in this Study are for illustrative purposes only.

Public Target Study Sample Overview

- ◆ This Study analyzes publicly-available acquisition agreements for acquisitions of U.S. publicly-traded targets by publicly-traded and other strategic acquirers for transactions announced in 2007. Acquisition agreements for acquisitions by private equity buyers have not been included among the agreements analyzed for purposes of this Study.
- ◆ Comparative references in this Study to data from “deals in 2004” and “deals in 2005/2006” refer to data in *The First Annual Public Target M&A Deal Points Study* and data in the *2007 Strategic Buyer/Public Target Mergers and Acquisitions Deal Points Study*, respectively (<http://www.abanet.org/dch/committee.cfm?com=CL560003>).
- ◆ Of the 152 transactions studied, 82 were entered into before July 1, 2007.

Transaction Value* Range	# of Deals	Consideration		
		All Cash	All Stock	Mixed
\$100M and over	152**	74%	10%	16%

* Includes debt assumed.

** Includes 35 deals structured as negotiated tender offers.

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Target's Representations and Warranties

“Fair Presentation” Representation

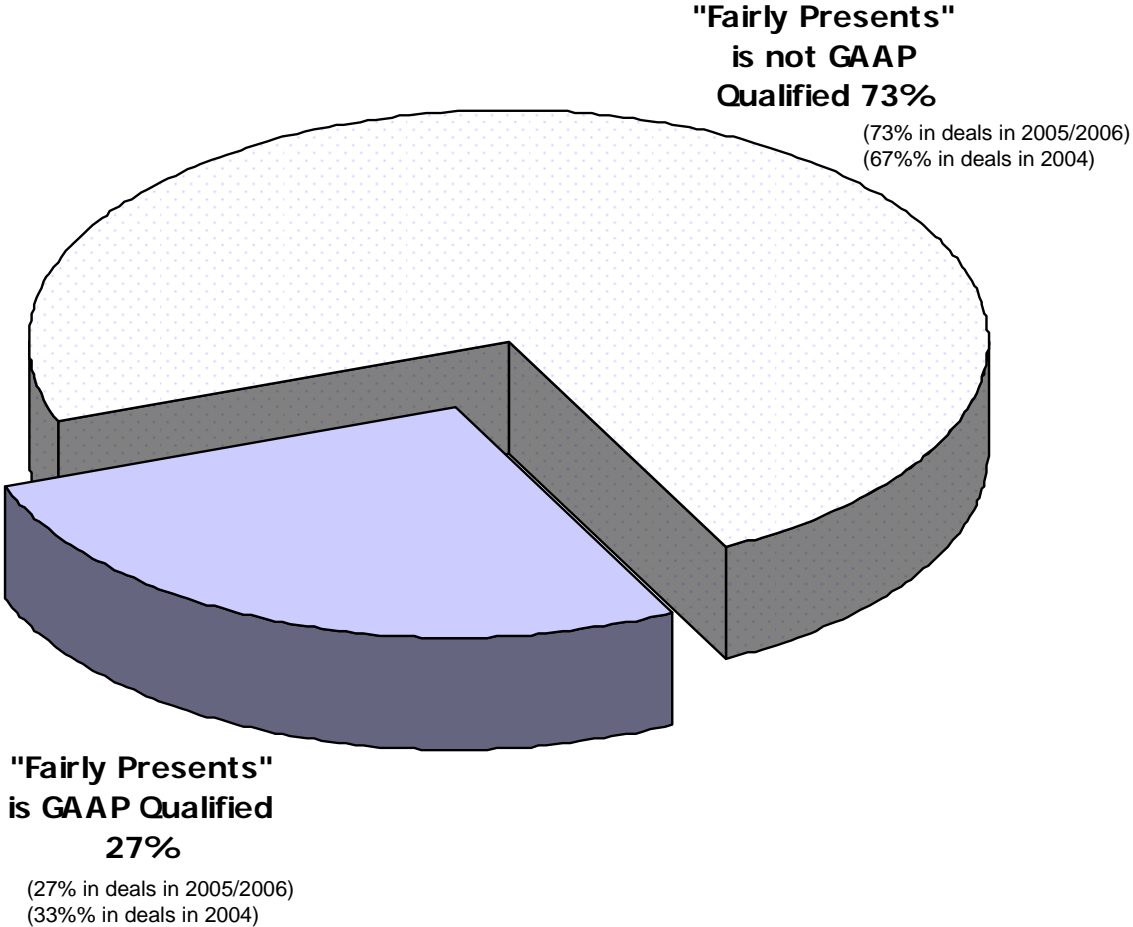
(“Fairly Presents” is is GAAP Qualified)

“Financial Statements. The Target Financial Statements fairly present the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby, **all in accordance with GAAP.**”

(“Fairly Presents” is not GAAP Qualified)

“Financial Statements. The Target Financial Statements fairly present the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby. The Target Financial Statements have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered.”

"Fair Presentation" Representation



“No Undisclosed Liabilities” Representation

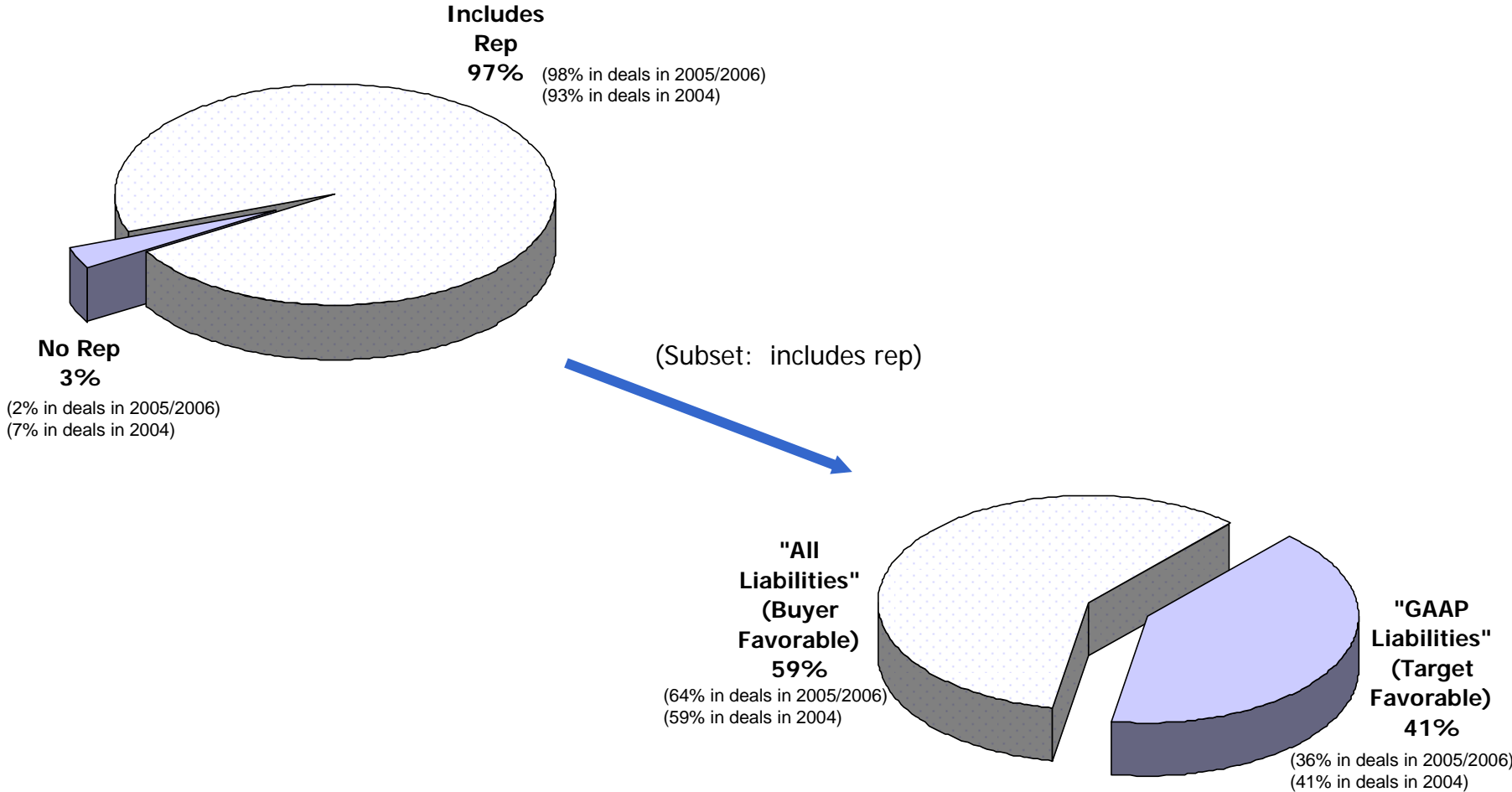
All Liabilities

“**No Undisclosed Liabilities.** The Target has no accrued, contingent or other liabilities of any nature, either matured or unmatured, except for . . .”

GAAP Liabilities

“**No Undisclosed Liabilities.** The Target has no liabilities of the type required to be disclosed in the liabilities column of a balance sheet prepared in accordance with GAAP, except for . . .”

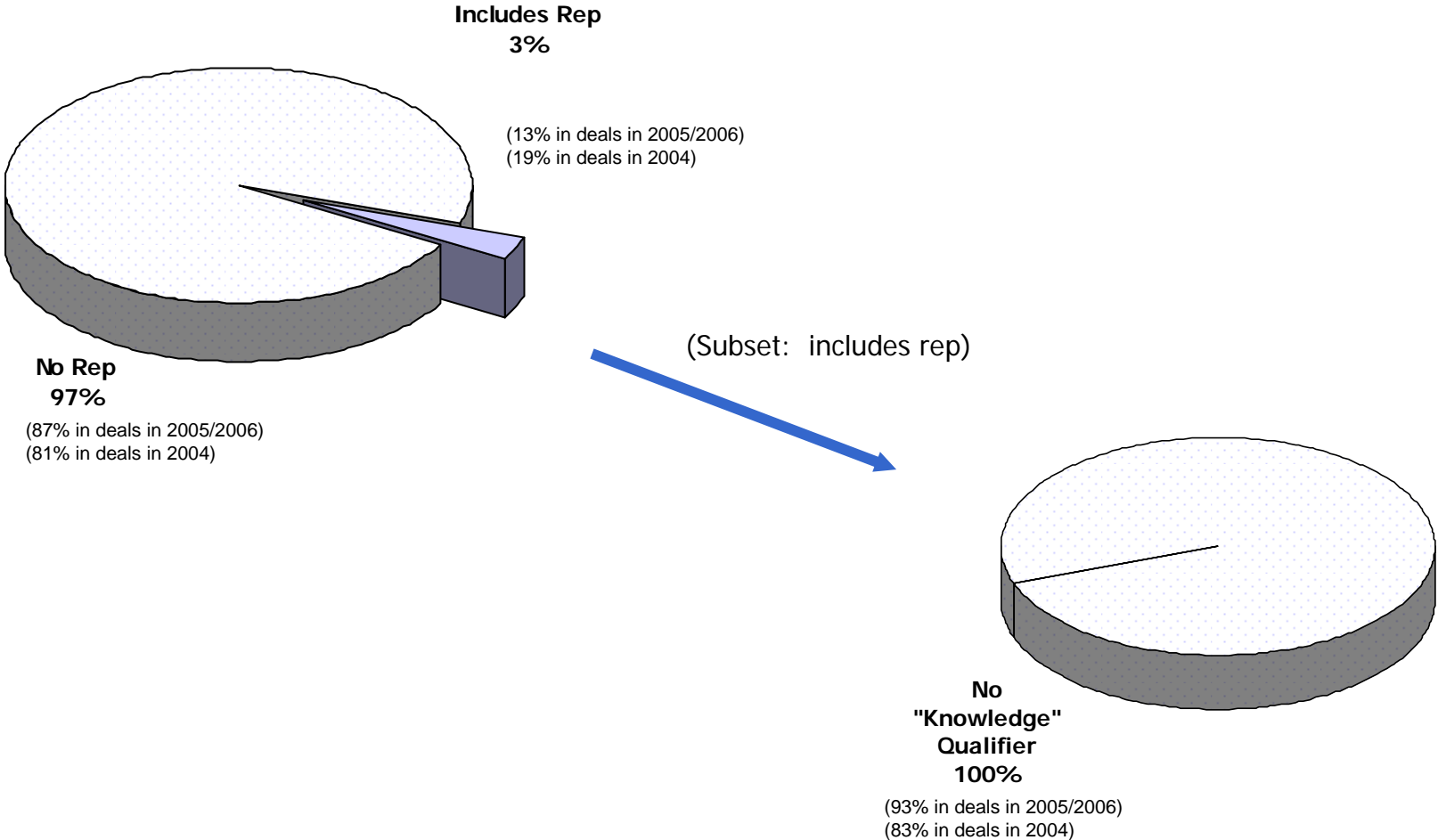
"No Undisclosed Liabilities" Representation



“Full Disclosure” Representation

“Full Disclosure. [To the knowledge of the Target,] No representation or warranty made by the Target in this Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make any such representation or warranty, in light of the circumstances in which it was made, not misleading.”

"Full Disclosure" Representation



Conditions to Closing

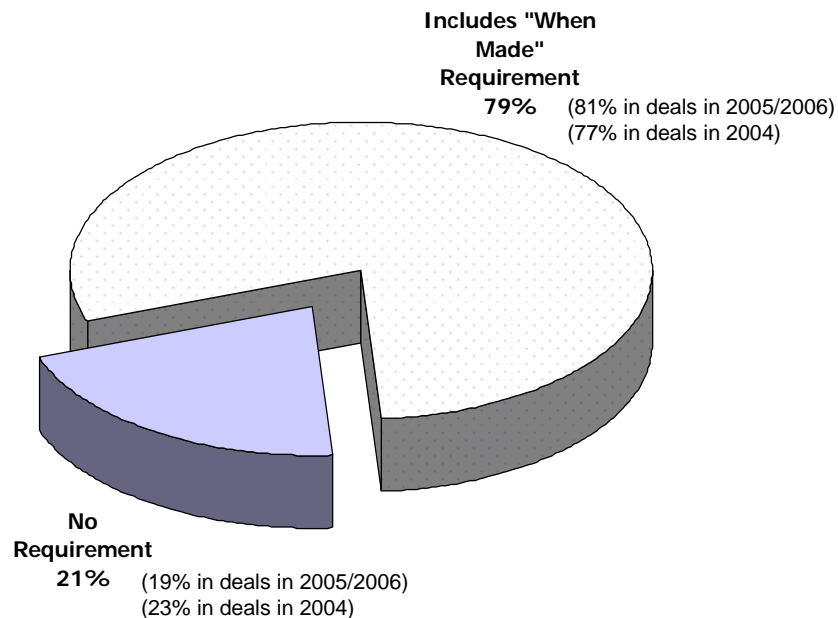
Accuracy of Target's Representations - When Must They Be Accurate?

(Two Points in Time: At Signing and At Closing)

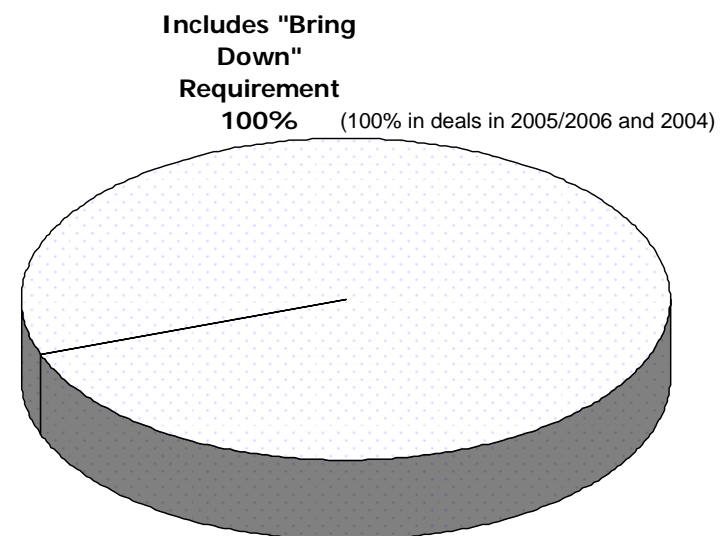
“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been accurate in all respects as of the **date of this Agreement**, and shall be accurate in all respects as of the **Closing Date** as if made on the Closing Date.”

Accuracy of Target's Representations – When Must They Be Accurate?

“When Made”*
(i.e., at Signing)



“Bring Down”**
(i.e., at Closing)



* Includes deals with only certain representations containing a “when made” component.

** Includes deals with both “when made” and “bring down” requirement and deals solely with a “bring down” requirement.

**Accuracy of Target's Representations –
How Accurate Must They Be?**
("Accurate In All Material Respects")

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

Accuracy of Target's Representations – How Accurate Must They Be? (MAC/MAE Qualification)

“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been 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 result in a Material Adverse Effect.**”

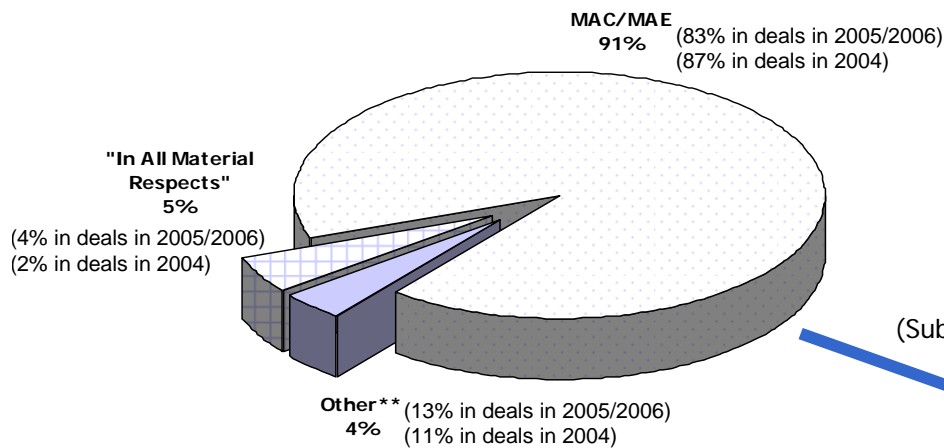
Accuracy of Target's Representations – How Accurate Must They Be?

("Double Materiality" Carveout)

“Accuracy of Representations and Warranties. Each of the representations and warranties made by the Target in this Agreement shall have been 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 result in 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 contained in such representations and warranties shall be disregarded**).”

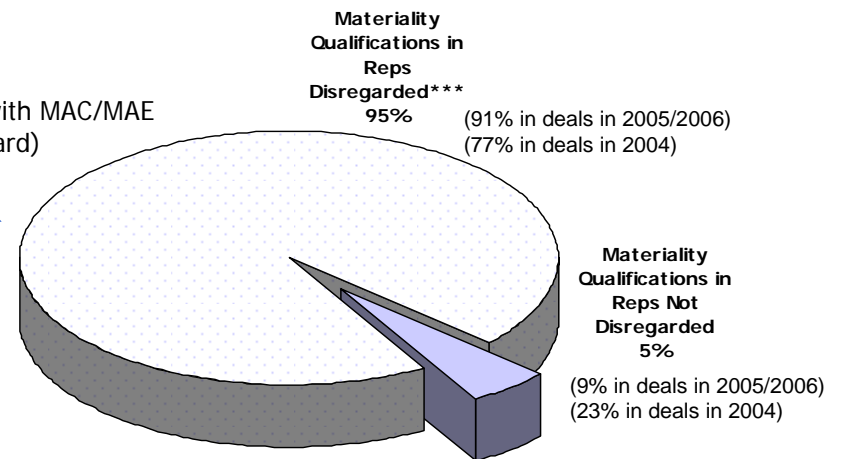
Accuracy of Target's Representations – How Accurate Must They Be? (Materiality Qualifiers In “When Made” Component)

Materiality Standard*



“Double Materiality” Carveout

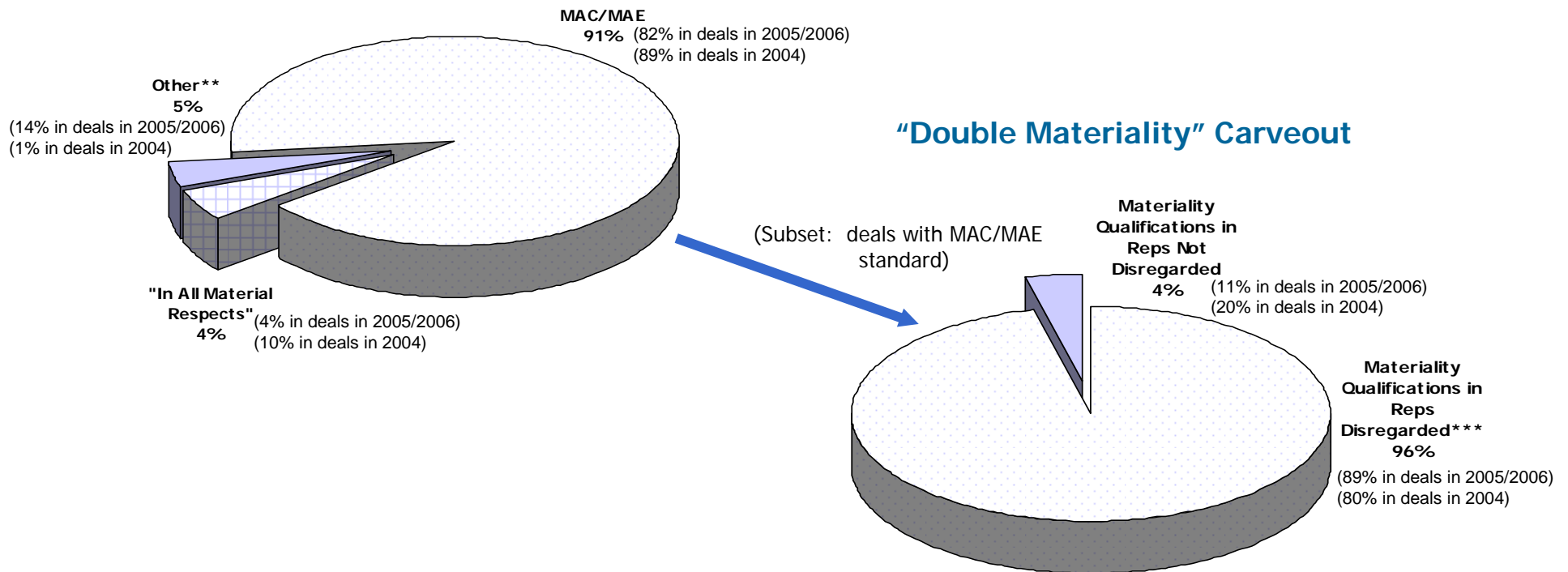
(Subset: deals with MAC/MAE standard)



* Many deals included separate (and different) materiality standards for the capitalization and certain other representations.
 ** “Other” includes “in all respects if qualified by materiality and in all material respects if not so qualified.”
 *** A number of deals carved out the “No Material Adverse Change” or similar representation from the “disregarded materiality” concept.

Accuracy of Target's Representations – How Accurate Must They Be? (Materiality Qualifier In "Bring Down" Component)

Materiality Standard*

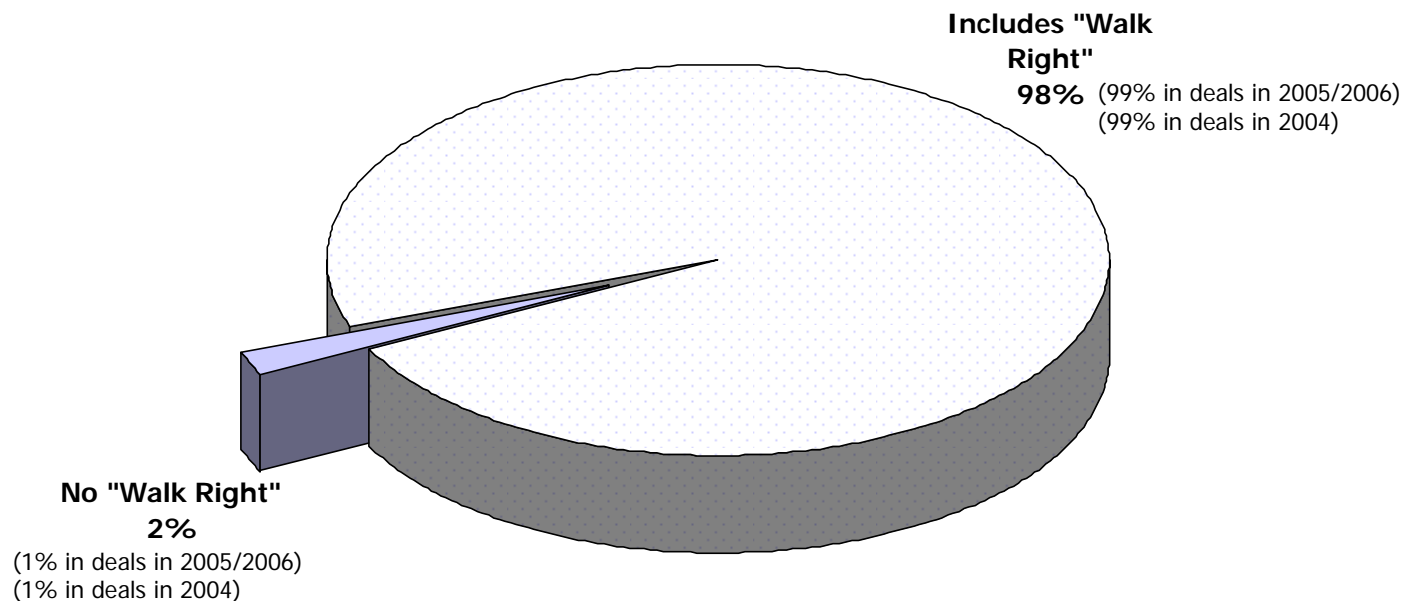


* Many deals included separate (and different) materiality standards for the capitalization and certain other representations.
 ** "Other" includes "in all respects if qualified by materiality and in all material respects if not so qualified."
 *** A number of deals carved out the "No Material Adverse Change" or similar representation from the "disregarded materiality" concept.

Buyer's MAC/MAE "Walk Right"

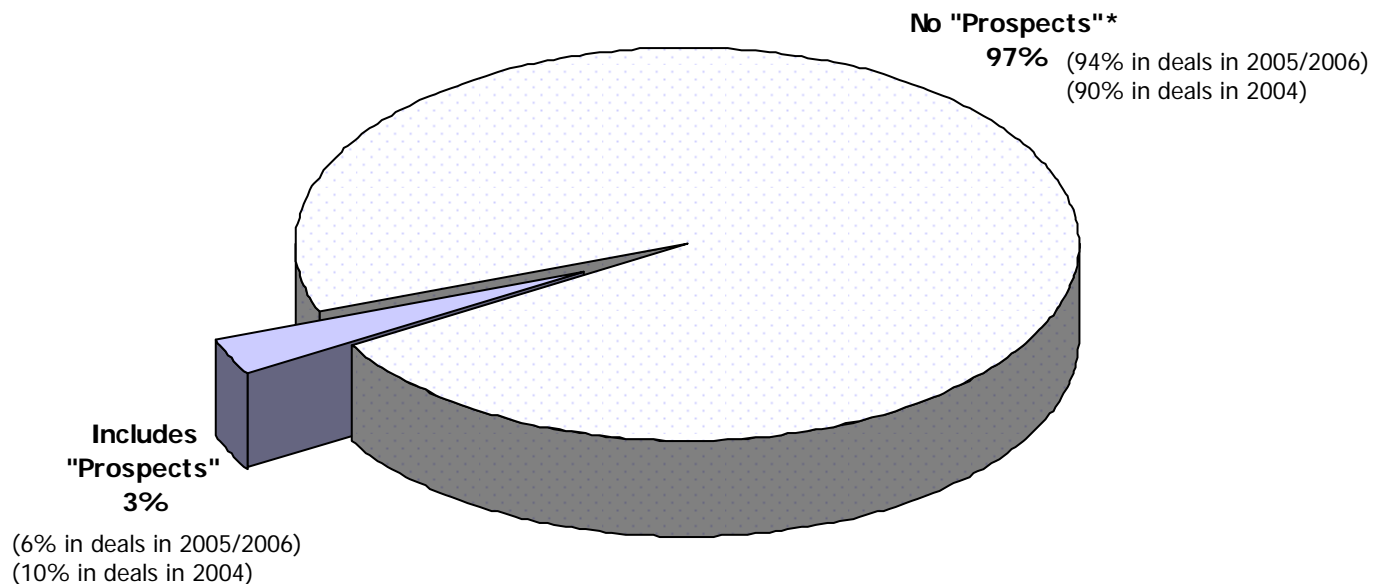
"No Material Adverse Change. Since the date of this Agreement, there has not been any material adverse change in the business, financial condition or results of operations of the Target and its Subsidiaries taken as a whole."

Buyer's MAC/MAE "Walk Right"*



- * MAC/MAE "walk right" includes closing condition, specific termination right in termination section and "back door" MAC/MAE (i.e., MAC/MAE closing condition or termination right through bring down of MAC/MAE representation).

Buyer's MAC/MAE "Walk Right" (Prospects)

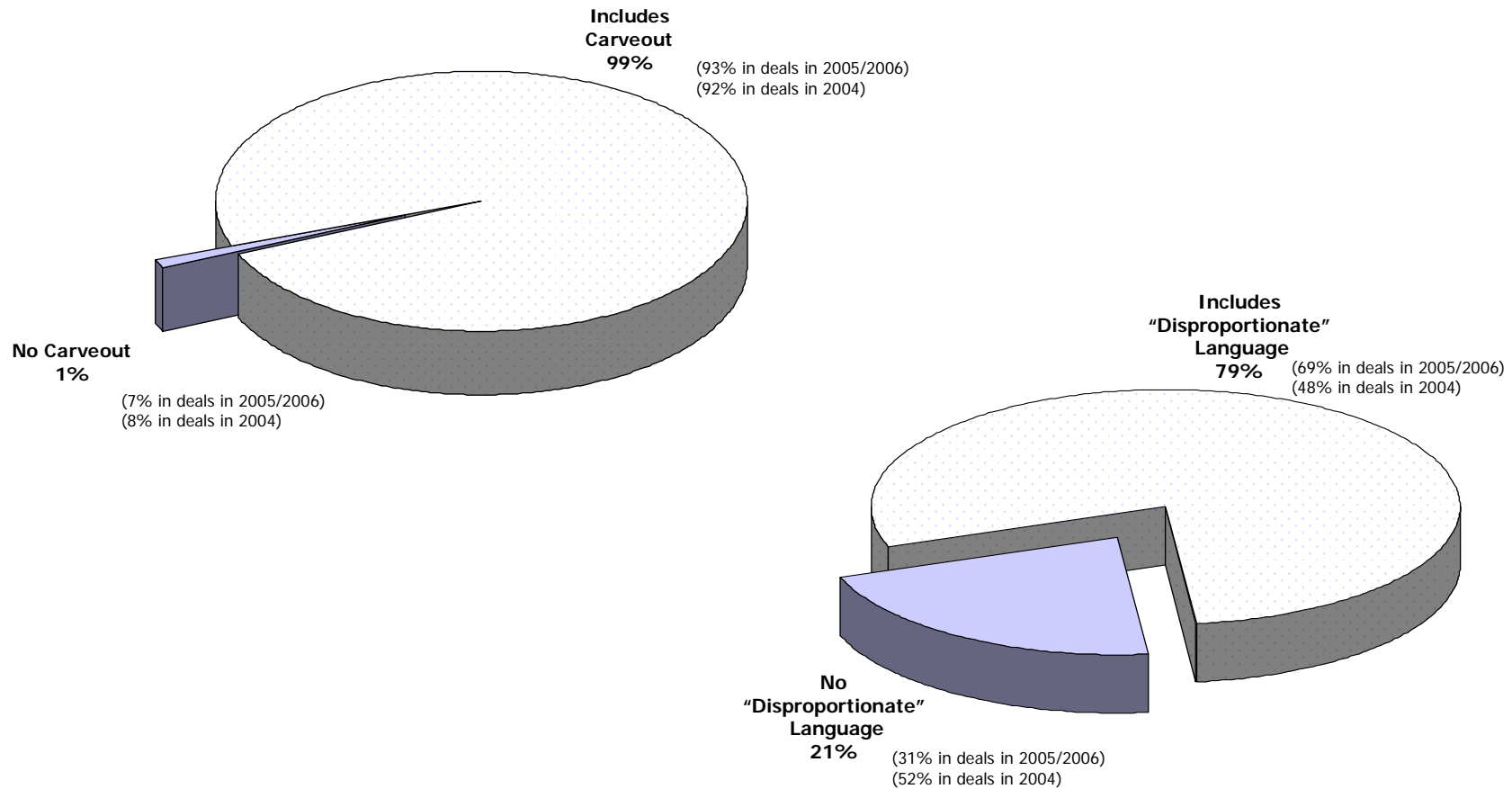


- * A substantial number of the acquisition agreements that did not include the word "prospects" in the MAC/MAE clause did include other forward-looking language in that clause, such as "events that could/would reasonably be expected to result in a MAC/MAE."

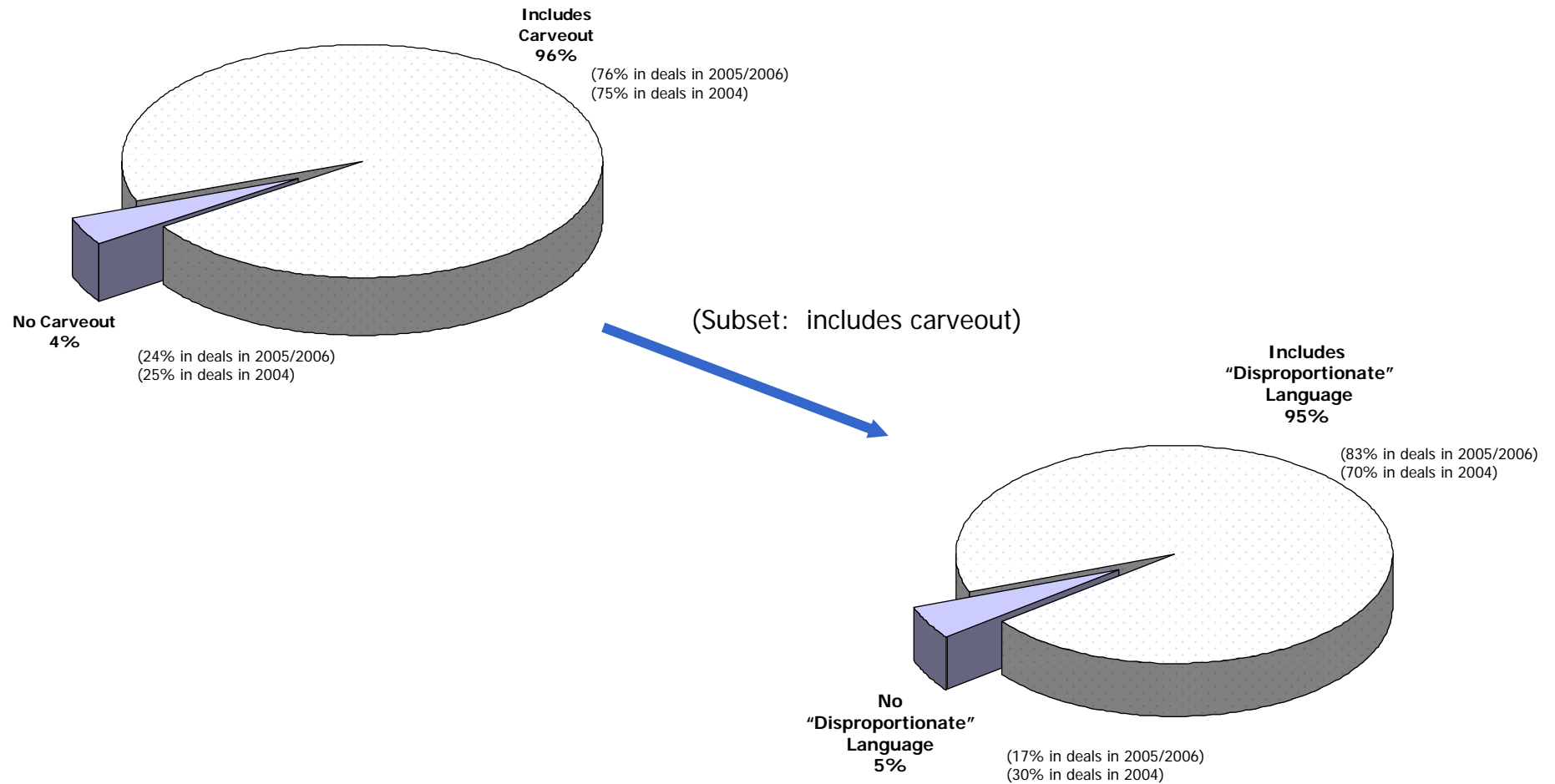
MAC/MAE Carveouts

"MATERIAL ADVERSE CHANGE/EFFECT" means, when used in connection with the Target, any change, event, violation, inaccuracy, circumstance or effect that is materially adverse to the business, financial condition or results of operations of the Target and its Subsidiaries taken as a whole, **other than as a result of: (i) changes adversely affecting the United States economy (so long as the Target is not disproportionately affected thereby); (ii) changes adversely affecting the industry in which the Target operates (so long as the Target is not disproportionately affected thereby); (iii) the announcement or pendency of the transactions contemplated by this Agreement; (iv) the failure to meet analyst projections, in and of itself; (v) changes in laws; (vi) changes in accounting principles; or (vii) acts of war or terrorism.**

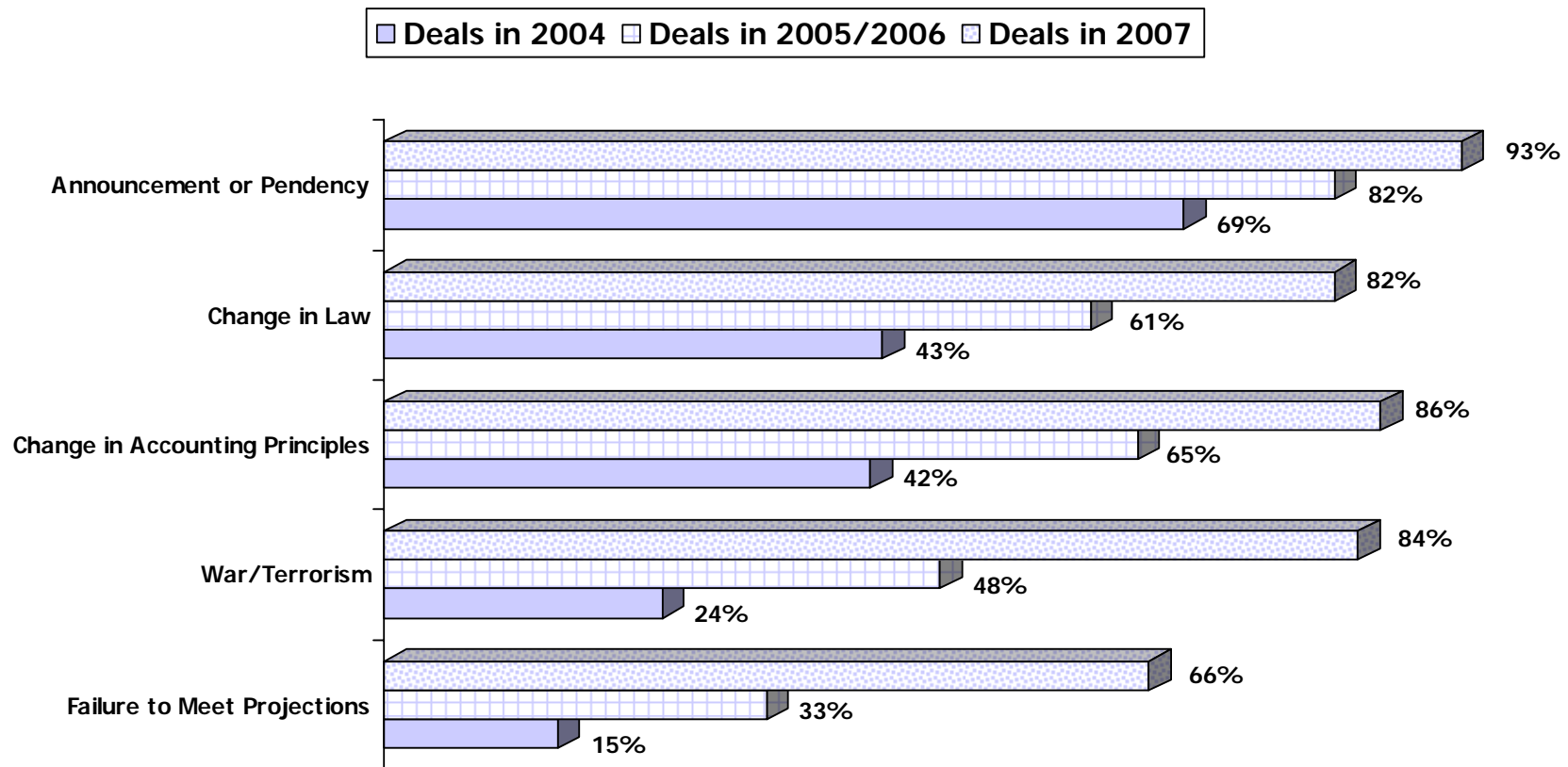
MAC/MAE Carveouts (General Economy)



MAC/MAE Carveouts (Industry)



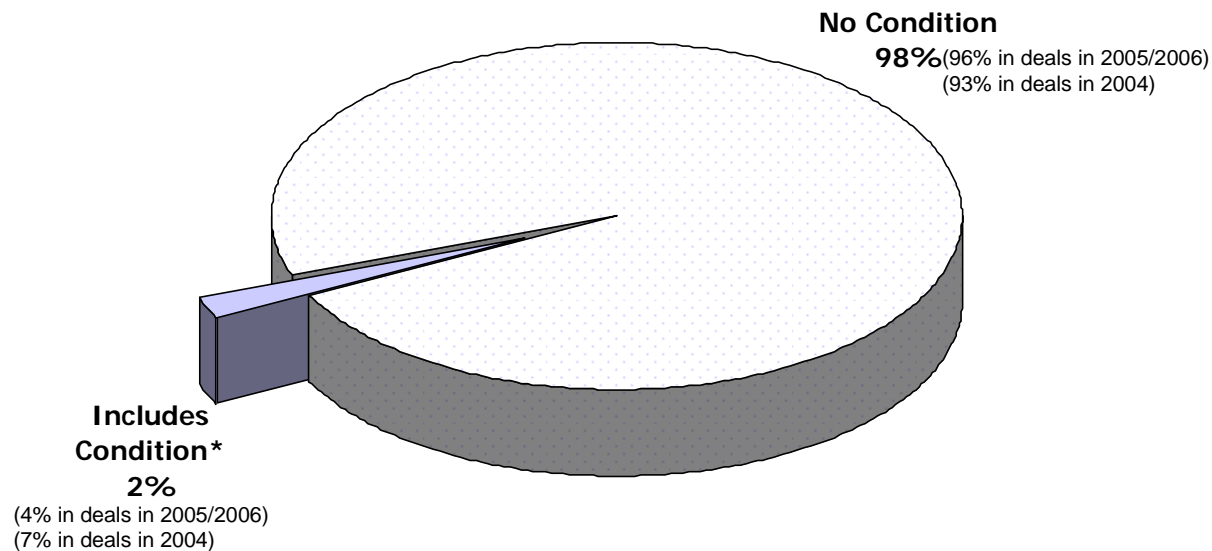
Other Popular MAC/MAE Carveouts



Opinion of Target's Counsel (Not Including Tax Opinion)

“Agreements and Documents. The Buyer shall have received the following agreements and documents, each of which shall be in full force and effect: . . . (___) a legal opinion of [counsel to the Target], substantially in the form of Exhibit ___;”

Opinion of Target's Counsel (Not Including Tax Opinion)

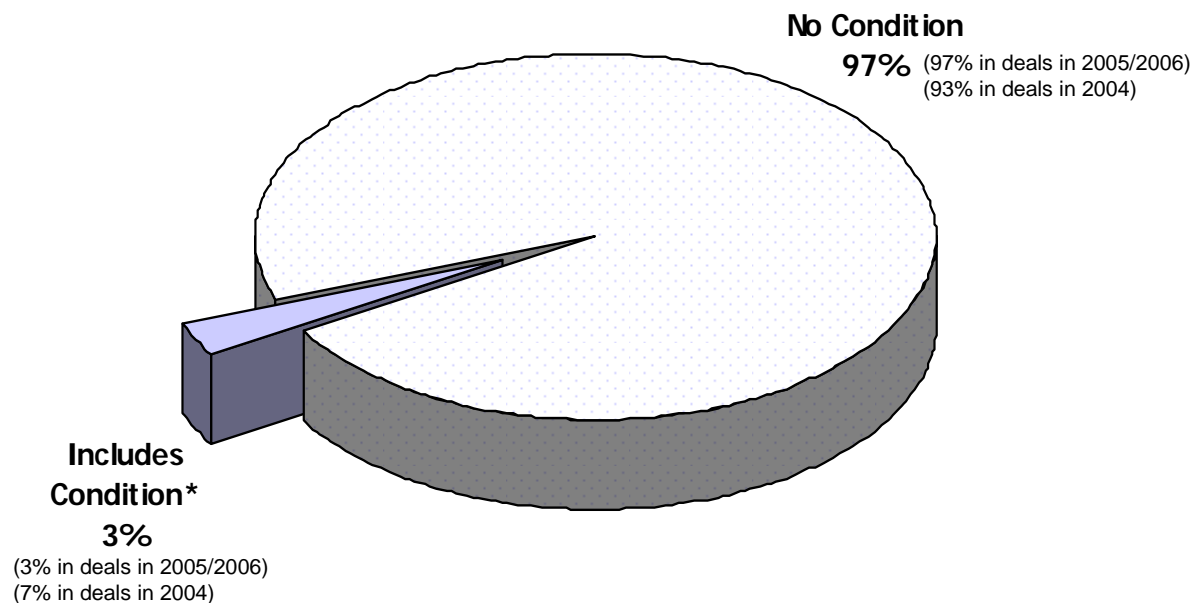


- * Does not include two deals containing an opinion condition because such condition relates to a single issue or because the scope of the opinion could not be determined.

Retention of Specified Employees of Target

“Employees. None of the individuals identified on Schedule 6.7(a) shall have ceased to be employed by the Target, or shall have expressed an intention to terminate his or her employment with the Target or to decline to accept employment with the Buyer; and not more than [__%] of the individuals identified on Schedule 6.7(b) shall have ceased to be employed by the Target or shall have expressed an intention to terminate their employment with the Target or to decline to accept employment with the Buyer.”

Retention of Specified Employees of Target

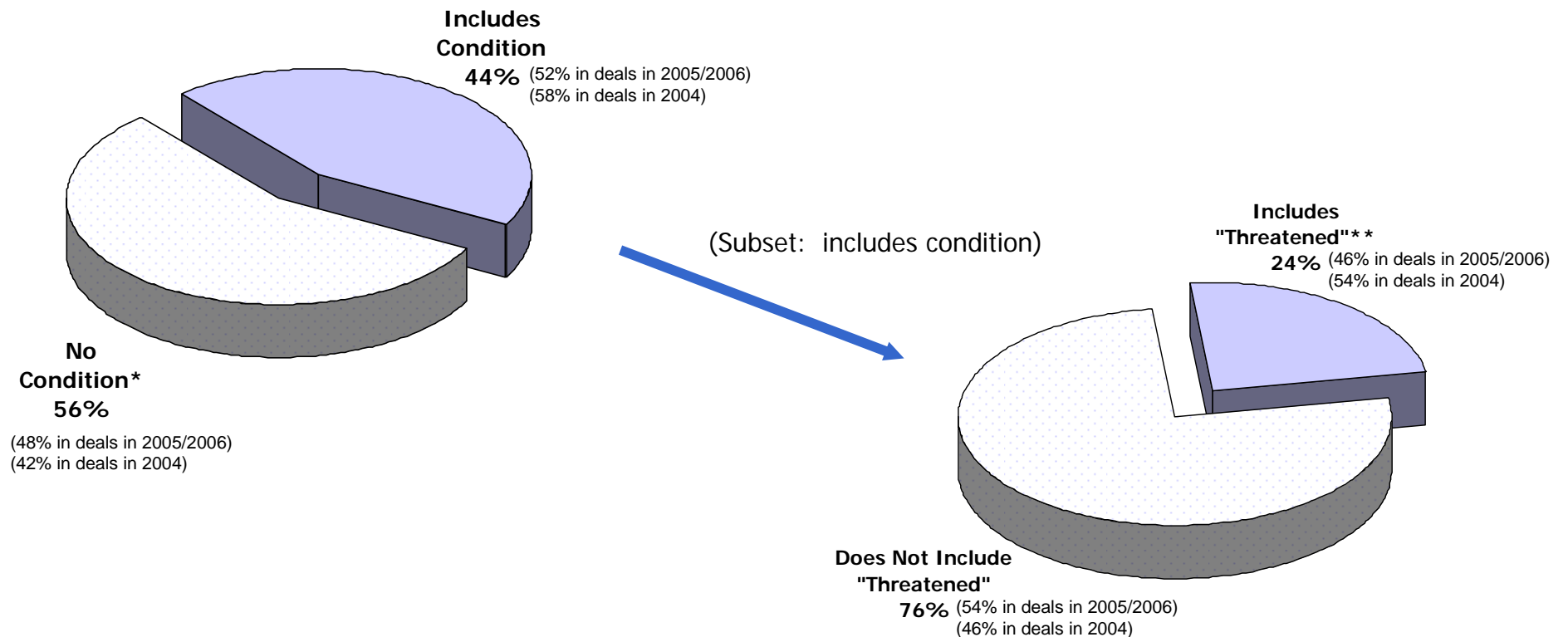


* Condition to the effect that “employment agreements remain in full force and effect” are not included in the 3% statistic. The 3% statistic includes agreements requiring that certain employees enter into new agreements as well as agreements that have either or both of a “single employee” trigger and/or a “percentage of employees” trigger – see prior slide for examples.

No Governmental Litigation Challenging the Transaction

“No Governmental Litigation. There shall not be **pending** or **threatened** any Legal Proceeding **in which a Governmental Body is or is threatened to become a party**. (a) challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement; (b) seeking to prohibit or limit in any material respect the Buyer’s ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of the Surviving Corporation; or (c) seeking to compel the Target, the Buyer or any Subsidiary of the Buyer to dispose of or hold separate any material assets as a result of the Merger or any of the other transactions contemplated by this Agreement.”

No Governmental Litigation Challenging the Transaction



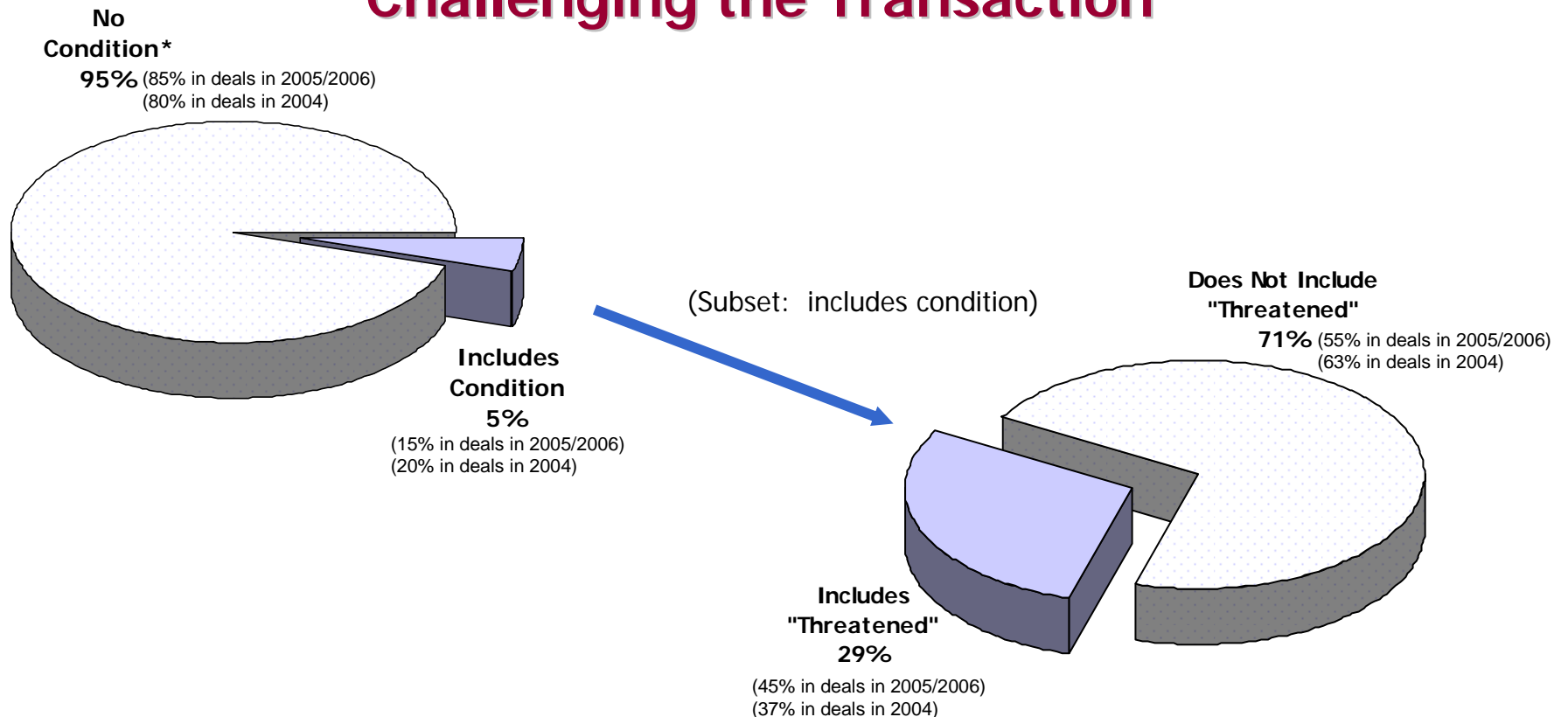
* Many of the agreements that did not include a specific “no governmental litigation” condition did include other provisions (such as a “material adverse change” condition or the “bring down” of the target’s “no litigation” representation) that could, under certain circumstances, provide the buyer with a walk right in the event of governmental litigation relating to the transaction.

** Of the transactions that included “threatened” governmental litigation, approximately 5% also included “in writing.”

No Non-Governmental Litigation Challenging the Transaction

“No Other Litigation. There shall not be *pending or threatened* any Legal Proceeding in which *any Person* is or is threatened to become a party: (a) challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement; (b) seeking to prohibit or limit in any material respect the Buyer’s ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of any of the Target; or (c) seeking to compel the Target, the Buyer or any Subsidiary of the Buyer to dispose of or hold separate any material assets as a result of the Merger or any of the other transactions contemplated by this Agreement.”

No Non-Governmental Litigation Challenging the Transaction

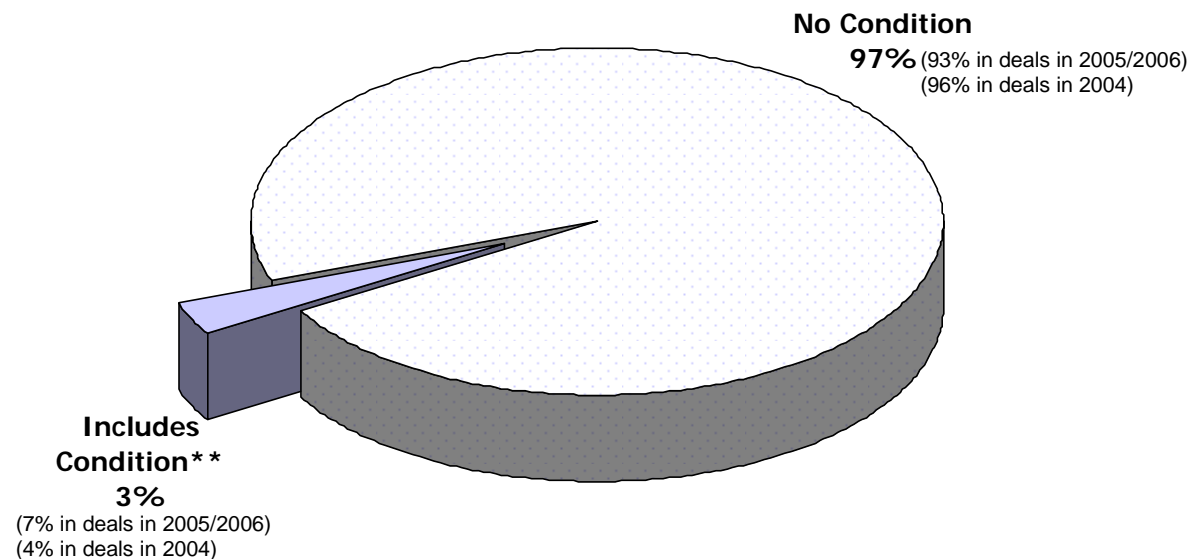


* Many of the agreements that did not include a specific “no non-governmental litigation” condition did include other provisions (such as a “material adverse change” condition or the “bring down” of the target’s “no litigation” representation) that could, under certain circumstances, provide the buyer with a walk right in the event of non-governmental litigation relating to the transaction.

Resignation of Target Directors

“Agreements and Documents. The Buyer and the Target shall have received the following agreements and documents, each of which shall be in full force and effect: . . . (___) the written resignations of all directors of the Target, effective as of the Effective Time.”

Resignation of Target Directors*

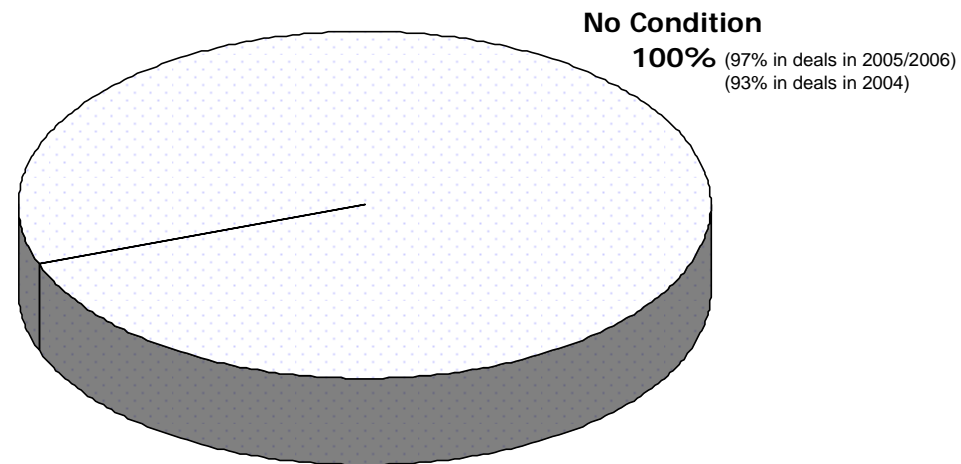


- * Some of the agreements that did not include a specific “resignation of target directors” condition did include other provisions (such as covenant of target to use certain efforts to obtain specified director resignations) that could, under certain circumstances, provide the buyer the ability to delay closing in the event that director resignations were not obtained.
- ** Two of the four deals with a director resignation condition involved targets that had staggered boards of directors.

Availability of Financing

“Financing. The Buyer shall have obtained the financing described in the Commitment Letters on the terms set forth in the Commitment Letters and on such other terms as are reasonably satisfactory to the Buyer.”

Availability of Financing (Subset: Transactions In Which Consideration Was 100% Cash)*

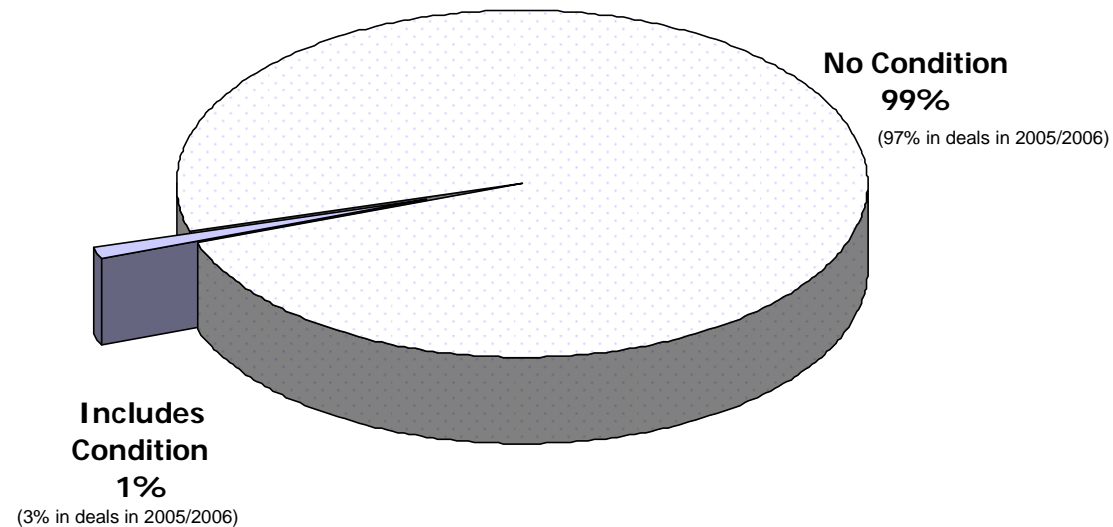


* None of the part cash/part stock deals included in the sample contained a financing condition.

Receipt/Bring Down of Fairness Opinion

“Fairness Opinion. The opinion of [Investment Banker] to the effect that the Exchange Ratio is fair, from a financial point of view, to the shareholders of the Target shall not have been withdrawn and shall be in full force and effect.”

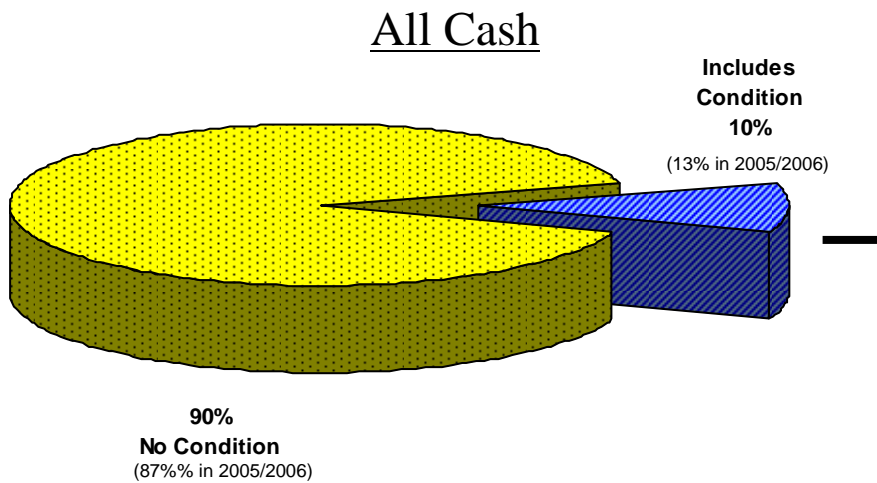
Receipt/Bring Down of Fairness Opinion



Appraisal Rights

“Appraisal Rights. The aggregate number of shares of Target Common Stock at the effective time of the Merger, the holders of which have demanded purchase of their shares of Target Common Stock in accordance with the provisions of Section 262 of the DGCL, shall not equal [10]% or more of the shares of Target Common Stock outstanding as of the record date for the Target Stockholders Meeting.”

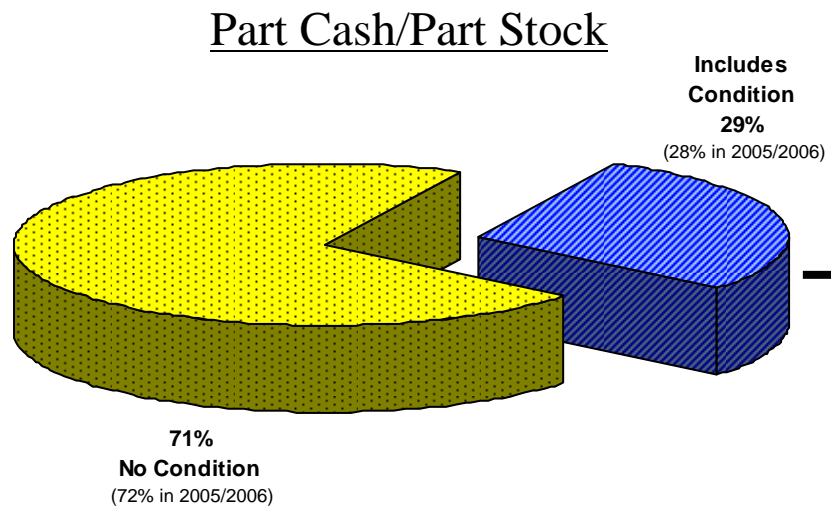
Appraisal Rights



(Subset:
Includes Condition)

All Cash

<u>Appraisal Rights Cap</u>	<u>Number of Deals</u>
11% - 15%	2 out of 11
6% - 10%	9 out of 11



(Subset:
Includes Condition)

Part Cash/Part Stock

<u>Appraisal Rights Cap</u>	<u>Number of Deals</u>
More than 15%	1 out of 7
11% - 15%	1 out of 7
6% - 10%	4 out of 7
1% - 5%	1 out of 7

Deal Protection and Related Provisions

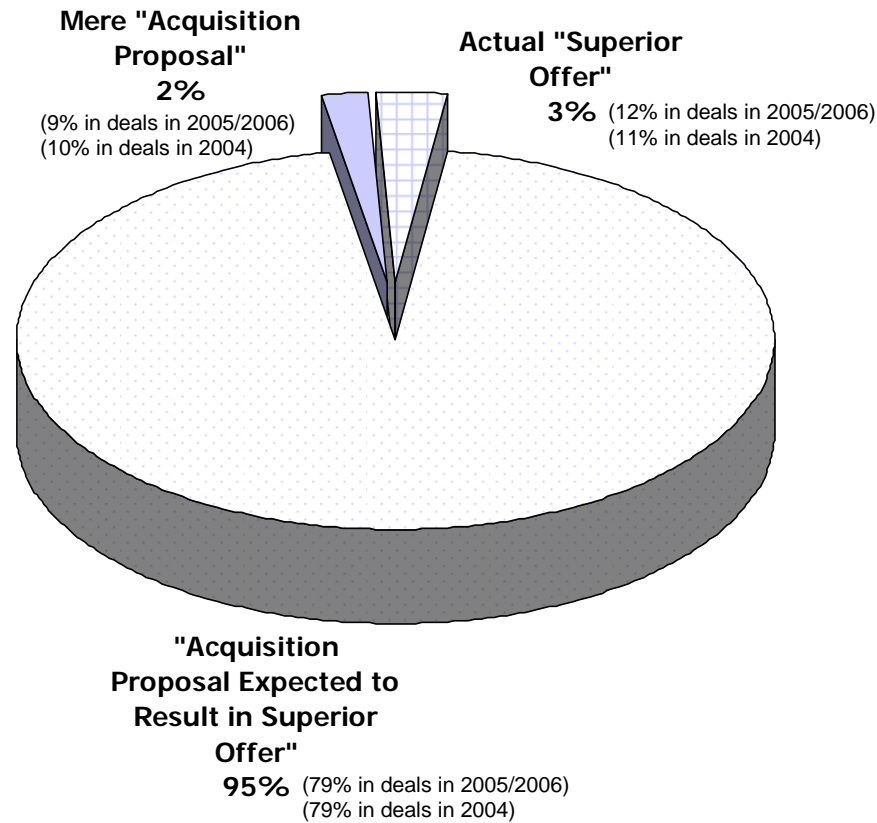
Target No-Shop/No-Talk; Fiduciary Exception to No-Talk

“No Solicitation. The Target shall not directly or indirectly, and shall not authorize or permit any of the other Acquired Corporations or any Representative of any of the Acquired Corporations directly or indirectly to: (a) solicit, initiate, encourage, induce or facilitate the making, submission or announcement of any Acquisition Proposal . . . ; (b) furnish any nonpublic information regarding any of the Acquired Corporations to any Person in connection with or in response to an Acquisition Proposal or an inquiry or indication of interest that could lead to an Acquisition Proposal; (c) engage in discussions or negotiations with any Person with respect to any Acquisition Proposal; (d) . . . ;”

Fiduciary Exception to No-Talk

“*provided, however,* that prior to the approval of this Agreement by the Required Target Stockholder Vote, this Section 4.3(a) shall not prohibit the Target from furnishing nonpublic information regarding the Acquired Corporations to, or entering into discussions with, any Person *in response to [an Acquisition Proposal] [an Acquisition Proposal that is reasonably likely to result in a Superior Offer] [a Superior Offer]* that is submitted to the Target by such Person (and not withdrawn) if . . . ”

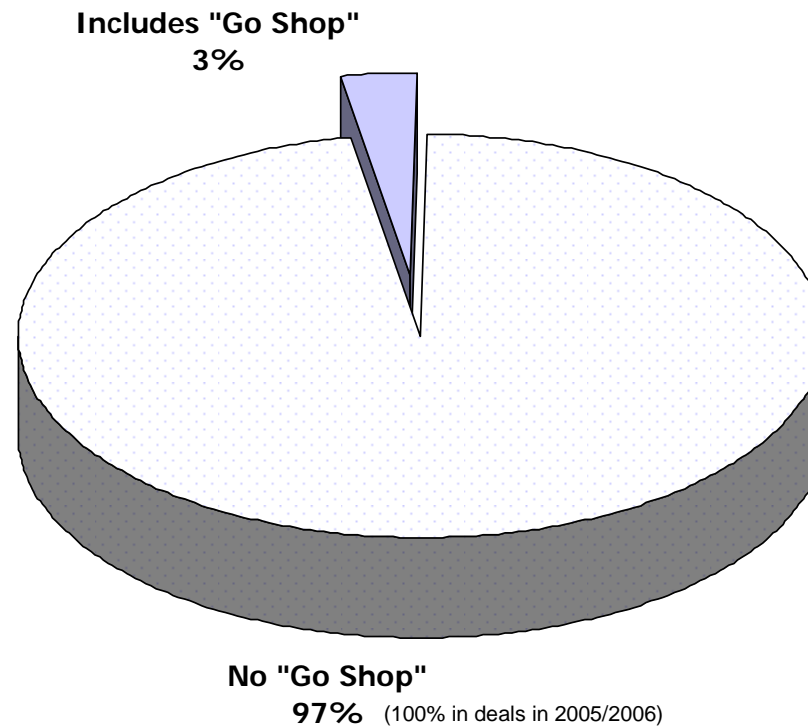
Fiduciary Exception to No-Talk



Go Shop

“Go Shop. During the period beginning on the date of this Agreement and continuing until 11:59 p.m. (EST) on the date that is [25] days after the date hereof . . . , the Target . . . shall have the right . . . to directly or indirectly: (i) initiate, solicit and encourage Acquisition Proposals, including by way of providing access to non-public information pursuant to one or more Acceptable Confidentiality Agreements, provided that the Target shall promptly provide to the Buyer any material non-public information concerning the Target or its Subsidiaries that is provided to any Person given such access which was not previously made available to the Buyer; and (ii) enter into and maintain discussions or negotiations with respect to potential Acquisition Proposals or otherwise cooperate with or assist or participate in, or facilitate, any such inquiries, proposals, discussions or negotiations.”

Go Shop



Fiduciary Exception to Target Board Recommendation Covenant (“Superior Offer”)

“Notwithstanding anything to the contrary contained in Section 5.2(b), at any time prior to the approval of this Agreement by the Required Target Stockholder Vote, the Target Board Recommendation may be withdrawn or modified in a manner adverse to the Buyer if: (i) **an unsolicited, bona fide written offer** . . . is made to the Target and is not withdrawn . . .

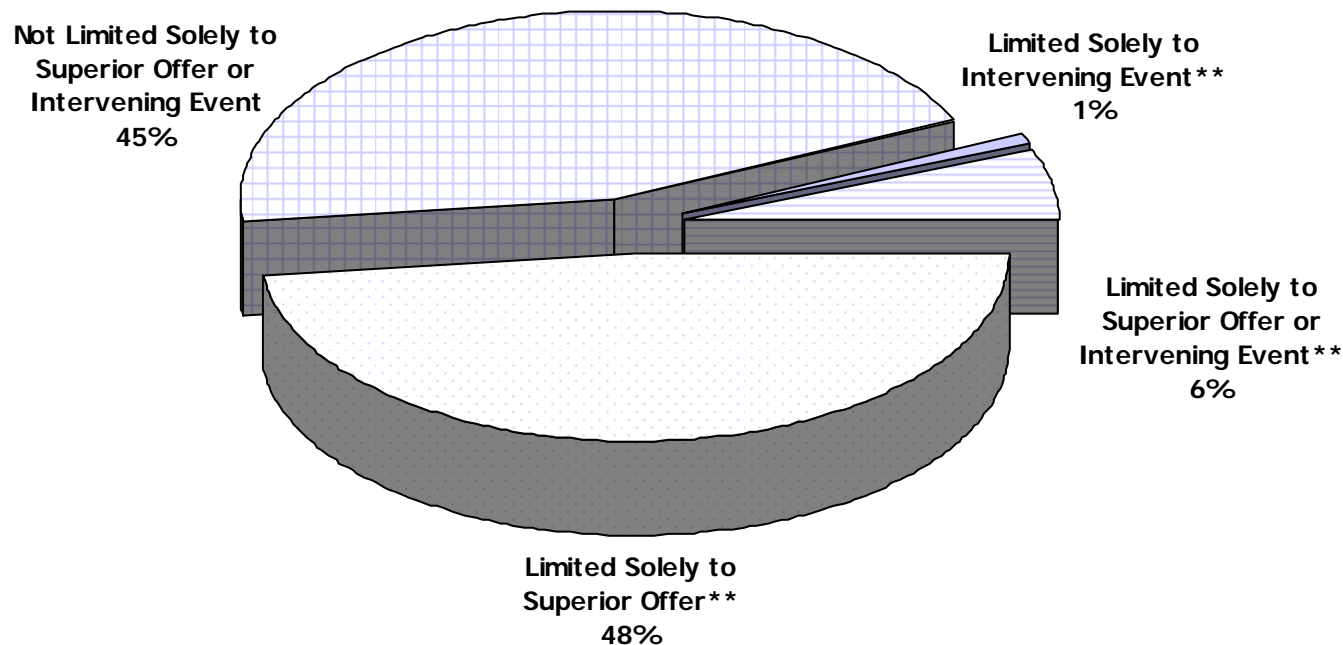
(iii) the Target’s board of directors determines in good faith (based upon a written opinion of an independent financial advisor of nationally recognized reputation) **that such offer constitutes a Superior Offer**;

(iv) the Target’s board of directors determines in good faith . . . that, in light of such Superior Offer, the withdrawal or modification of the Target Board Recommendation is required in order for the Target’s board of directors to comply with its fiduciary obligations to the Target’s stockholders under applicable law . . .”

Fiduciary Exception to Target Board Recommendation Covenant ("Superior Offer/Intervening Event")

"Notwithstanding anything to the contrary contained in Section 5.2(b), at any time prior to the approval of this Agreement by the Required Target Stockholder Vote, the Target Board Recommendation may be withdrawn or modified in a manner adverse to the Buyer if: (A)(i) an unsolicited, bona fide written offer... is made to the Target and is not withdrawn... and the Target's board of directors determines in good faith (based upon a written opinion of an independent financial advisor of nationally recognized reputation) that such offer constitutes a Superior Offer; or (ii) a material development or change in circumstances occurs or arises after the date of this Agreement [that was not known by the Target's board of directors as of the date of this Agreement] (such material development or change in circumstances being referred to as an "Intervening Event"), and (B) the Target's board of directors determines in good faith . . . that, in light of such Superior Offer or such Intervening Event, the withdrawal or modification of the Target Board Recommendation is required in order for the Target's board of directors to comply with its fiduciary obligations to the Target's stockholders under applicable law . . ."

Fiduciary Exception to Target Board Recommendation Covenant*



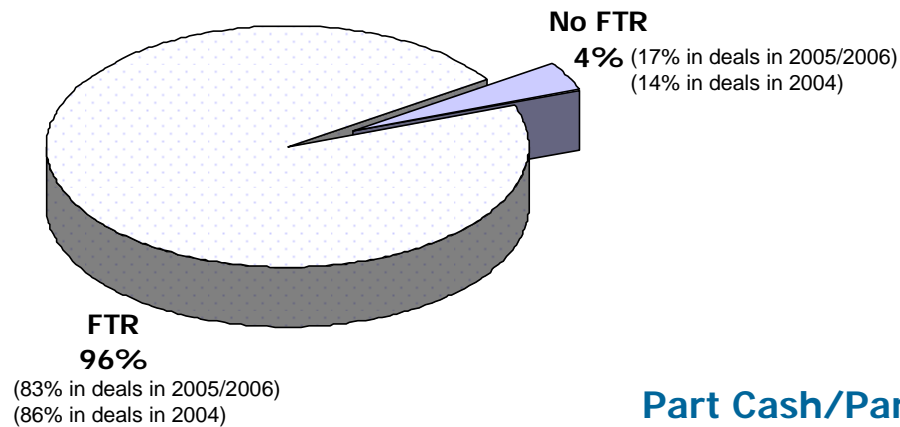
- * Three transactions were excluded from the main study sample because the relevant acquisition agreement did not include a customary form of recommendation covenant. For deals in 2005/2006, the fiduciary exception was limited to a Superior Offer in 48% of the transactions tested (as compared to 41% in deals in 2004). The Intervening Event concept was not tested in prior years.
- ** A number of transactions in which the fiduciary exception was limited to a Superior Offer and/or an Intervening Event also included provisions generally allowing the board to comply with its fiduciary duty of candor and/or securities laws.

Target Fiduciary (Superior Offer) Termination Right

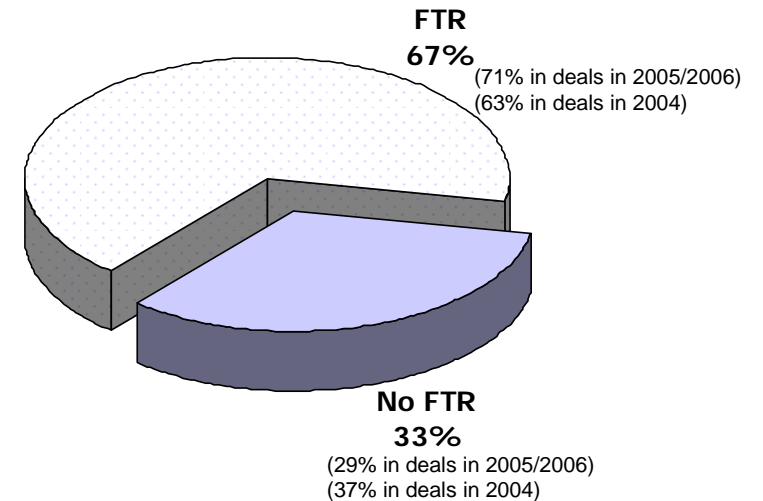
“Termination. This Agreement may be terminated at any time prior to the Effective Time . . . (f) by the Target if: (i) the Target Stockholder Approval has not been obtained; and (ii) concurrently the Target enters into a definitive Target Acquisition Agreement providing for a Superior Offer in accordance with Section 5.3; *provided that [first pay “break-up” fee].*”

Target Fiduciary (Superior Offer) Termination Right

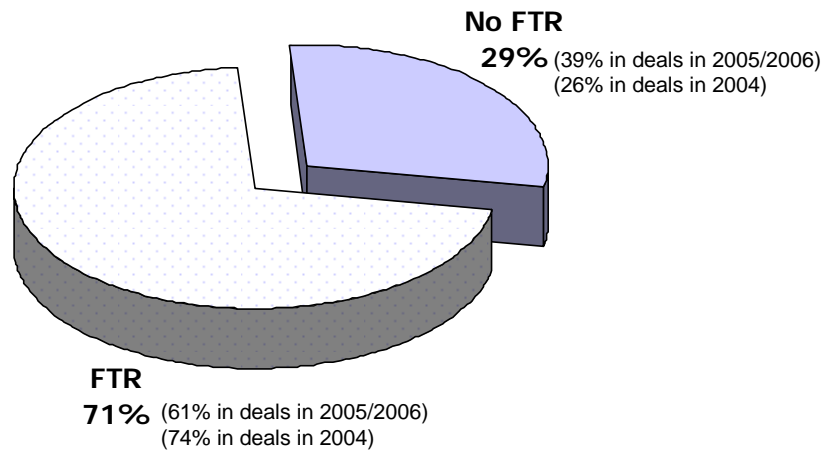
All Cash



All Stock



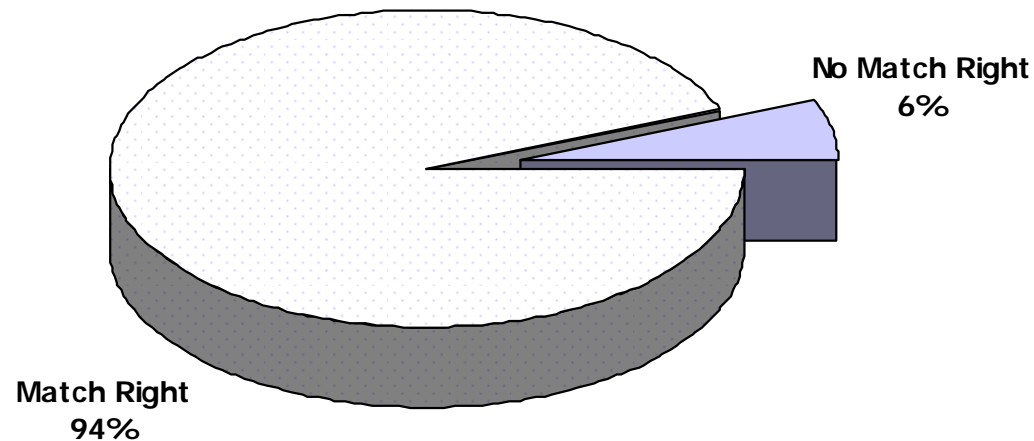
Part Cash/Part Stock



Buyer “Match Right” to Target Fiduciary (Superior Offer) Termination Right

“Termination. This Agreement may be terminated at any time prior to the Effective Time . . . (f) by the Target if: (i) the Target Stockholder Approval has not been obtained; (ii) (A) the Target Board has determined that an Acquisition Proposal constitutes a Superior Offer, (B) Target has provided notice to Buyer of such determination, (C) Target has negotiated in good faith with Buyer to amend the terms of this Agreement so that the Superior Offer would no longer constitute a Superior Offer, (D) [five] days have elapsed since such notice to Buyer and the Acquisition Proposal remains a Superior Offer, and (iii) concurrently with the termination under this subsection (f), the Target enters into a definitive Target Acquisition Agreement providing for the Superior Offer; *provided that [first pay “break-up” fee].*”

Buyer “Match Right” to Target Fiduciary (Superior Offer) Termination Right*



* Only agreements providing a fiduciary (superior offer) termination right that also expressly provided the buyer with the right to “match” the superior offer prior to the target’s ability to terminate the agreement are listed as having a “match right.” Four agreements studied contained other provisions (such as notification rights and restrictions on the ability of the Target to terminate for a specified period of time) which may effectively give the buyer a match right, but were not included because such provision did not explicitly grant that right. Many of the agreements studied also included a match right concept with respect to the ability of the Target board to change its recommendation.

Target “Break-Up” Fee Triggers

“8.3 Expenses; Termination Fees.

(a) Except as set forth in this Section 8.3, all fees and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement shall be paid by the party incurring such expenses, whether or not the Merger is consummated; *provided, however*, that:

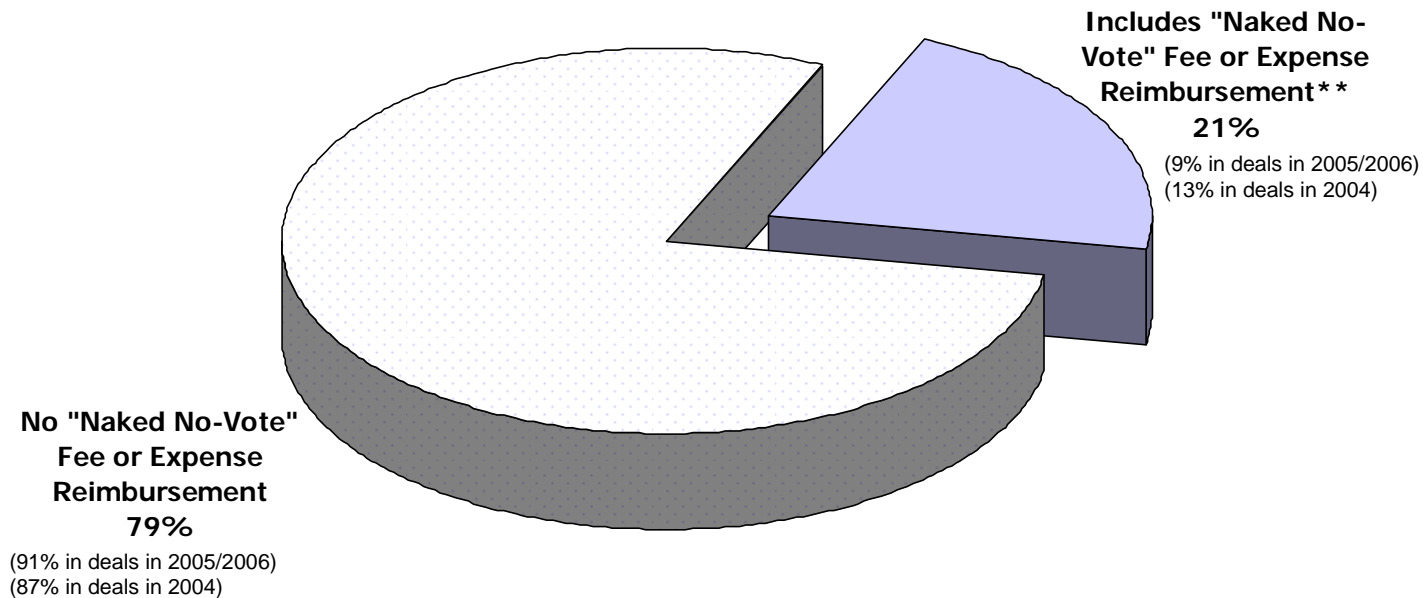
(i) [**Naked No-Vote Fee**] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(d) [*no vote*], then the Target shall [reimburse the Buyer for all expenses incurred by the Buyer in connection with the Merger] [pay to the Buyer, in cash, a nonrefundable fee in the amount of \$_____].

(ii) [**Fee for No-Vote + Acquisition Proposal**] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(d) [*no vote*] **and** at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been made, then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount of \$_____.

(iii) [**Drop-Dead Date + Acquisition Proposal**] If this Agreement is terminated by the Buyer or the Target pursuant to Section 8.1(b) [*drop dead date*] **and** at or prior to the time of the termination of this Agreement an Acquisition Proposal shall have been made, then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount of \$_____.

(iv) [**Change in Board Recommendation; Certain Breaches**] If this Agreement is terminated by the Buyer pursuant to Section 8.1(e) [*change in Board Recommendation*], Section 8.1(f) [*breach of no shop or meeting covenants*] or Section 8.1(g) [*breach of representations, warranties or covenants*], then the Target shall pay to the Buyer, in cash, a nonrefundable fee in the amount of \$_____.”

Target "Break-Up" Fee Triggers ("Naked No-Vote")*

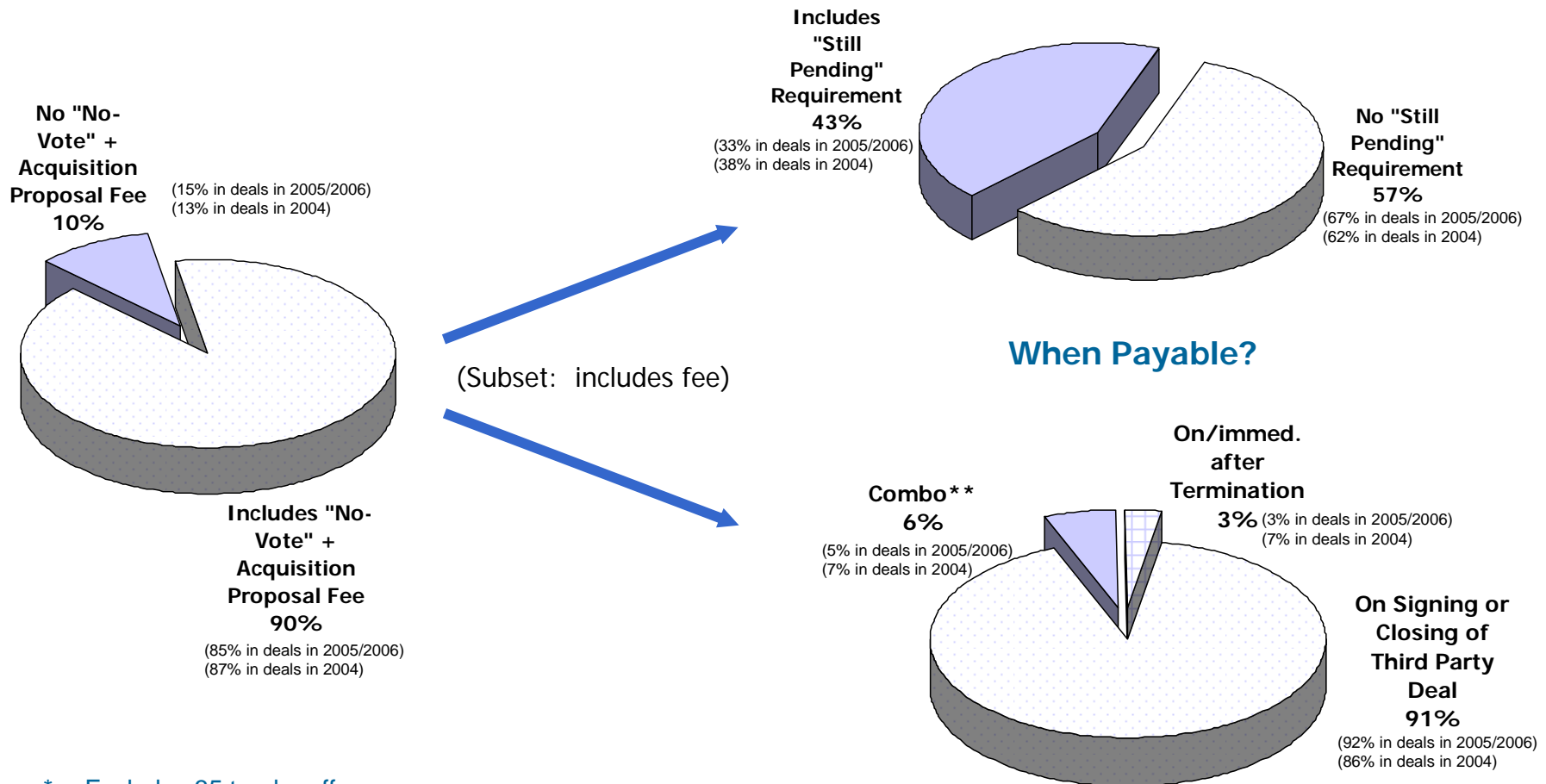


* Excludes 35 tender offers.

** Out of the 24 transactions that contained a "naked no-vote" trigger, 20 required reimbursement of expenses only, three required payment of a full break-up fee (i.e., the same dollar amount as the break-up fee payable in other contexts) and one required payment of a partial break-up fee.

Target "Break-Up" Fee Triggers ("No-Vote" + Acquisition Proposal)*

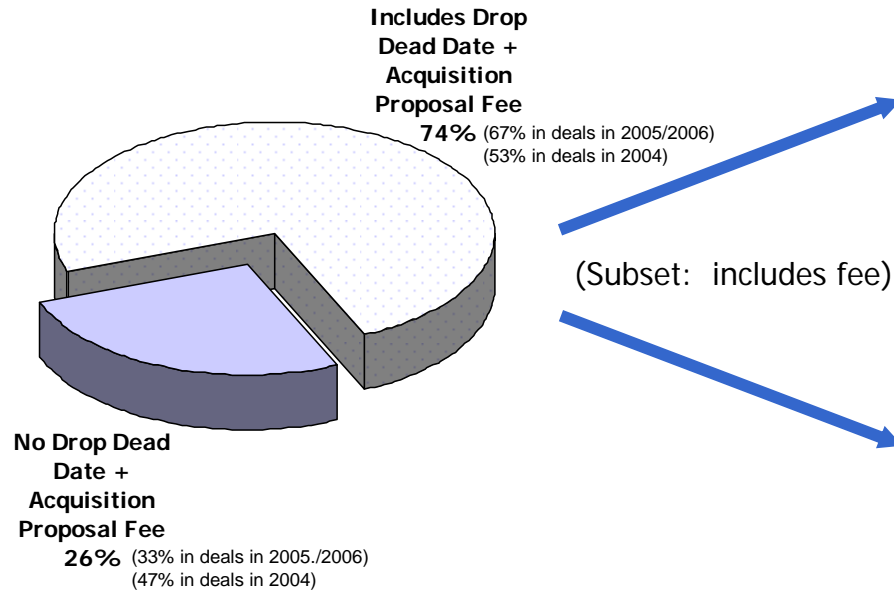
Must Acquisition Proposal be Pending?



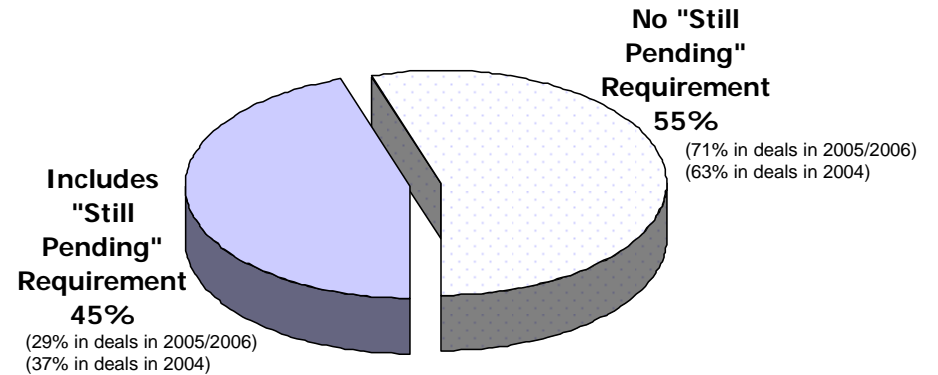
* Excludes 35 tender offers.

** Part of fee payable on/immediately after termination and part of fee payable on signing or consummation of third party deal.

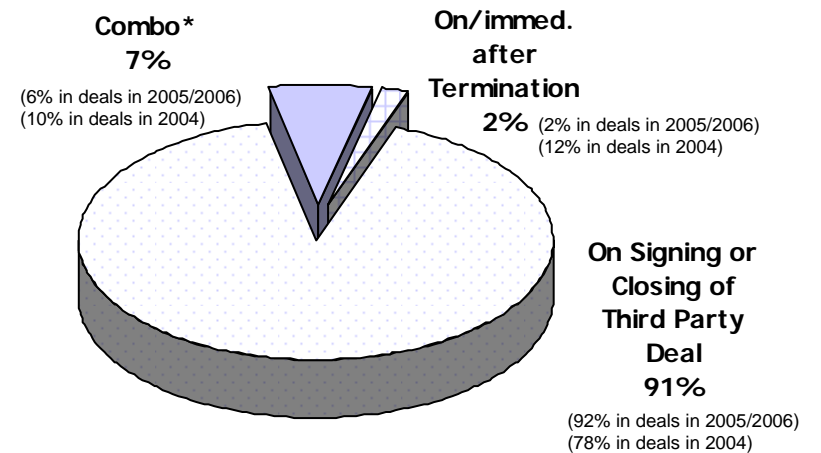
Target "Break-Up" Fee Triggers (Drop Dead Date + Acquisition Proposal)



Must Acquisition Proposal be Pending?

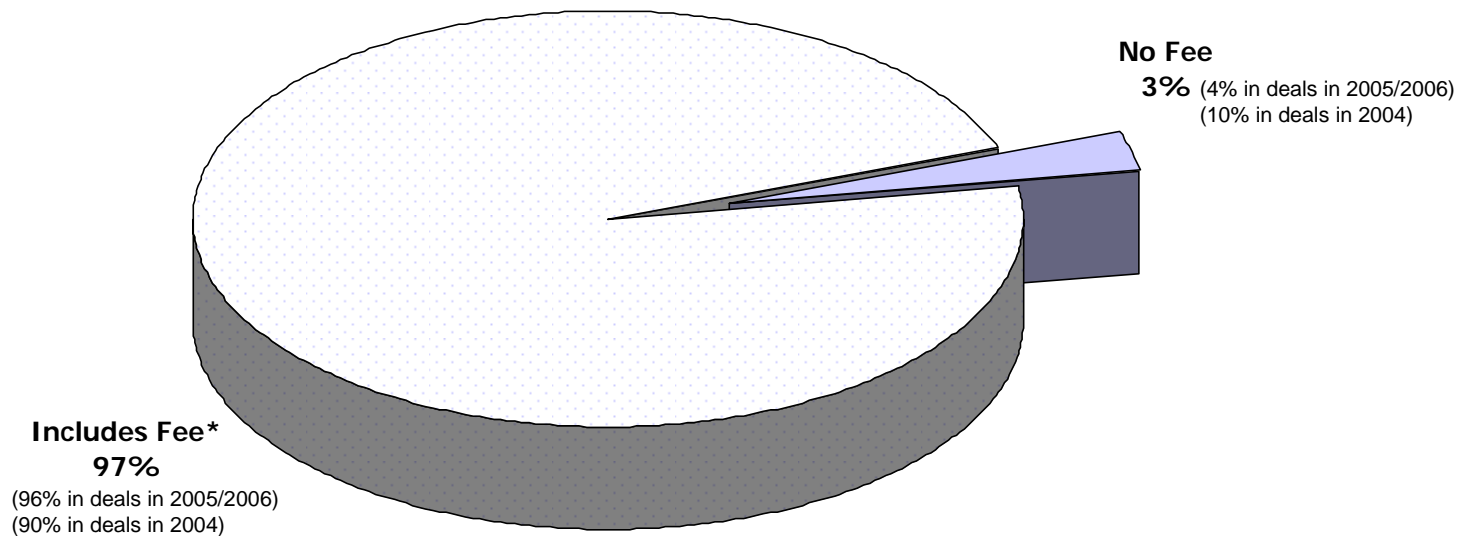


When Payable?



* Part of fee payable on/immediately after termination and part of fee payable on signing or consummation of third party deal.

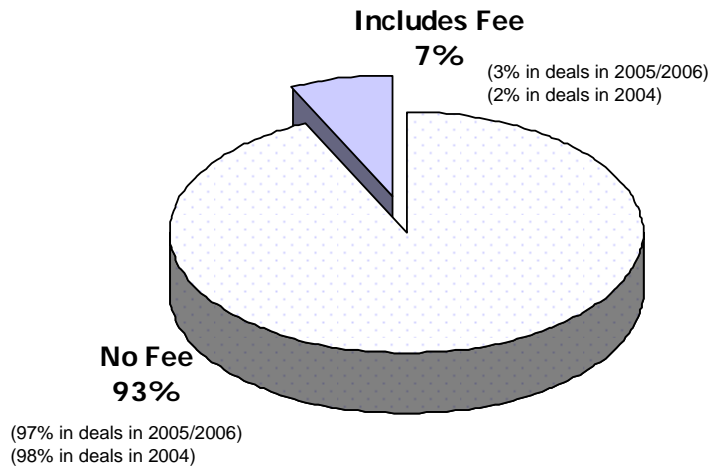
Target "Break-Up" Fee Triggers (Change of Board Recommendation)



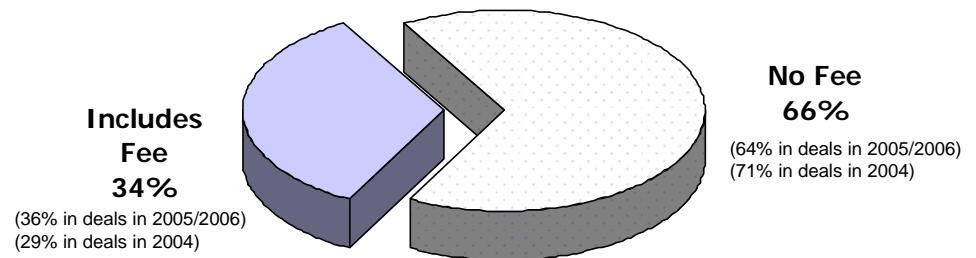
- * 14% of the transactions providing for a fee in this instance contain conditions in addition to mere change or withdrawal of board recommendation, such as consummation of a third party deal within a specified period after termination.

Target "Break-Up" Fee Triggers (Breach of Acquisition Agreement)

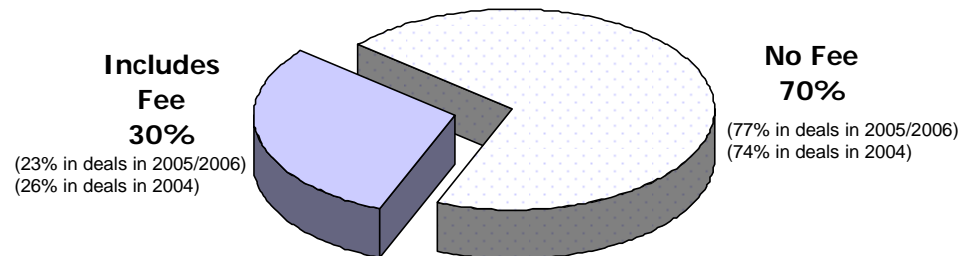
General Breach*



Breach No-Shop**



Breach Stockholder Meeting Covenants**



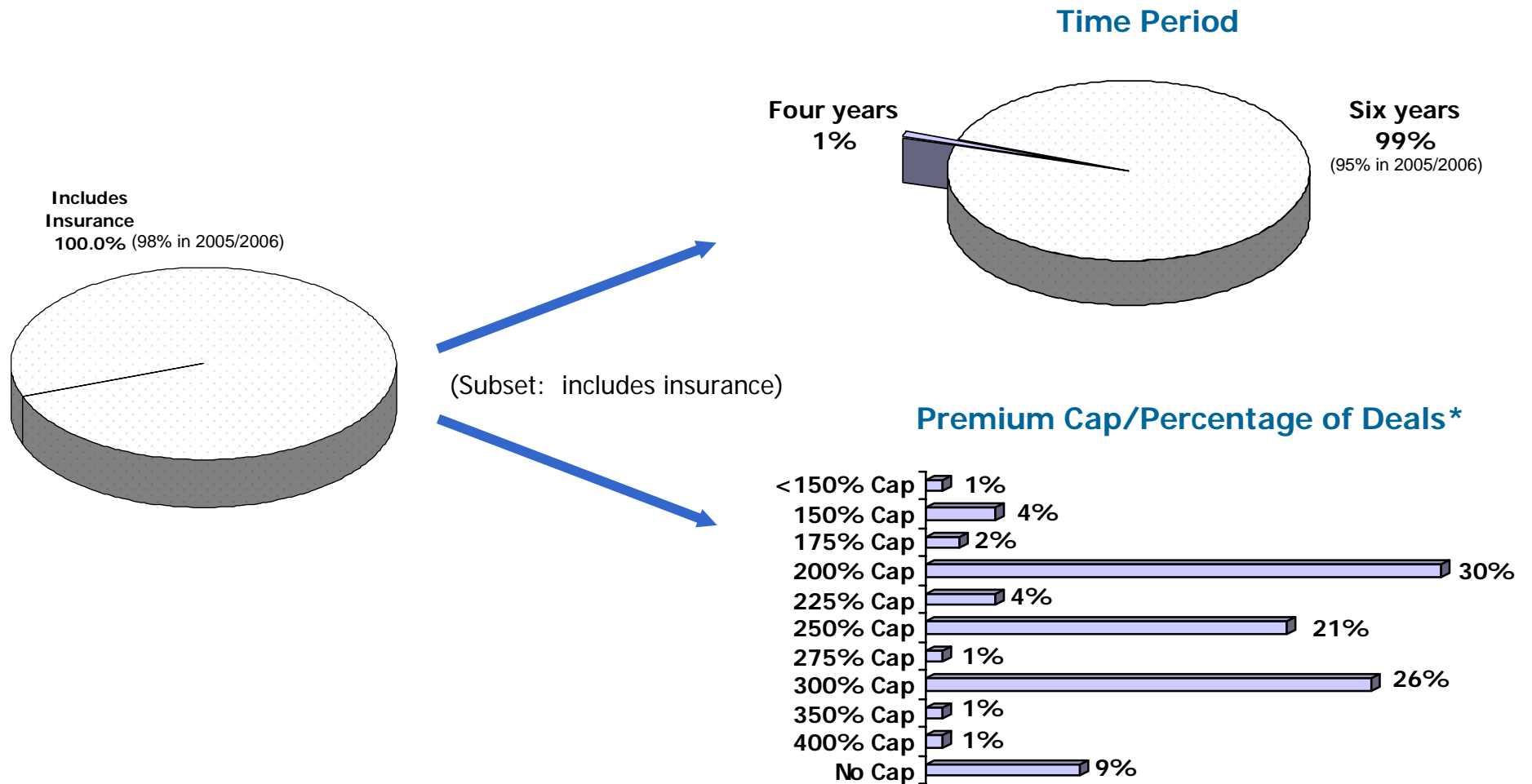
- * General breach of representations, warranties and covenants: (a) is limited to transactions in which mere breach, without other conditions (such as consummation of a third party bid), triggers a break-up fee; however, some transactions require willful or intentional breach; and (b) do not include transactions in which a breach triggers reimbursement of expenses rather than full break-up fee.
- ** Breach of stockholder meeting covenants and breach of no-shop covenants: (a) do not include general breach of representations, warranties and covenants; and (b) are limited to transactions in which mere breach, without other conditions, triggers a break-up fee.

Other Acquisition Agreement Data Points

D&O Insurance

“D&O Insurance. From the Effective Time until the ___ anniversary of the Effective Time, the Surviving Corporation shall maintain in effect, for the benefit of the Indemnified Persons with respect to their acts and omissions occurring prior to the Effective Time, the existing policy of directors’ and officers’ liability insurance maintained by the Target as of the date of this Agreement in the form disclosed by the Target to the Buyer prior to the date of this Agreement (the “Existing Policy”); *provided, however,* that: (i) the Surviving Corporation may substitute for the Existing Policy a policy or policies of comparable coverage; and (ii) the Surviving Corporation shall not be required to pay annual premiums for the Existing Policy (or for any substitute policies) in excess of \$_____ in the aggregate [**150%** of the current premium]....

D&O Insurance



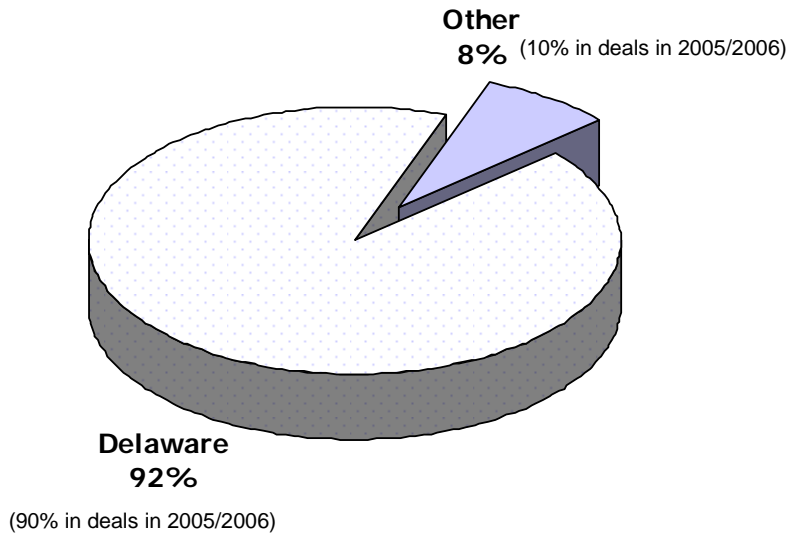
* Excludes 11 deals where premium cap percentage not determinable.

Choice of Law

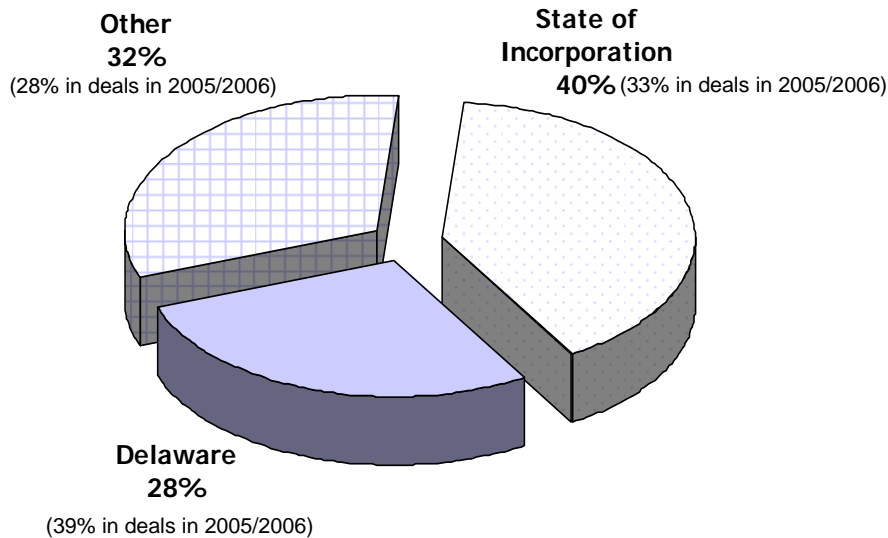
“Governing Law. This Agreement is made under, and shall be construed and enforced in accordance with, the laws of the State of [Delaware] applicable to agreements made and to be performed solely therein, without giving effect to principles of conflicts of law.”

Choice of Law*

Target incorporated in Delaware



Target *not* incorporated in Delaware

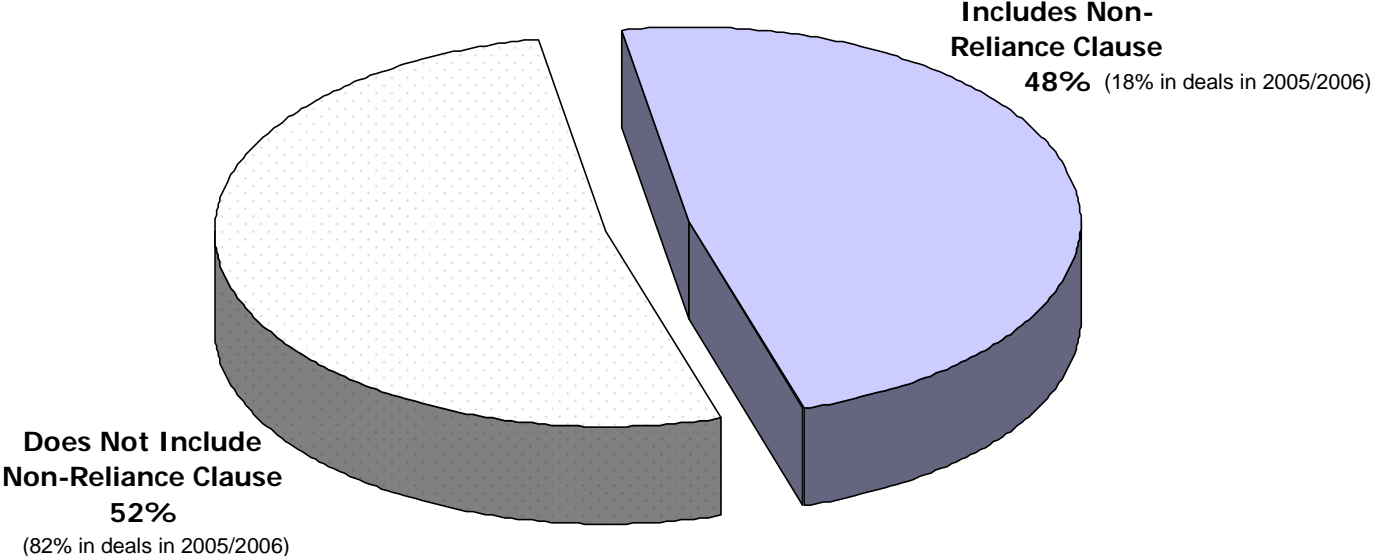


* The choice of law identified in the charts above refers to the law applicable to matters other than certain matters, such as the merger mechanics, that are mandatorily governed by the law of the jurisdiction of incorporation.

Non-Reliance

“Non-Reliance. The Buyer acknowledges that the 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, and that it is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in Section 3.”

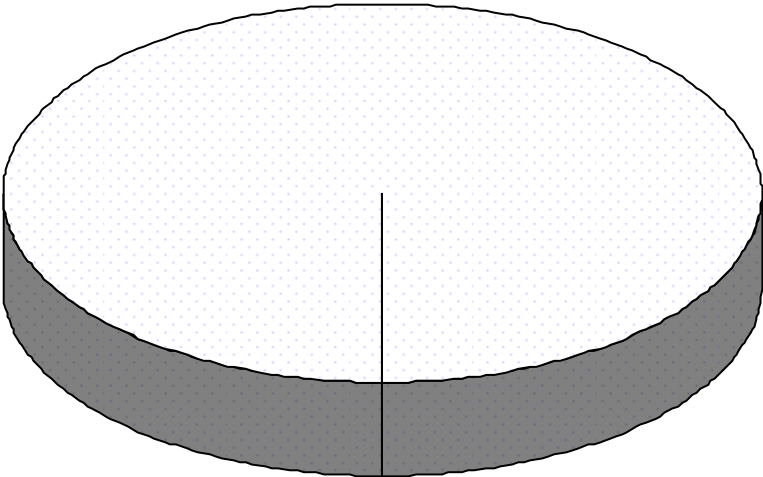
Non-Reliance



Entire Agreement/Integration

“Entire Agreement. This Agreement[, the other agreements referred to herein and the Confidentiality Agreement] constitute the entire agreement and supersede all prior agreements and understandings, both written and oral, among or between any of the parties with respect to the subject matter hereof and thereof. ”

Entire Agreement/Integration



**Includes Entire Agreement Clause
100%**

(100% in deals in 2005/2006)

Specific Performance

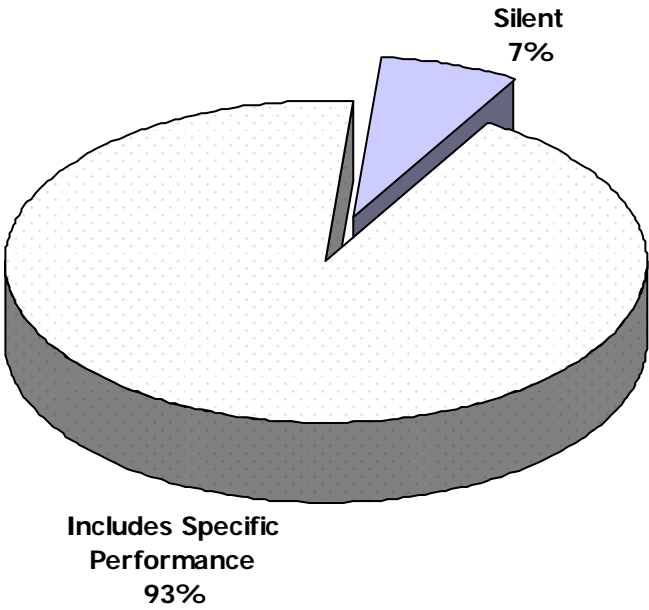
("Entitled" to Specific Performance)

Specific Performance. [Buyer/Target/the Parties] agree that money damages would not be a sufficient remedy for any breach of this Agreement [by Parent/Target]. It is hereby agreed that, prior to termination of this Agreement pursuant to Section 8.1, [Buyer/Target/the Parties] **shall be entitled to** specific performance and injunctive relief as a remedy for any such breach and to enforce compliance with the covenants of [Buyer/Target/the Parties] set forth in [Article V].

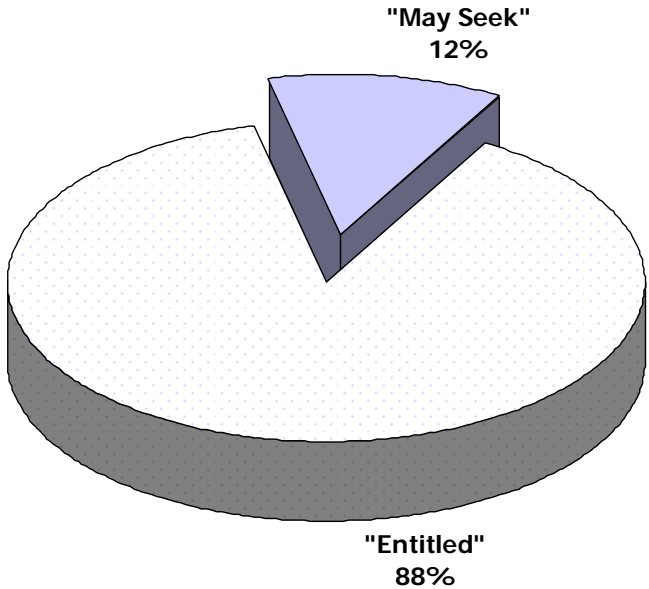
("May Seek" Specific Performance)

Specific Performance. [Buyer/Target/the Parties] agree that money damages would not be a sufficient remedy for any breach of this Agreement [by Parent/Target]. It is hereby agreed that, prior to termination of this Agreement pursuant to Section 8.1, [Buyer/Target/the Parties] shall be entitled **to seek** specific performance and injunctive relief as a remedy for any such breach and to enforce compliance with the covenants of [Buyer/Target/the Parties] set forth in [Article V].

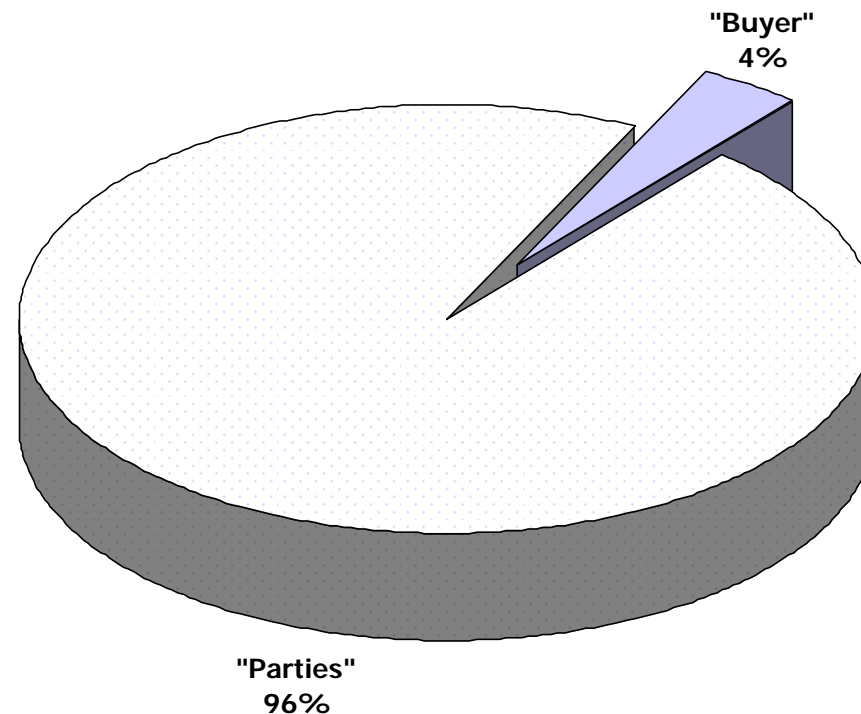
Specific Performance



(Subset: includes provision)

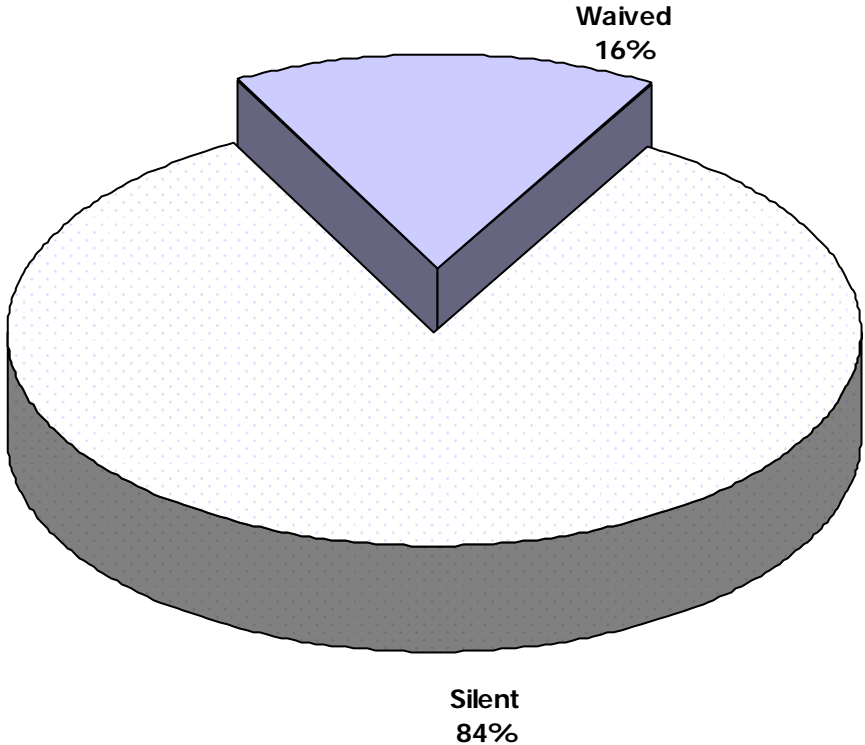


Specific Performance (In Favor of Whom?*)



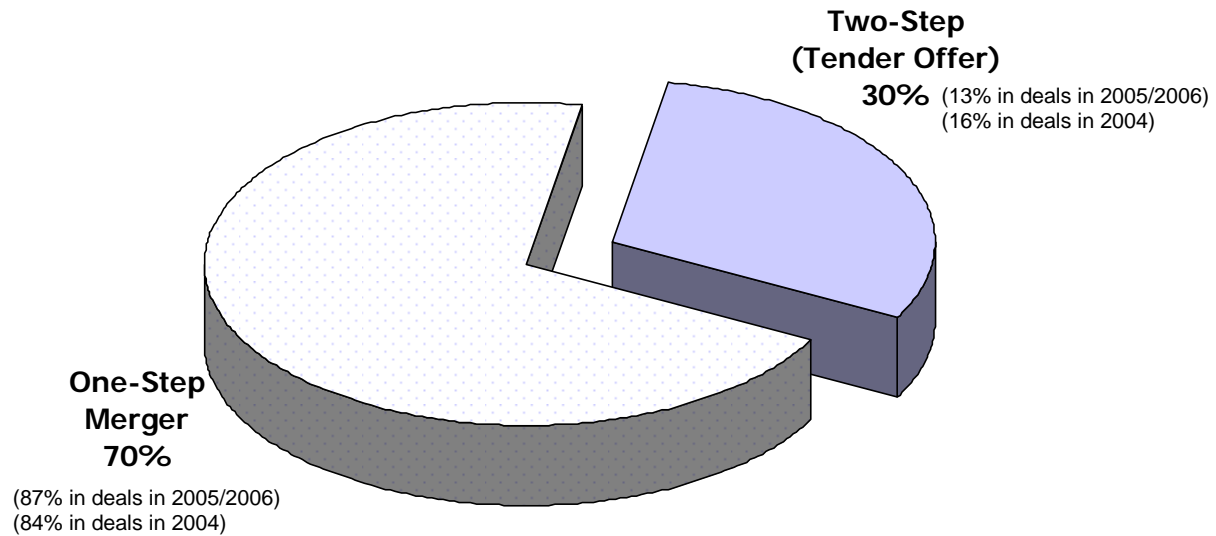
- * None of the 142 transactions having an express provision providing for the remedy of specific performance granted that right *exclusively* to the target. One transaction granting that remedy exclusively to the buyer did provide a limited right to the target to obtain specific performance for the breach by the buyer of confidentiality obligations.

Specific Performance (Waiver of Bond)



Two-Step Cash Transactions (Tender Offer Deals)

Structure of Cash Deals



Top-Up Option

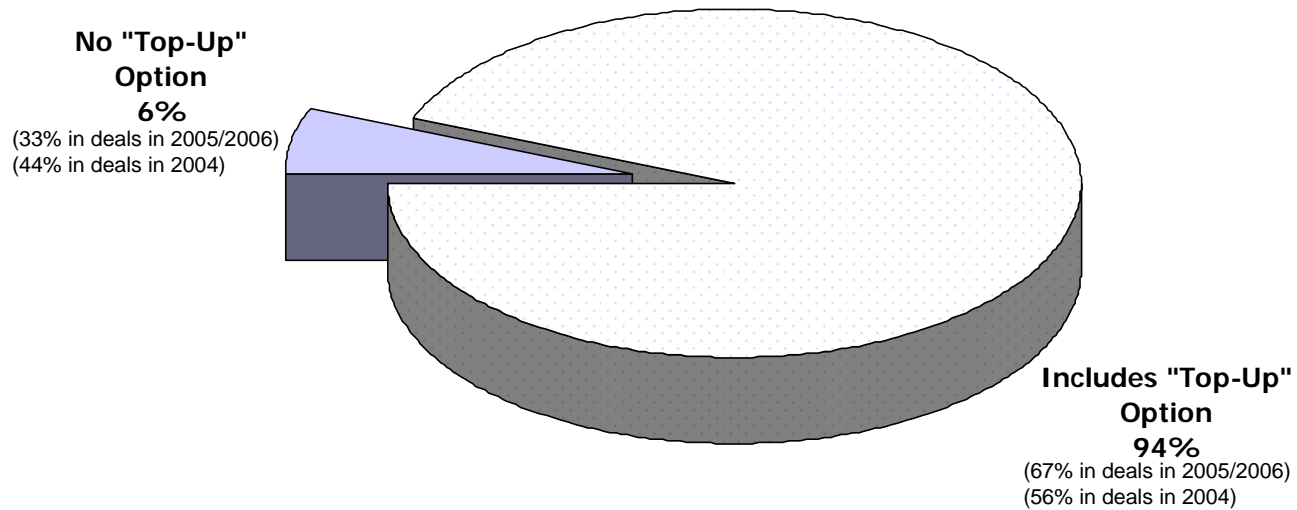
“Top-Up Option.

(a) The Target hereby grants to the Buyer and Acquisition Sub an irrevocable option (the “Top-Up Option”) to purchase that number of Shares (the “Top-Up Option Shares”) equal to the lowest number of Shares that, when added to the number of Shares owned by the Buyer and/or Acquisition Sub at the time of exercise of the Top-Up Option, shall constitute one Share more than 90% of the Shares then outstanding (assuming the issuance of the Top-Up Option Shares) at a price per Share equal to the Offer Price; *provided, however*, that the Top-Up Option shall not be exercisable unless immediately after such exercise the Buyer and/or Acquisition Sub would own more than 90% of the Shares then outstanding.

(b) The Buyer or Acquisition Sub may exercise the Top-Up Option, in whole but not in part, at any time after the occurrence of a Top-Up Exercise Event and prior to the occurrence of a Top-Up Termination Event.

(c) For the purposes of this Agreement, a “Top-Up Exercise Event” shall occur upon Acquisition Sub’s acceptance for payment pursuant to the Offer of Shares constituting less than 90% of the Shares then outstanding. Each of the following shall be a “Top-Up Termination Event”: (i) the Effective Time; and (ii) the termination of this Agreement pursuant to its terms.”

Top-Up Option



Conditions Regarding Trading Suspension; Banking Moratorium; War/Terrorism; Limitation on Extension of Credit

“ANNEX A”

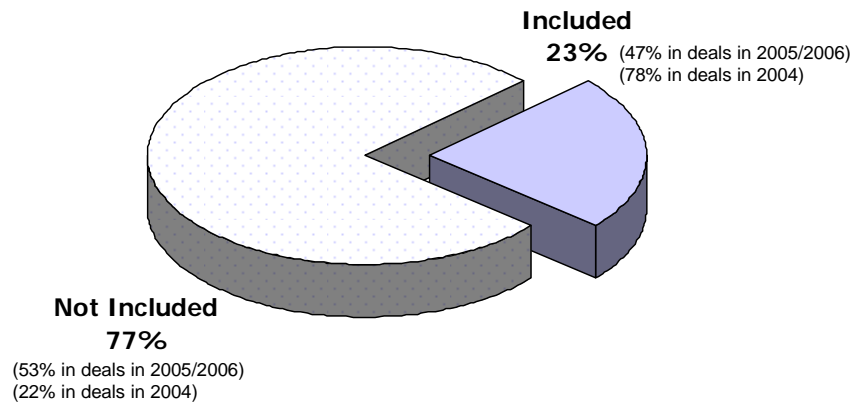
CONDITIONS TO THE OFFER

...Acquisition Sub shall not be required to accept for payment ...any tendered Target Shares, if... at any time on or after the execution and delivery of the Agreement and prior to the time of acceptance for payment for any such Target Shares, any of the following events shall have occurred:

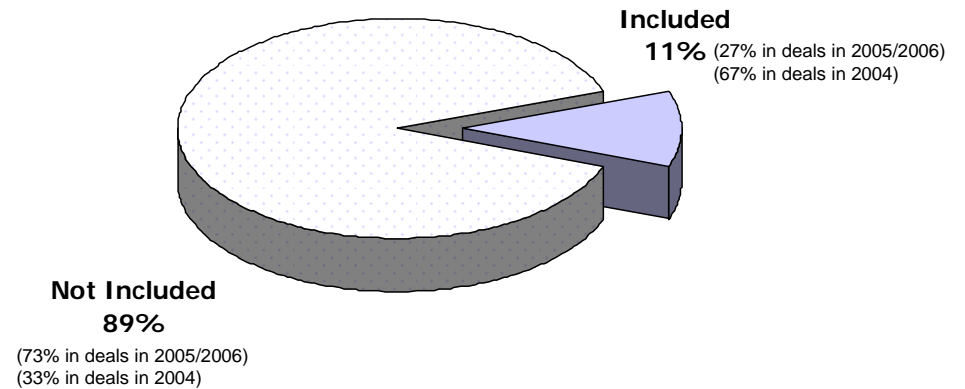
(c) ... (i) **any general suspension of trading** in, or limitation on prices for, securities on the New York Stock Exchange or on the Nasdaq, for a period in excess of twenty four hours; (ii) a declaration of a **banking moratorium** or any suspension of payments in respect of banks in the United States (whether or not mandatory); (iii) a commencement of a **war, armed hostilities or other international or national calamity (including terrorist activity)** directly or indirectly involving the United States; (iv) **any limitation** (whether or not mandatory) by any United States governmental authority **on the extension of credit generally** by banks or other financial institutions.”

Conditions Regarding Trading Suspension; Banking Moratorium; War/Terrorism; Limitation on Extension of Credit

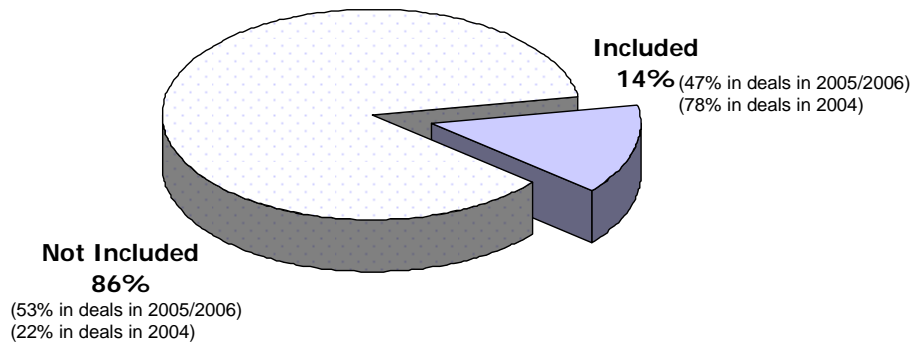
Banking Moratorium



Limitation on Extension of Credit



Trading Suspension



War/Terrorism

