

A League Table of Their Own: A Scouting Report on the State of the M&A Markets, Current Deal Terms and How and Why Women Excel in M&A

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Handouts

1. PowerPoint Presentation

Resources available on Dorsey.com

Dorsey & Whitney LLP eUpdate: *SEC Files First Reg FD Action In Years* (August 27, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/08/sec-files-first-reg-fd-action-in-years>

Dorsey Seminar Playback: *The HSR Merger Review Process: Basics and Recent Developments*
(April 29, 2019)

Link: <https://www.dorsey.com/newsresources/events/videos/2019/04/seminar-playback-hsr-merger-review-process>

Dorsey & Whitney LLP eUpdate: *Increase in HSR Reportability Thresholds and Other HSR Developments*
(February 20, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/02/hsr-reportability-thresholds>

**Materials are Available on www.dorsey.com at
<https://www.dorsey.com/newsresources/events/event/2019/11/corporate-counsel-symposium-2019-materials>**

Dorsey & Whitney LLP eUpdate: *Delaware Supreme Court Orders Company To Turn Over Emails To Stockholder In Response To Books And Records Request* (February 21, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/02/de-supreme-court-orders-company-turn-over-emails>

Dorsey & Whitney LLP eUpdate: *Understanding the SEC's New Mining Disclosure Rules: Questions and Answers* (February 5, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/02/new-mining-disclosure-rules-2019>

Dorsey & Whitney LLP eUpdate: *Government Shutdown Limits SEC Operations and Affects U.S. Public Companies and Stock Markets* (January 4, 2019)

Link: <https://www.dorsey.com/newsresources/publications/client-alerts/2019/01/government-shutdown-limits-sec-operations>

A League Table of Their Own: A Scouting Report on the State of the M&A Markets, Current Deal Terms and How and Why Women Excel in M&A

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Wednesday, November 6, 2019

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Agenda

- I. Introduction**
- II. M&A Market Update**
- III. Trends M&A Deal Terms**
- IV. Women in M&A / Interrupting Gender Bias**
- V. Conclusion**

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M&A Market Update

I. Introduction

II. M&A Market Update

III. Trends in M&A Deal Terms

IV. Women in M&A / Interrupting Gender Bias

V. Conclusion

Equity Market Performance Update

At the end of September 2019, the NASDAQ and NYSE indices were both down 1% since the end of September 2018 and were relatively flat compared to the levels at the end of June 2019.

Equity Market Performance



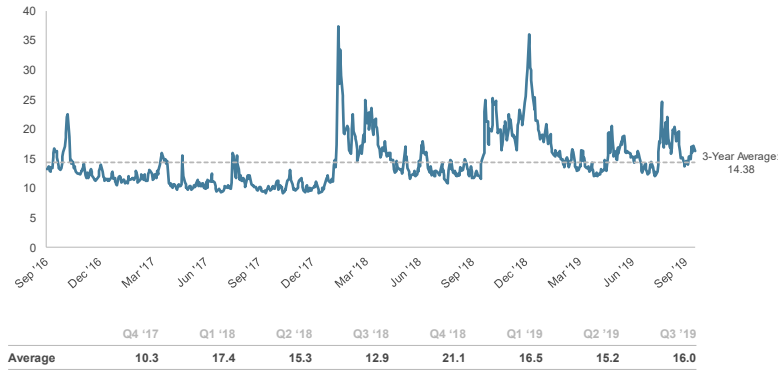
Source: S&P Capital IQ.



Market Volatility Movements

Market volatility increased in Q3 '19, with the VIX registering at 16.2 at the end of September 2019, as compared to 15.1 at the end of June 2019, and above the three-year average.

Volatility Index (VIX)



Source: S&P Capital IQ.



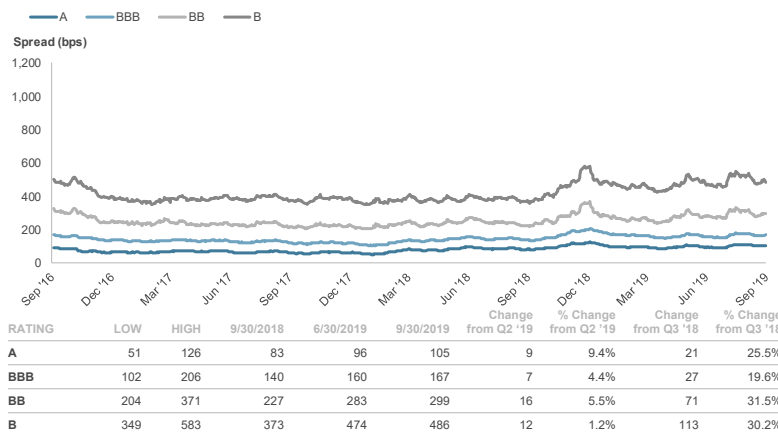
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Debt Market Performance Update

U.S. corporate and high-yield spreads widened in Q3 '19, as compared to spreads in Q2 '19 and spreads as of Q3 '18.

Corporate and High-Yield Spreads to 10-Year U.S. Treasury



Source: Bloomberg.



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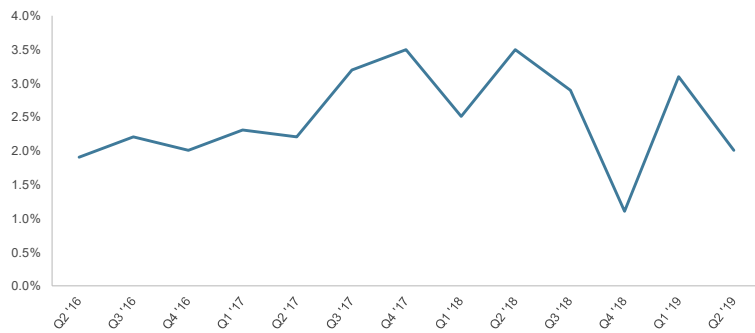
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U.S. GDP

The U.S. economy remains in positive growth territory after exiting the recession in June 2009, marking a slow but extended recovery.

- U.S. GDP growth for 2019 is expected to decline to 2.3% relative to the 2.9% GDP growth experienced in 2018, down from the 2.6% growth rate expected as of June. Expectations are for 1.8% annual GDP growth in 2020.⁽¹⁾
- The September 2019 National Association of Manufacturers Survey indicated that 67.9% of respondents were positive about business prospects, down from the 79.8% level reported in June 2019 and the 89.5% level in March 2019.
- Similarly, consumer confidence levels declined in September 2019, while the CEO confidence index declined to its lowest level in a decade in Q3 '19, registering concern for growth prospects amid trade and tariff issues, volatility in the financial markets, and moderating global growth.

U.S. GDP Growth (QoQ Growth Rate)



Source: Bureau of Economic Analysis, The Conference Board, Bloomberg.
(1) Based on a survey of 54 economists conducted by the National Association for Business Economics September 9 – 16, 2019.

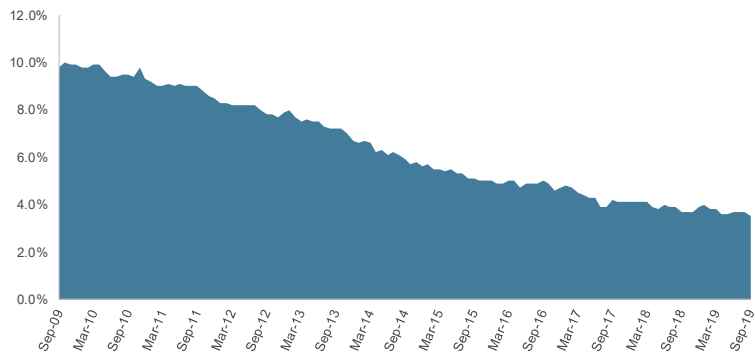


U.S. Unemployment

Historically low unemployment rates reflect resilience in the U.S. economy.

- The unemployment rate decreased slightly to 3.5% in September 2019, its lowest level in the last decade. Total non-farm payroll employment increased by 136,000 in September 2019, with employment in health care and in professional and business services continuing to trend up.

Unemployment Rate



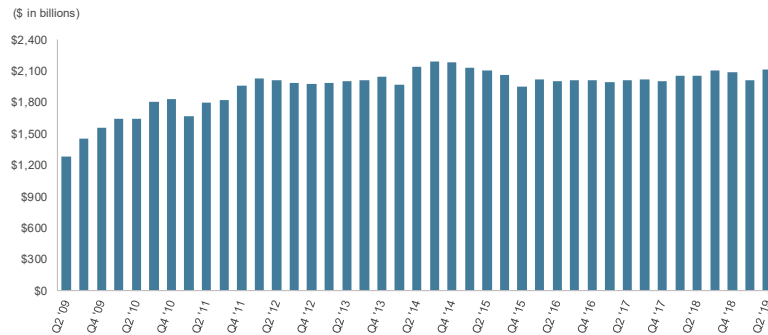
Source: Bureau of Labor Statistics.



Corporate Profit Movements

Profit gains increased throughout 2018 amid changes to the U.S. tax code. While corporate profit levels decreased slightly to start the year in 2019, profits levels rebounded in Q2 '19.

Corporate Profits by Quarter



Sources: Federal Reserve and news articles.



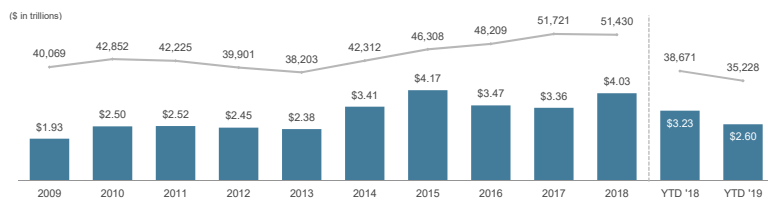
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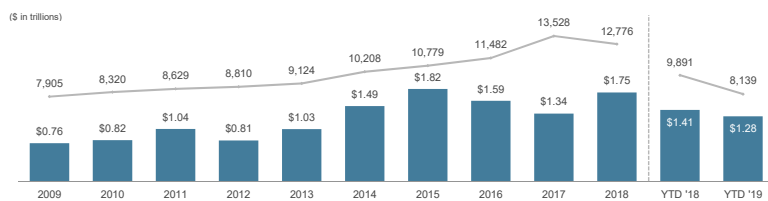
Global and Domestic M&A Activity

Global and domestic M&A activity decreased in YTD '19 relative to YTD '18 in terms of both transaction values and the number of transactions, driven by a very weak Q3 in 2019.

Global M&A Volume



U.S. M&A Volume



Source: Thomson Reuters, as of 9/30/19.
Notes: Regional breakdowns are by target and are based on total number of transactions.
Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values.



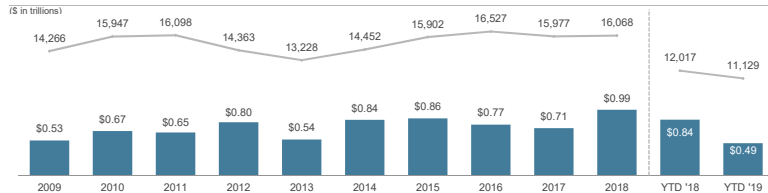
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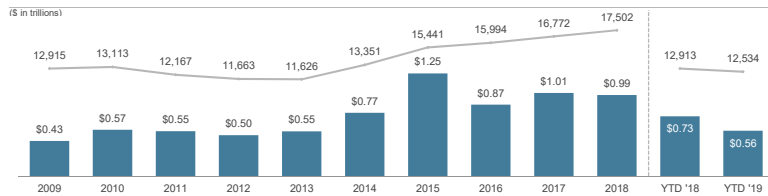
International M&A Activity

Similarly, M&A activity decreased across both Europe and Asia in YTD '19 relative to YTD '18 in terms of both transaction values and the number of transactions.

Europe M&A Volume



Asia M&A Volume



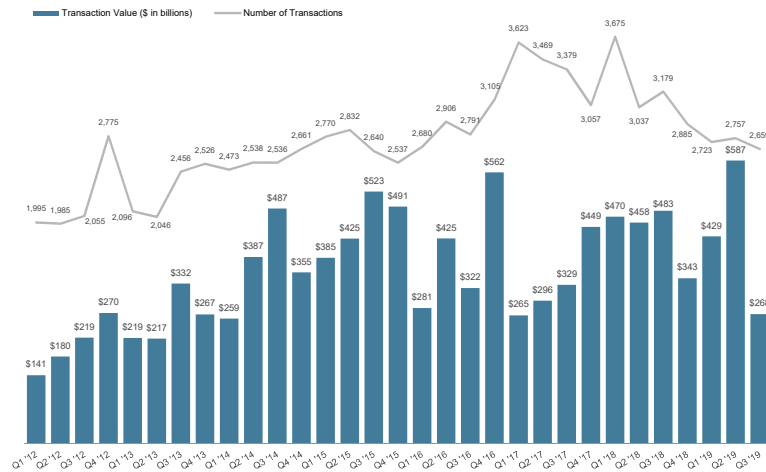
Source: Thomson Reuters, as of 9/30/19.
Notes: Regional breakdowns are by target and are based on total number of transactions. Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values. For purposes of the above charts, Europe includes Russia, and Asia includes Australia and India.



Quarterly Domestic M&A Activity

Quarterly U.S. M&A Activity

Following its strongest quarter over the past decade, domestic transaction values decreased by more than 50% in Q3 '19 to their lowest quarterly level since Q1 '17, while the number of transactions remained relatively consistent with recent quarters.



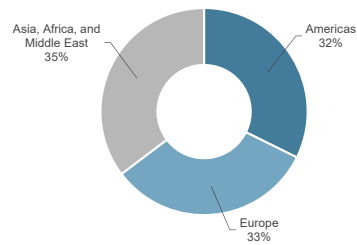
Source: Thomson Reuters, as of 9/30/19.
Notes: Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values.



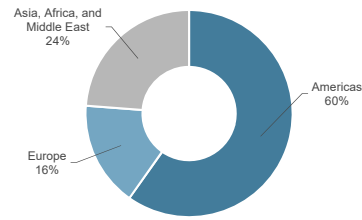
M&A Activity by Region

Activity in the Americas accounted for approximately 60% of global M&A activity by transaction value in YTD '19.

Number of Transactions by Region



Transaction Values by Region



Source: Thomson Reuters, as of 9/30/19.
Notes: For purposes of the above charts, Europe includes Russia, and Asia includes Australia and India.



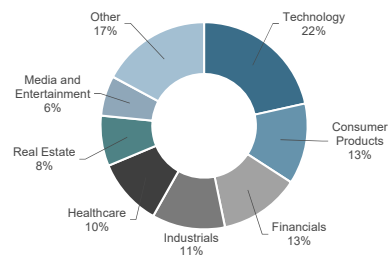
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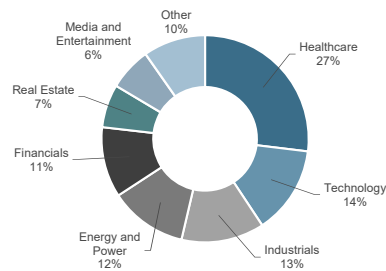
M&A Activity by Industry

Technological convergence continues to be a key driver of activity in 2019. A number of mega-deals in the healthcare sector also factored in meaningfully to deal mix.

Top Industries by Number of Transactions (U.S.)



Top Industries by Transaction Values (U.S.)



Source: Thomson Reuters, as of 9/30/19.
Note: Excludes minority transactions.



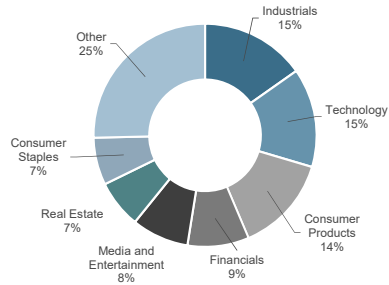
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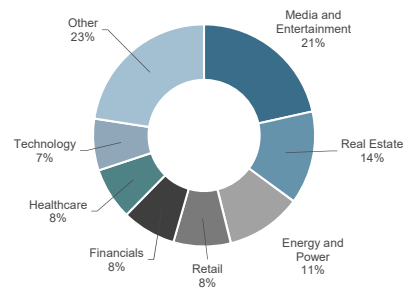
M&A Activity by Industry (cont.)

The industrials, technology, and consumer products sectors were the most active in Europe in YTD '19, while the media and entertainment sector led the way in terms of transaction values.

Top Industries by Number of Transactions (Europe)



Top Industries by Transaction Values (Europe)



Source: Thomson Reuters, as of 9/30/19.
Note: Excludes minority transactions.

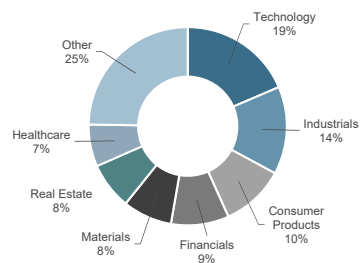


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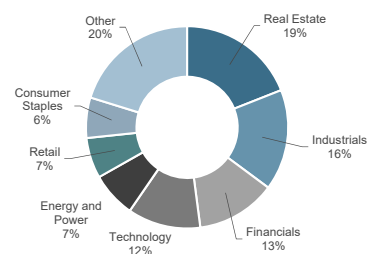
M&A Activity by Industry (cont.)

The technology sector was the most active in Asia in YTD '19, while the real estate sector dominated in terms of transaction values.

Top Industries by Number of Transactions (Asia)



Top Industries by Transaction Values (Asia)



Source: Thomson Reuters, as of 9/30/19.
Note: Excludes minority transactions.

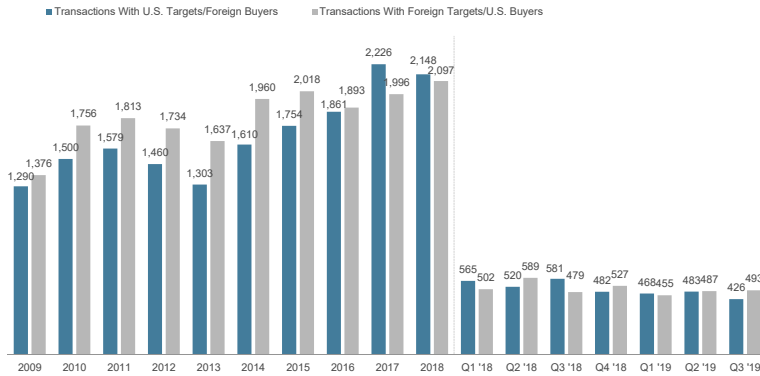


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Cross-Border Transactions

Although inbound cross-border activity in the U.S. has outpaced outbound activity over the last two years, that trend appears to be slowing, or perhaps reversing, as interest in U.S. targets slows.

Number of U.S.-Related Inbound and Outbound Cross-Border Transactions



Source: Thomson Reuters, as of 9/30/19.



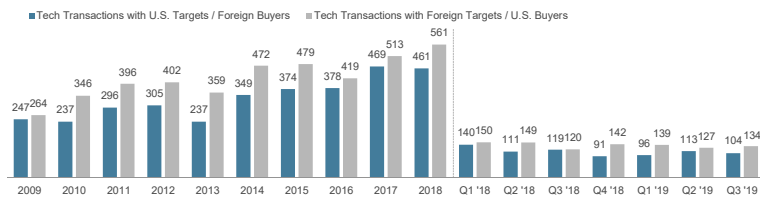
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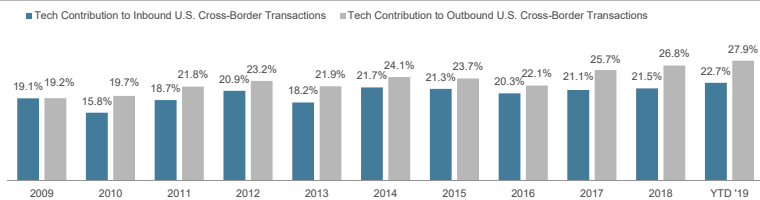
U.S. Cross-Border Tech Transactions

Although there has been a slowing in the number of cross-border Tech transactions this year, the sector continues to grow as a percentage of overall cross-border activity, accounting for nearly 30% of all U.S. outbound cross-border transactions in YTD '19.

Number of U.S.-Related Inbound and Outbound Cross-Border Tech Transactions



Tech Contribution to Number of U.S.-Related Cross-Border Transactions



Source: Thomson Reuters, as of 9/30/19.

Note: Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values.



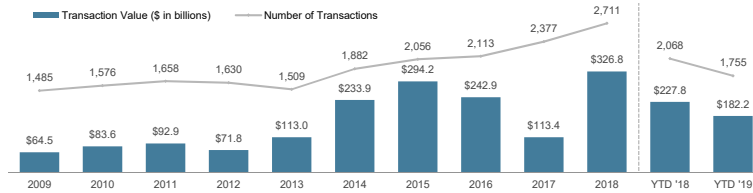
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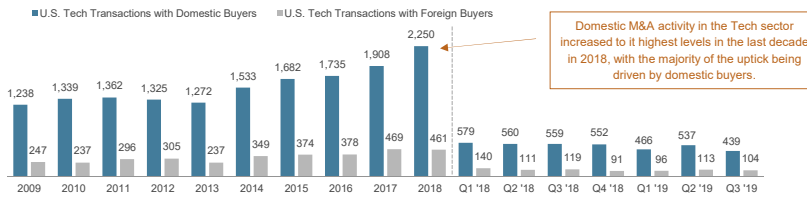
Domestic Tech M&A Activity

Consistent with overall U.S. M&A trends, transaction activity in the Tech sector decreased in YTD '19 relative to the same period in 2018 in terms of both transaction values and the number of transactions.

U.S. Tech M&A Volume



Number of U.S.-Related Tech Transactions



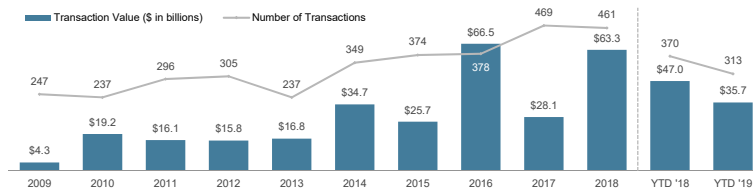
Source: Thomson Reuters, as of 6/30/19.
Note: Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values.



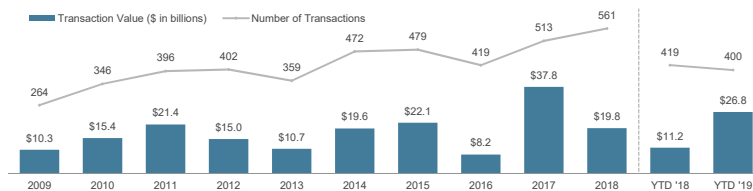
U.S. Cross-Border Tech Transactions

Inbound cross-border transaction activity in the Tech sector decreased in YTD '19 relative to YTD '18 in terms of both transaction values and number of transactions, while outbound cross-border transaction values in the Tech sector increased substantially despite a decline in the number of transactions over the same period.

U.S. Inbound Cross-Border Tech M&A Volume



U.S. Outbound Cross-Border Tech M&A Volume



Source: Thomson Reuters, as of 9/30/19.
Note: Includes minority equity deals, equity carve-outs, exchange offers, open market repurchases, and deals with undisclosed transaction values.

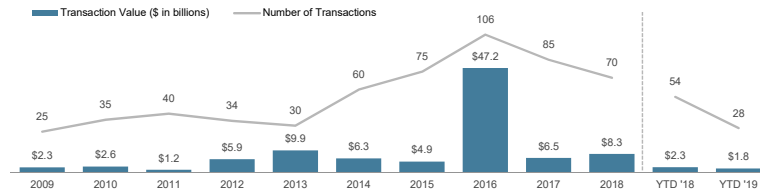


U.S.-China Cross-Border M&A Activity

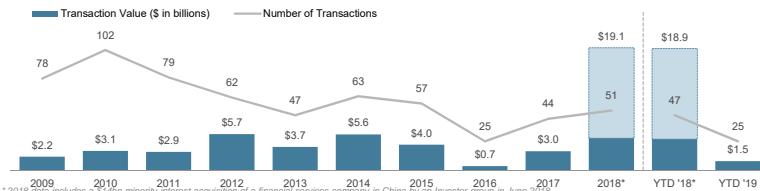
The number of U.S. inbound cross-border transactions from China has continued to decrease in 2019 as regulators enacted legislation in 2018 to further expand the jurisdiction of CFIUS and increase the scrutiny into potential foreign investments from China.

- Cross-border transaction activity with China will likely continue to be challenged amid escalating "trade wars."

U.S. Inbound Cross-Border Activity from China



U.S. Outbound Cross-Border Activity into China



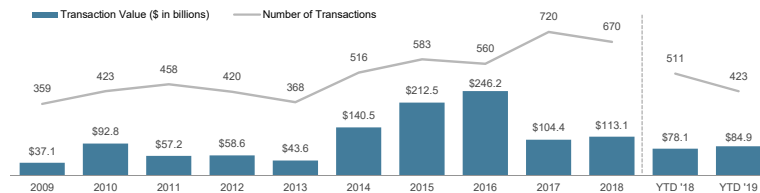
* 2018 data includes a \$1.4bn minority interest acquisition of a financial services company in China by an investor group in June 2018.
Source: Thomson Reuters, as of 9/30/19.



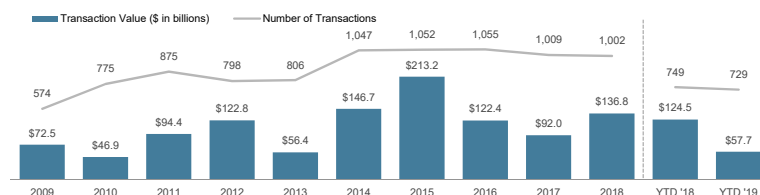
U.S.-Europe Cross-Border M&A Activity

Inbound cross-border transaction values from Europe increased in YTD '19 relative to YTD '18 despite a decline in the number of transactions, while outbound cross-border activity into Europe decreased in terms of both transaction values and number of transactions in YTD '19 relative to YTD '18.

U.S. Inbound Cross-Border Activity from Europe



U.S. Outbound Cross-Border Activity into Europe



Source: Thomson Reuters, as of 9/30/19.

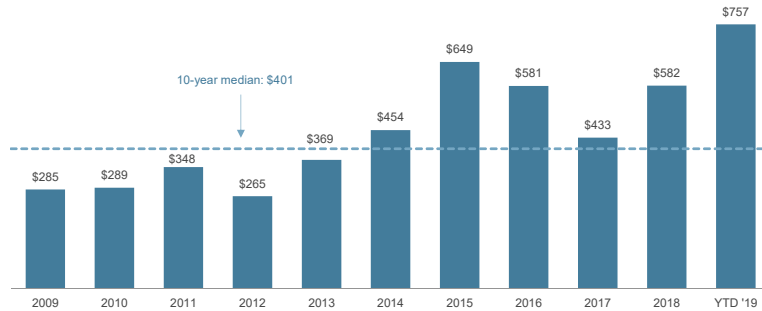


Average Domestic Transaction Size

Average transaction values increased substantially in YTD '19, well above the 10-year median.

Average Size of Announced Domestic M&A Transactions

(\$ in millions)



Source: Thomson Reuters, as of 9/30/19.
Notes: Includes transactions with estimated values.
Excludes terminated transactions. Future terminations of pending transactions will reduce totals shown.
Excludes minority stake acquisitions and most minority capital infusions into major financial institutions.



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Mega-Transactions Drive M&A Activity

The 10 largest transactions announced thus far in 2019 have accounted for nearly 40% of the overall value of domestic M&A activity.

Largest Announced Domestic M&A Transactions – 2019

Date Announced	Acquirer	Target	Value (\$ in billions)	Industry
01/03/2019	Bristol-Myers Squibb Co.	Celgene Corp.	\$93.4*	Healthcare
06/08/2019	United Technologies Corp.	Raytheon Co.	\$89.8*	Industrials
06/24/2019	Abbvie, Inc.	Allergan PLC	\$83.9*	Healthcare
04/23/2019	Occidental Petroleum Corp.	Anadarko Petroleum Corp.	\$54.2	Energy
03/17/2019	Fidelity National Information Services, Inc.	Worldpay, Inc.	\$42.7	Technology
01/16/2019	Fiserv, Inc.	First Data Corp.	\$38.7	Financials
02/07/2019	BB&T Corp.	SunTrust Banks, Inc.	\$28.3*	Financials
05/27/2019	Global Payments, Inc.	Total System Services, Inc.	\$25.7	Financials
06/23/2019	Eldorado Resorts, Inc.	Caesars Entertainment Corp.	\$25.4*	Media and Entertainment
07/28/2019	Mylan NV	Upjohn, Inc.	\$24.6*	Healthcare

Source: Thomson Reuters, as of 9/30/19.
* Transactions are pending as of 9/30/19.



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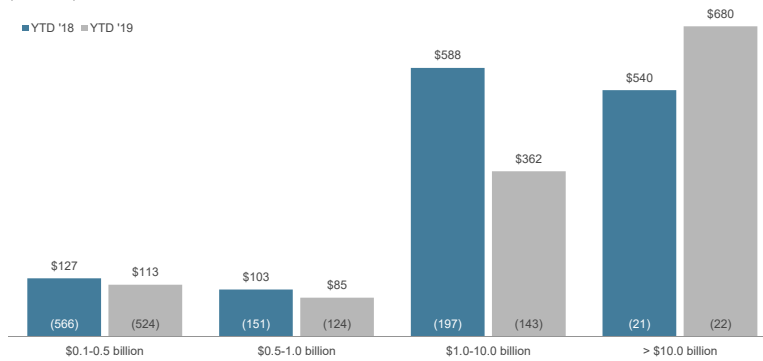
Transaction Size Distribution

Deals with transaction values above \$10 billion were up substantially in YTD '19 relative to YTD '18, while deals with transaction values below \$10 billion were down across the board over the same time period.

Size Distribution of Announced U.S. M&A Transactions

(\$ in billions)

■ YTD '18 ■ YTD '19



Source: Thomson Reuters, as of 9/30/19.
Notes: The figures in parentheses represent the number of deals in each size distribution.
Includes share repurchase transactions and transactions with estimated values.
Excludes terminated transactions. Future terminations of pending transactions will reduce totals shown.



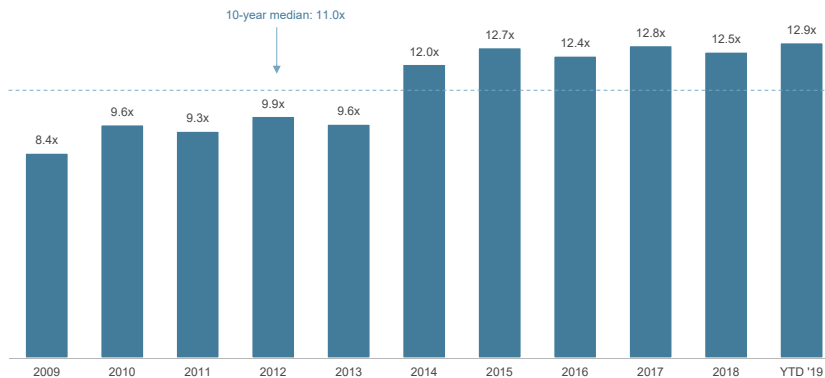
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Transaction Multiples Remain High

Median transaction multiples have remained elevated in YTD '19, in line with multiples over the past five years.

Median EV/EBITDA Multiples



Source: Thomson Reuters, as of 9/30/19.
Notes: Based on U.S. deals and excludes multiples below 0.0x and above 25.0x.



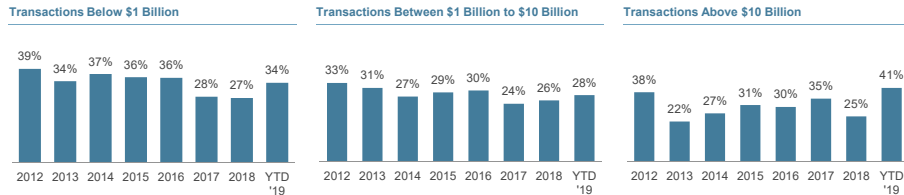
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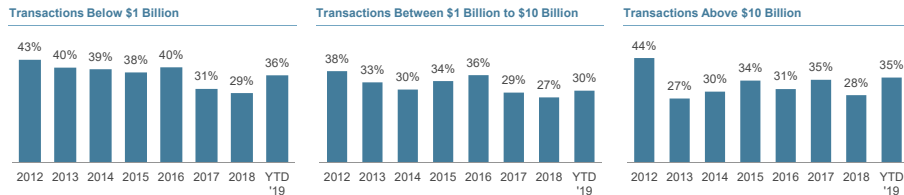
Acquisition Premiums

Average one-day prior and four-week prior acquisition premiums have increased in YTD '19 relative to those in 2018 across all transaction sizes.

Average 1-Day Prior Acquisition Premiums



Average 4-Week Prior Acquisition Premiums



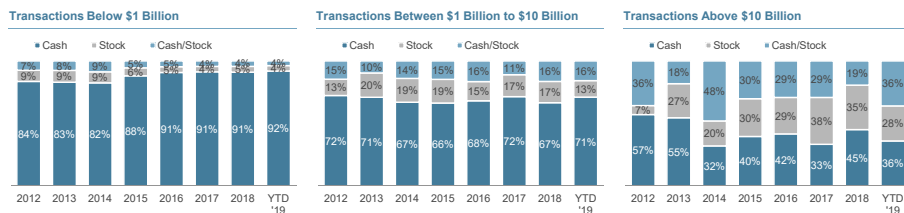
Source: Thomson Reuters, as of 9/30/19.
Notes: Premiums are relative to target share prices one day and four weeks prior to announcement for deals with U.S. targets valued over \$100 million. Excludes terminated transactions, ESOPs, self-tenders, spinoffs, share repurchases, minority interest transaction, exchange offers, recapitalizations, and restructurings. Excludes negative premiums and premiums over 100%.



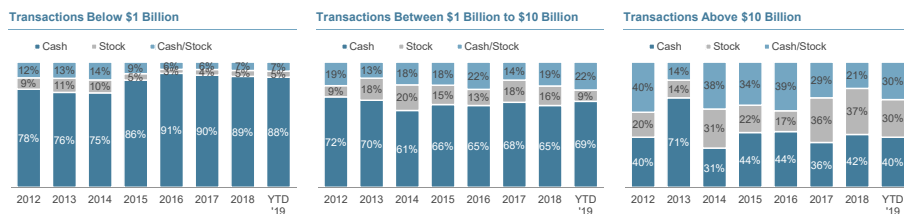
Cash Remains King

Larger transactions generally tend to feature a larger stock component

Transaction Consideration by Deal Size – Global



Transaction Consideration by Deal Size – Domestic



Source: Thomson Reuters, as of 9/30/19.
Note: Based on number of transactions.

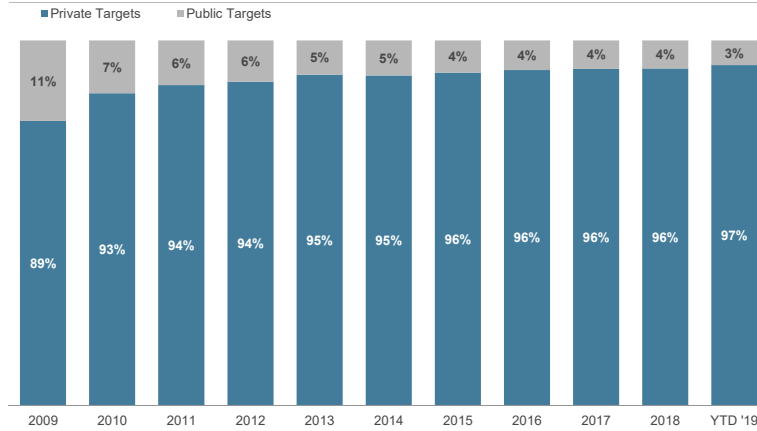


Acquisition Targets

The vast majority of domestic M&A transactions involve private company targets.

- The number of U.S.-listed public companies has decreased by nearly 50% over the last two decades.

U.S. M&A Activity (by Number of Transactions)



Source: Thomson Reuters, as of 9/30/19.



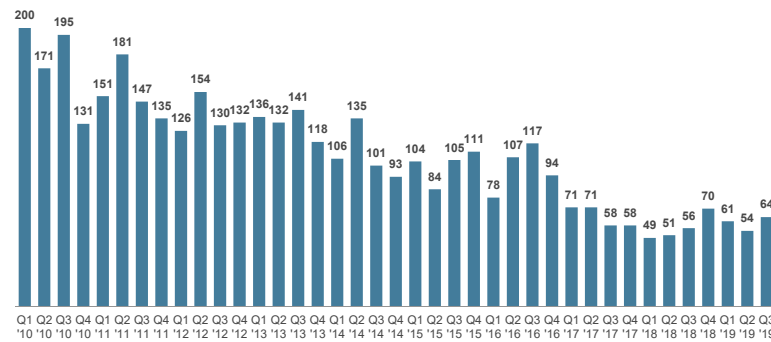
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Bankruptcy Sales Remain Muted

The number of bankruptcy sales has remained low by historical standards, as more readily available financing in recent years has reduced the number of companies forced into bankruptcy.

Number of Bankruptcy Sales (1/1/10 to 9/30/19)



Source: S&P Capital IQ, as of 9/30/19.

Note: Includes all domestic targets and sellers that have filed for bankruptcy.



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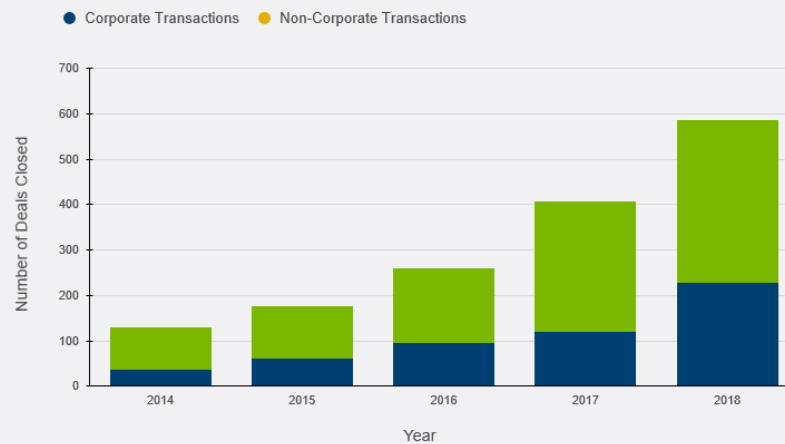
Trends in M&A Deal Terms

- I. Introduction
- II. M&A Market Update
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Growth in Use of Representation and Warranty Insurance

Number of Deals Closed | Total R&W, Tax, and Other

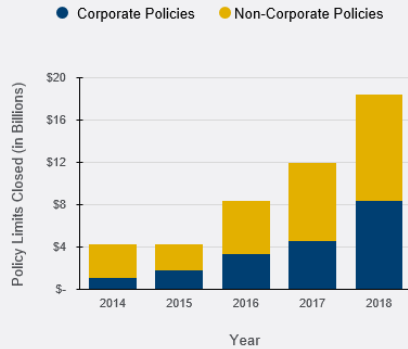


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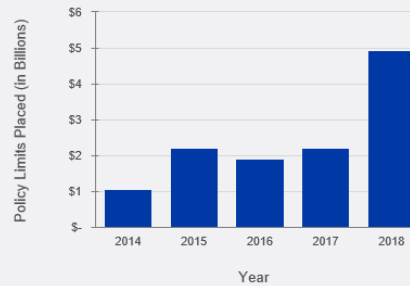
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Growth in Use of Representation and Warranty Insurance

Amount of R&W Policy Limits Closed



Amount of Tax Policy Limits Placed

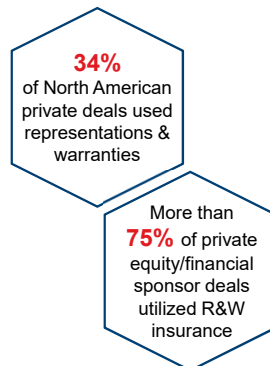


Source: AON

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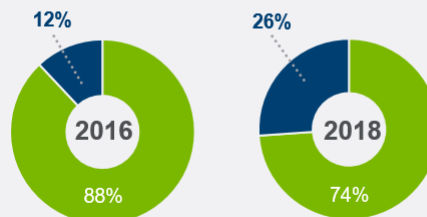
M&A Insurance: Demonstrable Impact

Aon
estimates



Reflecting industry trends, Aon observed "no seller indemnity" policies increased

● No Seller Indemnity ● Limited Seller Indemnity



Source: AON

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Current Deal Trends

Baby Boomers Looking to Sell

- **60% of privately-held businesses in the U.S. are owned by Baby Boomers**
- **Exit Strategies:**
 - In a survey of 500 business owners with annual revenue of \$5 million to \$250 million:
 - 1/3rd expect to transition ownership within the next 5 years
 - 2/3rds expect to transition ownership within the next 10 years
 - About 40% have considered selling to a private equity firm or a third-party investor
 - Surveys have found many need to sell in order to finance retirement
- **Key Concerns: Protecting their Legacy**



Source: <https://www.themiddlemarket.com/video/baby-boomer-business-owners-drive-robust-m-a-environment>
Source: <https://www.forbes.com/sites/suntrust/2018/12/06/the-5-biggest-trends-in-mergers--acquisitions-for-2019/#16a8d49f1ca1>

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Current Deal Trends

Post-Closing Purchase Price Adjustments

- **91% of private-target transactions in 2018 included PPA**
- **Separate Escrows**
 - Adjustments are more frequently guaranteed by a separate escrow
 - Up to 58% of deals in 2018 from 27% in 2015
- **Adjustment metrics**
 - Most deals include more than one metric
 - Working capital – 85%
 - Cash – 80%
 - Debt – 84%
 - Majority exclude tax-related items from the Working Capital adjustment
- **Most common preparation method for PPAs is GAAP consistent with past practices**

Source: SRSAcquiom 2019 Deal Terms Study

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Current Deal Trends

Baskets and Caps

- **Increasingly baskets are limited to breaches of reps and warranties**
 - 4% of baskets in 2018 covered breaches of covenants – down from 13% in 2016
 - 10% of baskets in 2018 covered other indemnity claims – down from 18% in 2016
- **Deductible baskets continue to increase in frequency**
 - **2015:**
 - 63% First Dollar
 - 31% Deductible
 - **2018:**
 - 48% First Dollar
 - 50% Deductible
- **Overall basket and cap sizes have remained relatively constant**
 - **Baskets:**
 - 49% of baskets were 0.5% or less of transaction value
 - 44% of baskets were >0.5% to 1% of transaction value
 - **Caps:**
 - Average cap was 10.7% of transaction value
 - Median cap was 10.0% of transaction value
 - Secondary cap of purchase price: 93% of deals for fundamental reps; 89% of deals for tax reps

Source: SRSACquiom 2019 Deal Terms Study

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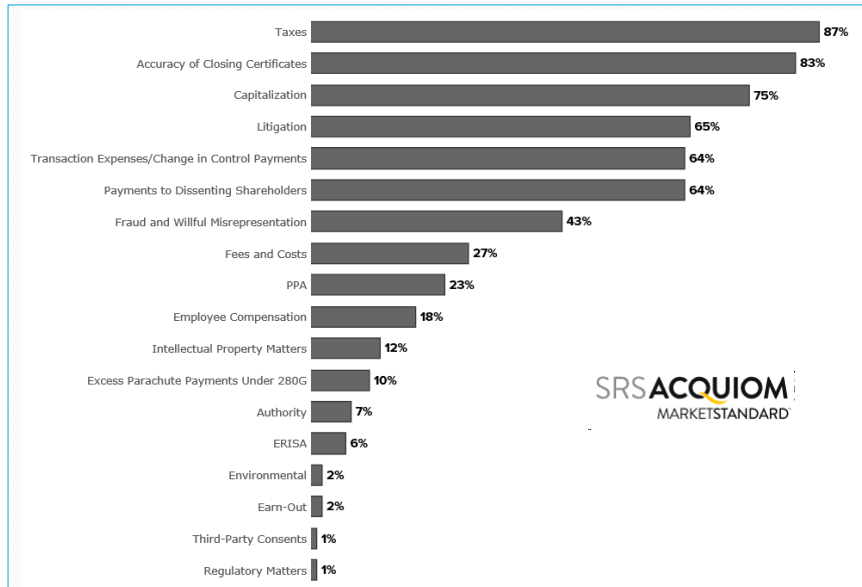
Current Deal Trends

Stand-Alone Indemnities

- **Use of stand-alone indemnities has steadily increased**
 - Most notably, capitalization indemnity jumped sharply from 5% in 2015 to 75% in 2018
 - Litigation indemnity up from 37% in 2015 to 65% in 2018
 - Transaction expenses indemnity went from 45% in 2015 to 64% in 2018
- **Most Popular:**
 - Taxes
 - Accuracy of Closing Certificates
 - Capitalization
- **Least Popular:**
 - Environmental
 - Earn-Out
 - Third-Party Consents
 - Regulatory Matters

Source: SRSACquiom 2019 Deal Terms Study

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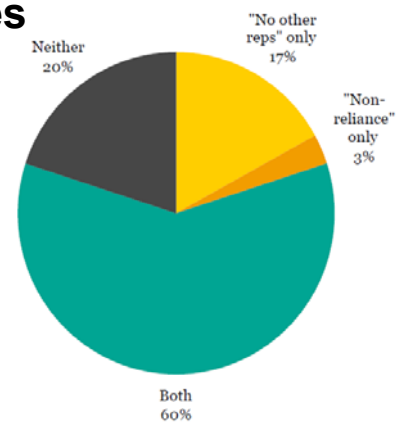
Source: SRSAcquiom

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Current Deal Trends Non-Reliance and No Other Reps Clauses

Inclusion of representations (2018 deals)

- **No Other Representations**
 - Buyer acknowledges that Seller has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in this Article.
- **Non-Reliance**
 - Buyer is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for representations and warranties provided in this Article.



SRSACQUIOM
MARKETSTANDARD

Source: SRSAcquiom

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Current Deal Trends

Non-Reliance and No Other Reps Clauses

- **New developments in Delaware case law in 2016**
 - In a post-closing lawsuit for fraud, a “no other representations” provision and an integration clause are not enough to preclude a claim for extra-contractual fraud.
 - Defendant (typically seller) must demonstrate that the plaintiff (typically buyer) affirmatively agreed to disclaim reliance on extra-contractual statements.
 - *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006): “murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations.”
 - *FdG Logistics LLC v. A&R Holdings, Inc.*, 31 A.3d 842, 860 (Del. Ch. 2016): “in order to bar fraud claims, a disclaimer of reliance ‘must come from the point of view of the aggrieved party,’ meaning that it must come from the *buyer* who is asserting the fraud claim.”
- **More likely to be present when there is Buy-Side RWI**
 - Likely driven by sellers limiting as much as possible their representations and warranties to those that are covered by the RWI policy.

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Women in M&A / Interrupting Gender Bias

- I. Introduction
- II. M&A Market Update
- III. Trends in M&A Deal Terms
- IV. Women in M&A / Interrupting Gender Bias**
- V. Conclusion

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ABA M&A Committee - Women in M&A Subcommittee

- **Goals and Initiatives include:**
 - Increase the pipeline (law school panels)
 - Retain women (law firm presentations)
 - Act as a clearinghouse for relevant information
 - Increase number of women in leadership/management
 - Women on boards of directors

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Female Talent Pipeline

- **A 2019 study conducted by the ABA's Women in M&A Taskforce ("ABA Study") shows that women make up 46% of the total enrollment in law schools in the United States but only 37% of the population enrolled in M&A-related courses.**
 - Results in disproportionately low numbers of women entering M&A practice and even smaller numbers rising up the ranks.
 - **Compounded effect over time:**

Women represent **41%** of junior associates in the North American M&A practice (compared to **49%** of junior associates in all fields).

Women represent **39%** of senior associates years 6 and up (compared to **48%** of senior associates in all fields).

Women represent **16%** of senior equity partners years 6 and up in the M&A field (compared to **20%** of senior equity partners in all fields).

ABA Women in M&A Subcommittee – Strategies to Retain and Promote Women in M&A

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Why Does It Matter?

- **Affects the hiring process**
- **Affects the outcome of client pitches**
- **Affects the outcome of negotiations**
- **Adversely impacts the career trajectory of women**
- **Impacts retention at all levels**
- **Impacts workplace diversity**
- **It matters to clients**
- **At each level, missing out on half of the population and talent pool**

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The “Business Case”

The business case for increased social diversity within organizations is well-established.

Diverse teams excel.

- **For example, one study assessed the effect of increased gender diversity in leadership of top firms in Standard & Poors Composite 1500 index. They found that, on average, female representation in the top ranks was an indicator for greater sustained business success in both growth and profitability.¹**
- **Another study, conducted by Credit Suisse, of 2,360 companies across the globe found that companies with one or more women on the board of directors had higher average returns on equity, lower gearing, and better average growth.²**

1) Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation, August 2011

2) The CS Gender 3000: The Reward for Change Report Analyzing the Impact of Female Representation in Boardrooms and Senior Management, September 2016

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The “Business Case”

Clients expect diversity.

- **As corporate clients achieve improved diversity in their leadership teams, they expect their advisors to do the same.**
- **The Minority Corporate Counsel Association’s 2017 Annual General Counsel Survey indicated that women were now leading the legal departments of 132 of the Fortune 500 companies.¹**
- **More than 170 corporate legal officers recently signed an open letter to big law firms, saying that their companies will prioritize their legal spend on those firms that commit to diversity and inclusion.²**

“// We, as a group, will direct our substantial outside counsel spend to those law firms that manifest results with respect to diversity and inclusion, in addition to providing the highest degree of quality representation. //”

1) Breaking Through the Concrete Ceiling, Winter 2017
2) 170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business, January 2019

The “Business Case”

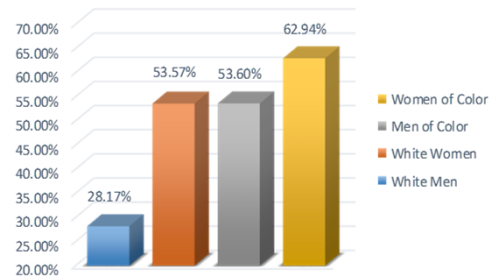
- **Additionally, leading investment funds and banks are now considering board diversity as an investment issue; citing better decision-making and financial outcomes from diverse boards.¹**
- **For example, State Street Corporation recently stated that during the 2017 proxy season, State Street Global Advisors voted against 512 companies for failing to take action regarding their board gender diversity.²**
 - **During the first half of 2018, through several country proxy voting seasons, State Street Global Advisors voted against 581 companies for again failing to take action regarding board gender diversity.²**
 - **BlackRock, Inc. has also stated that its Investment Stewardship team will likely vote against directors on boards that don’t make progress on diversity and that deliberate action needs to be taken by boards with a lack of diversity.¹**

1) Breaking Through the Concrete Ceiling, Winter 2017
2) 170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business, January 2019

Types of Implicit Bias: Prove-it-again Bias (PIA)

- **Prove-it-again: the need for women to work harder to prove themselves**
- **Two thirds of female lawyers reported PIA Bias**
- **Regression analysis confirmed that women reported higher levels of PIA bias after controlling for race, age, workplace type, firm/department size, caregiving responsibilities, and geographic location.**

Have to prove themselves more than colleagues



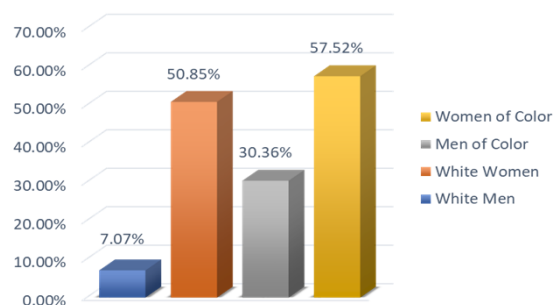
Source: *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*.
<https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession/>

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Types of Implicit Bias: Mistaken Role

- **The Workplace Experiences Survey findings noted that “because of the automatic association of lawyers with majority men, lawyers from other groups are much more likely to be mistaken for, or viewed as, less than a lawyer.”**

“I have been mistaken for administrative staff, custodial staff, or court personnel.”

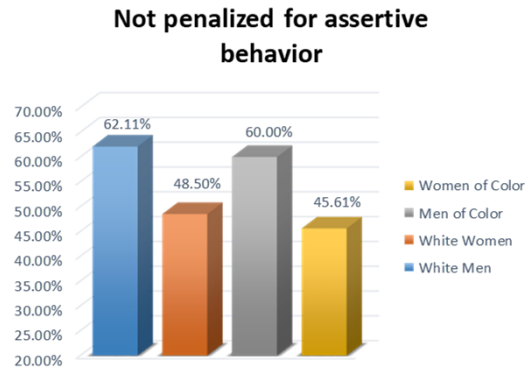


Source: *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*.
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Types of Implicit Bias: Tightrope

- **Pressure to behave in a feminine way, including backlash for masculine behaviors and higher loads of non-career-enhancing “office housework”**
 - While an assertive man may be considered as “having high standards”, an equally assertive woman may be characterized as a “diva” and told to “calm down”



Source: You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession.
<https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession/>

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Types of Implicit Bias: Glamour Work vs. Office Housework

The Workplace Study found the following:

- GLAMOUR WORK** More than 80% of male lawyers but only 53% to 59% of women lawyers reported the same access to desirable assignments in law firms.
- OFFICE HOUSEWORK** 43 - 50% of women lawyers reported that at work they more often play administrative roles such as taking notes for a meeting or plan internal events compared to their male colleagues. Only 20-26% of male lawyers reported the same.

Source: You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession.
<https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession/>

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Types of Implicit Bias: Tug of War

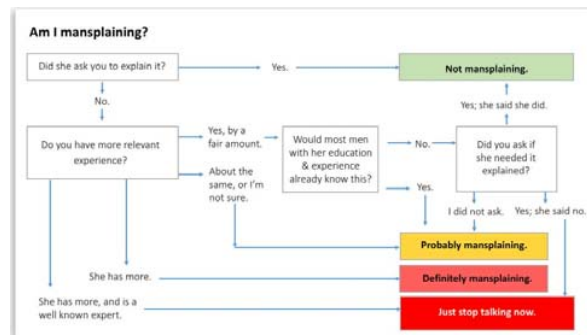
- Bias in the environment may fuel conflict between members of disadvantaged groups
 - Tokenism
- **1/3** Almost one third of women lawyers felt that there is only one “slot” for someone like them and that they have to compete with the women colleagues
- Assimilation
 - Conflict when women fault each other for assimilating too much, or too little

Source: *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession.*
<https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/new-you-cant-change-what-you-cant-see-interrupting-racial-gender-bias-the-legal-profession/>

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Types of Implicit Bias: Mansplaining

- When a man feels compelled to condescendingly explain something to a woman on a topic that she knows more about than he does



Credit: Twitter/Kim Goodwin
<https://www.bbc.com/worklife/article/20180727-mansplaining-explained-in-one-chart>

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Types of Implicit Bias: Affinity Bias

- We gravitate toward people like ourselves in appearance, beliefs, and background. And we may avoid or even dislike people who are different from us. (*Leanin.org*)
- *Innocuous but impactful*
- *Example: You decide to mentor someone because they remind you of yourself.*
- **Why it matters**
 - Because senior leaders are more likely to be white men, and because people tend to gravitate toward mentoring others like themselves, women tend to miss out on that support.
 - As a result law firms and companies also miss out on fostering talented attorneys.

Source: *Leanin.org*

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Eliminating Implicit Bias: Why is this Happening?

- Invisible forces like gender bias are difficult to identify, much like a guerilla warfare
- Lack of awareness and straight path for solution
- Eliminating bias without proper identification and countermeasures is ineffective
- Lack of representation of women in management committee level leadership reinforces entrenched beliefs – creates a blind spot and pervasive cycle
- Lack of long term strategy and meaningful disruption

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Eliminating Implicit Bias: What's the Science?

- “It’s not enough to identify and instill the ‘right’ skills and competencies as if in a social vacuum. The context must support a woman’s motivation to lead and also increase the likelihood that others will recognize and encourage her efforts—even when she doesn’t look or behave like the current generation of senior executives.” - Harvard Business Review¹
- Primary factor for keeping women under the glass ceiling is the absence of male advocacy.²
- Report found that high performing women are not getting male sponsorship to reach the top because they are not interacting in business contexts on a one-on-one basis with senior men in their organizations.²

1) <https://hbr.org/2013/09/women-rising-the-unseen-barriers>
2) <https://hbr.org/product/the-sponsor-effect-breaking-through-the-last-glass-ceiling/10428-PDF-ENG>

Eliminating Implicit Bias: You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession

- 2016 Study by the Williams’ Center for WorkLife Law for the ABA Commission on Women in the Profession and the Minority Counsel Association
- Survey of 2,827 lawyers found:
 - 56%** of white men felt free to express anger
 - 40%** While approximately 40% of women felt the same
 - 2/3** Two-thirds of men reported that they were rarely interrupted, compared to one-half of the women (no difference when race is factored in)
 - 62%** of white men reported they are not penalized for being aggressive, compared to **46%** of women of color and **48%** of white women

Source: http://www.abajournal.com/news/article/showing_anger_in_the_courtroom_can_backfire_for_women_lawyers_study_suggest?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

Takeaway: What You Can Do Now

- **Result: When interrupted, concern is left unaddressed and influence over the outcome is limited. Same issue is persistent in the deal room and in the board room.**
 - Take a moment, stop interrupting¹
 - If you are interrupted, continue speaking. It can be helpful to use someone's first name when asked for space to speak: "James, I'd love to quickly finish this point."²
 - More representation
 - Obama calling on only female reporters during press conference³
 - Amplification
 - Technique adopted by female Obama staffers in 2008⁴
 - When a woman makes a key point, other women repeat it, giving credit to its author, forcing the men in the room to recognize the contribution and denying them the chance to claim the idea as their own.⁴

1) <https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html>
2) <http://fortune.com/2017/05/15/most-powerful-women-career-advice-gender-bias-stereotyping-workplace-equality/>
3) <https://www.washingtonpost.com/news/the-fix/wp/2014/12/19/that-time-obama-called-on-all-women-at-a-press-conference/>
4) https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/white-house-women-are-now-in-the-room-where-it-happens/?mc_cid=23f41632c6&mc_eid=4cd64fb794&postshare=6251473762897800&wpisrc=nl_daily202&wprm=1

Takeaway: What You Can Do Now

- Tracking development through data
- Establish clear, public rules and pathways to promotion
- Avoid “window dressing” method – allocate substantive responsibility and credit appropriately
- Sponsors/Mentors
 - What can you say or do in the room where the woman is not able to advocate for herself?
 - Point out specific bias when evaluating a candidate
 - Develop clear goals and milestones

Source: *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession.*

Conclusion

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