

Impact of “Buyer Power Ratio” on Selected M&A Deal Terms in Acquisitions of Privately Held Target Companies by Publicly Traded Buyers

July 2017

(Including Transactions Completed 2012 – 2016)



Mergers & Acquisitions Committee

SRSACQUIOM

STUDY CHAIRS

Rick Climan (Founding Chair)
Hogan Lovells US LLP
Silicon Valley, CA

Paul Koenig
SRS Acquiom Inc.
Denver, CO

DATA ANALYTICS

Glenn Kramer, PhD
SRS Acquiom Inc.
San Francisco, CA

ADVISORY GROUP

Wilson Chu
McDermott Will & Emery LLP
Dallas, TX

Jessica C. Pearlman
K&L Gates LLP
Seattle, WA

M&A COMMITTEE / MARKET TRENDS SUBCOMMITTEE LEADERSHIP

Scott Whittaker
(M&A Committee Chair)
Stone Pigman Walther Wittmann L.L.C.
New Orleans, LA

Hal Leibowitz
(Market Trends Subcommittee Chair)
WilmerHale
Boston, MA



Mergers & Acquisitions Committee

SRSACQUIOM

Slide 2

CONTENTS

ABOUT THIS STUDY AND THE “BUYER POWER RATIO”	Slide 4
Terminology used in this presentation	Slide 7
Disclaimers	Slide 8
REPRESENTATIONS & WARRANTIES	Slide 9
“No undisclosed liabilities” representation	Slide 10
“10b-5” or “full disclosure” representation	Slide 14
CLOSING CONDITIONS	Slide 18
“Accuracy of representations” condition – timing	Slide 19
“Accuracy of representations” condition – materiality	Slide 23
INDEMNIFICATION AND RELATED PROVISIONS	Slide 27
“Sandbagging”	Slide 28
“Non-reliance” clause	Slide 32
Treatment of “consequential” damages	Slide 36
IP cap in excess of escrow in acquisitions of tech companies	Slide 39
Buyer’s contractual obligation to mitigate losses	Slide 42
Buyer’s indemnifiable losses reduced by tax benefits	Slide 45
APPENDIX 1: METHODOLOGY FOR MERGING ABA STUDIES	Slide 48

ABOUT THIS STUDY AND THE “BUYER POWER RATIO”

This Study is a product of the joint efforts of the Mergers & Acquisitions Committee of the ABA’s Business Law Section (the “M&A Committee”) and SRS Acquiom Inc.

To compile the sample set for this Study, we utilized SRS Acquiom’s database of acquisition agreements relating to purchases of privately held U.S. companies by publicly traded buyers. Many of the acquisition agreements in this database have not been filed with the SEC and are not publicly accessible.

This Study is built around a newly developed metric, which we refer to as “**Buyer Power Ratio**” or, simply, “**BPR**.” Buyer Power Ratio has two components:

1. The **market capitalization** (market cap) of the buyer; and
2. The **purchase price** paid by the buyer in the acquisition.

The Buyer Power Ratio for a particular acquisition is determined by dividing the buyer’s market cap by the applicable purchase price, i.e.:

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

ABOUT THIS STUDY AND THE “BUYER POWER RATIO”(cont'd)

This Study demonstrates that the Buyer Power Ratio for a particular transaction generally correlates with the level of the buyer's negotiating strength in that transaction, as measured by the buyer's ability to obtain buyer-favorable deal terms. For example, a large buyer with a \$100 billion market cap buying a relatively small company for \$50 million (BPR = 2,000) would ordinarily be expected to have a higher degree of negotiating leverage than a smaller buyer with a \$500 million market cap buying a company for \$250 million (BPR = 2). That is, all other things being equal, a buyer should be able to obtain deal terms that are more buyer-favorable in a transaction with a BPR of 2,000 than in a transaction with a BPR of 2.

Of course, BPR is not the only factor that can affect a buyer's negotiating leverage. Among the other factors that may come into play are: the price the buyer is willing and able to pay; the importance of the transaction to the buyer relative to its importance to the seller; and the presence of competing bidders for the target company. This Study does not attempt to measure the effect of these other factors on buyers' ability to obtain favorable deal terms.

This Study shows, for each deal point featured, the correlation between BPR and a buyer-favorable resolution of that deal point. Therefore, this Study, unlike other deal points surveys, allows a prospective buyer and seller to calculate the BPR for their

ABOUT THIS STUDY AND THE “BUYER POWER RATIO”(cont'd)

proposed transaction and then focus specifically on the particular statistics relevant to other transactions with similar BPRs. In most cases, this Study shows that the frequency of buyer-favorable outcomes increases as BPR increases.

For comparison purposes, this Study also shows, for each deal point featured, the relevant statistics presented in the studies prepared by the M&A Committee in 2013 and 2015, for which the sample set consists exclusively of deals with acquisition agreements filed with the U.S. Securities and Exchange Commission (“SEC”). The average BPR for the transactions surveyed by the M&A Committee in 2013 and 2015 is significantly lower than the average BPR for the transactions surveyed in this Study. This is not surprising, given that transactions with high BPRs are unlikely to be sufficiently material to the buyer to require the filing of information on the transaction with the SEC.

For completeness of presentation, we have looked separately at the correlation between deal point resolution and each of the two individual components of BPR – buyer's market cap and purchase price. The results of these separate analyses appear in Appendices 2 and 3, which are available for download at both the ABA and SRS Acquiom web sites.

TERMINOLOGY USED IN THIS PRESENTATION

<i>ABA Data (2012, 2014)</i>	Data from the 2013 and 2015 Private Target Mergers & Acquisitions Deal Points Studies prepared by the M&A Committee, for transactions completed in 2012 (136 transactions) and 2014 (117 transactions), with acquisition agreements filed with the SEC.* The data from these two studies was merged as described in Appendix 1.
<i>SRSA Data (2012 – 2016)</i>	Data on private target M&A transactions completed in 2012 through 2016 in which SRS Acquiom served as the shareholder representative, where the buyer's equity securities were, as of the date of the acquisition agreement, publicly listed on a U.S. stock exchange, so that the buyer's US\$ market capitalization could be calculated (457 transactions)
<i>Buyer Market Cap</i>	The buyer's market capitalization (as reported by YCharts**) as of the date of the acquisition agreement
<i>Buyer Power Ratio</i>	Buyer Market Cap <i>divided by</i> aggregate purchase price (with aggregate purchase price including amounts held back in escrow but excluding potential earn-out payments)

* ABA Data only includes transactions with SEC-filed agreements, as analyzed by the M&A Committee studies. U.S. buyers are generally not required to file with the SEC agreements for transactions that, in light of the buyer's size and other factors, are not material.

** Approximately 10% of market cap values were not available in YCharts. These market cap values were determined using Wolfram Alpha or manual SRS Acquiom calculations.

DISCLAIMERS

- Because of SRS Acquiom's confidentiality obligations with respect to the acquisition agreements included in its proprietary database, the M&A Committee was not permitted to review any of the acquisition agreements on which the Study results are based. Those acquisition agreements were reviewed exclusively by SRS Acquiom.
- The number of the transactions in the sample set varies slightly from deal point to deal point, either because a particular deal point was not applicable to specific transactions, or, in some situations, a clear determination of buyer- or seller-favorability could not be made.
- 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 "deal point" categories. Therefore, the Study Chairs and Advisory Group members have made various judgment calls regarding, for example, how to categorize the nature or effect of particular provisions. The conclusions presented in this Study should be viewed with these caveats in mind.
- Findings presented in this Study do not necessarily reflect the views of the ABA, the M&A Committee or SRS Acquiom, or the personal views of the Study Chairs or Advisory Group members or the views of their respective firms.

Representations & Warranties

“No undisclosed liabilities” representation

Is the “no undisclosed liabilities” representation
drafted broadly to include all liabilities,
including contingent liabilities
(so as to favor buyers)?

How does Buyer Power Ratio
correlate with this deal point?

“No undisclosed liabilities” representation

Sample provisions:

“no undisclosed liabilities” representation (Buyer-favorable formulation):

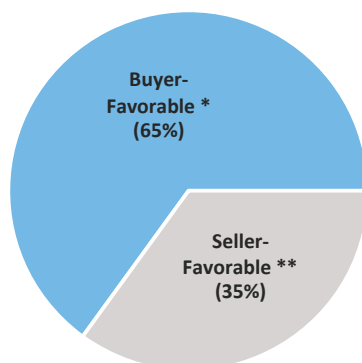
“Target has no liabilities of any nature (accrued, unaccrued, contingent or otherwise, and whether or not required to be disclosed on a balance sheet), except for liabilities reflected in the Interim Balance Sheet and current liabilities incurred in the ordinary course of business since the date of the Interim Balance Sheet.”

“no undisclosed liabilities” representation (Seller-favorable formulation):

“Target has no liabilities of the type required to be disclosed in the liabilities column of a balance sheet prepared in accordance with generally accepted accounting principles (GAAP), except for...”

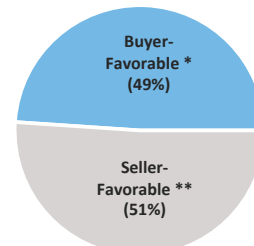
“No undisclosed liabilities” representation

ABA Data (2012, 2014)

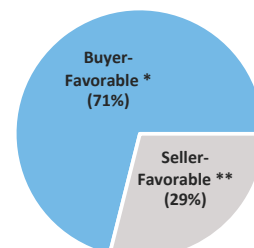


SRSA Data (2012 - 2016)

Buyer Power Ratio
< 10



Buyer Power Ratio
> 200



* Buyer-Favorable = all liabilities
** Seller-Favorable = GAAP liabilities or no rep

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Impact of "Buyer Power Ratio" on Selected M&A Deal Terms in Acquisitions of Privately Held Target Companies by Publicly Traded Buyers

Also available as part of the eCourse

[Negotiating the Private Company Deal: A Mock Negotiation of Today's—and Tomorrow's—Hot Issues](#)

First appeared as part of the conference materials for the
13th Annual Mergers and Acquisitions Institute session
"Negotiating the Private Company Deal: A Mock Negotiation of Today's—and Tomorrow's—Hot Issues"