

Risk Mitigation in M&A

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Traditional Risk Sharing: Indemnification

- Survival of representations and warranties
- Baskets and caps on liability
- Detailed procedures
- Materiality scrapes
- Mitigation
- Tax benefits
- Exclusive remedy
- Fraud

Transactional Insurance Solutions

Representations & warranties insurance:

Offers protection for **unknown breaches** of target and seller representations and warranties in a purchase agreement

Tax liability insurance:

Offers protection against a **known tax risk or uncertain tax position** that is challenged by a tax authority and is not otherwise covered by an RWI policy. Each placement led by an in-house tax expert.

Insurance solutions

Contingent liability insurance:

Offers protection for a **broad range of known contingent risks** for which neither party to the transaction will accept financial responsibility

Tailored solutions:

Offers protection across a **wide array of bespoke transactional risks** such as insurance on secondaries transactions, de-spac transactions, end of fund insurance, etc.

Representations and Warranties Insurance

Benefits and Uses

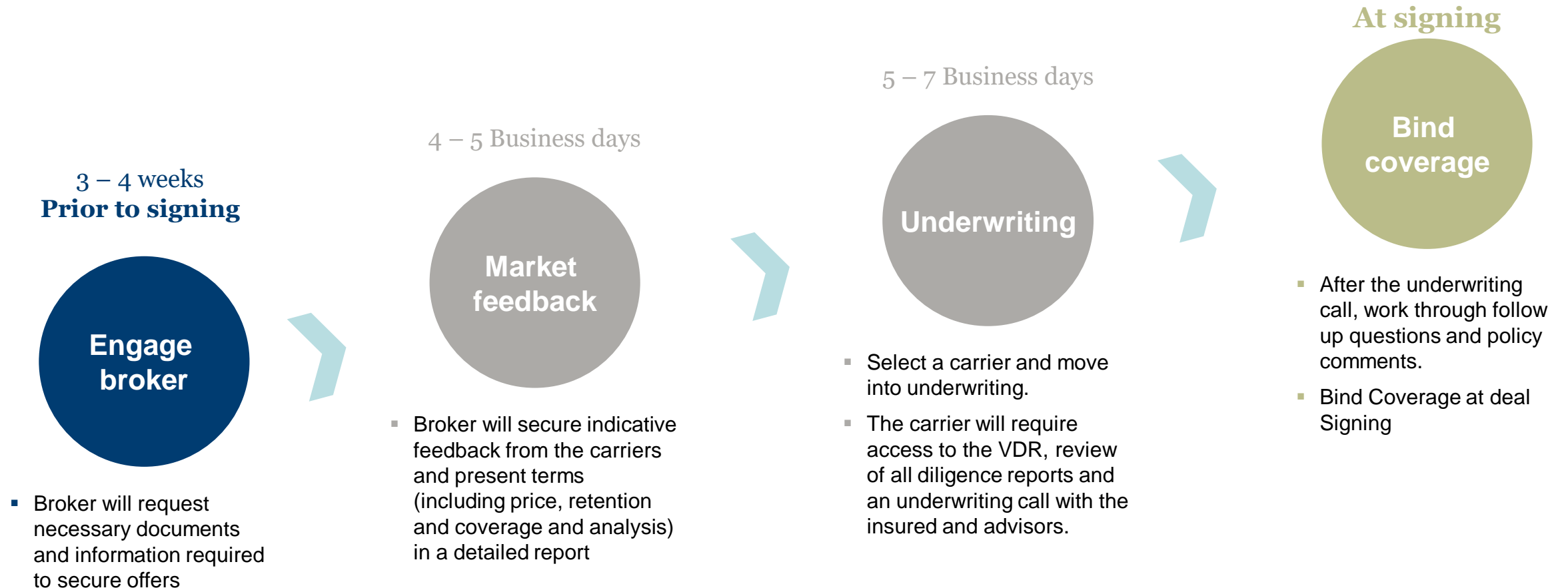
Buyers

- Receive broader representations under a policy than sellers may otherwise offer
- Benefit from extended survival periods (customarily 3 years for general representations & 6 years for fundamental representations)
- Avoid post-closing proceedings with sellers who may remain active at the company
- Benefit from security where there is concern over the ability to collect indemnification

Sellers

- Collect proceeds up front without funds tied up in escrow
- Avoid post-closing contingent liabilities and proceedings
- Reduce the risk of prolonged or contentious negotiation over representations and indemnification provisions in a transaction agreement
- For minority and passive investors, receive protection from any indemnity obligations arising out of joint and several liability obligations

Process Overview



Overview: Buyer-Side Coverage

- Over 99% of RWI policies are buyer-side policies

RWI insurance	
Term	<ul style="list-style-type: none">▪ 3 years for General Reps▪ 6 years for Fundamental reps▪ Coverage for 6 years for all reps may be available depending on the deal characteristics
Limit	<ul style="list-style-type: none">▪ Insureds select the coverage limit amount according to preference and risk appetite▪ Coverage available for excess fundamentals and tax risk
Retention	<ul style="list-style-type: none">▪ Typically, 1.0% of deal value▪ Most commonly either split 50/50 or follow a “no seller indemnity” structure▪ Over 65% of our placed policies in 2021 took the form of “no seller indemnity”
Fraud	<ul style="list-style-type: none">▪ Buyer-side policies cover seller fraud (the definition of fraud is reviewed by underwriters), so long as the insurer maintains subrogation's rights

Overview: Buyer-Side Coverage

	RWI insurance
Standard Exclusions	<ul style="list-style-type: none">▪ (a) Breaches known to the buyer's internal deal team prior to binding coverage; (b) defined benefit and retirement plan un/underfunding liability; (c) asbestos and PCBs; (d) fines and penalties uninsurable by law; (e) amount, validity, or usability of tax attributes (for example, net operating losses); (f) purchase price/working capital/leakage adjustments; and (g) transfer pricing matters.
Damages	<ul style="list-style-type: none">▪ Insurers will generally remove exclusions for consequential and multiplied damages provided that the transaction agreement neither expressly grants nor expressly prohibits such damages (i.e., is silent).
Rollover	<ul style="list-style-type: none">▪ If a seller is retaining 30% - 49% of a business, a seller NCD is required▪ If a seller retains greater than 50%, Loss is prorated according the buyer ownership.
Interim Breach	<ul style="list-style-type: none">▪ Coverage typically incepts at signing and is brought down at Closing with no extra cost or requirements if the interim period is less than 120 days▪ In limited circumstances, an insurer may consider erosion of the retention for interim breach coverage but heavily dependent on deal characteristics (including the size of the initial retention in terms of absolute dollars)

Overview of RWI Claims

	High level claims overview
Frequency	<ul style="list-style-type: none">▪ 1 out of every 5 policies results in a claims notice (i.e. a notice but not necessarily a payment)
Notification	<ul style="list-style-type: none">▪ > 60% of claims made within the first 12 months
Common breaches	<ul style="list-style-type: none">▪ Financial Statements and Tax matters remain the most frequent source of claims▪ Claims based on ‘Compliance with Laws’ and ‘Material Customer/Supplier’ Breaches are increasing
Impact	<ul style="list-style-type: none">▪ Claims history and handling are a critical factors when considering insurer.

Trends in R&W Insurance and Indemnification

- Premiums for R&W insurance decreased steadily during the period from 2018 to 2020 driven by increased supply
 - Premiums dropped as low as 2% - 3% of coverage
- In H2 2021, demand for R&W insurance outstripped supply, causing premiums to increase meaningfully
 - Premiums reached 4% - 5% of coverage, and in the month of December premiums in the range of 5.5% - 6.5% of coverage were not unusual (highest premiums observed in healthcare deals with regulatory risk)
 - Some deals were not getting quoted at all
- Market started experiencing a reset in 2022, with premiums reverting to the 4% - 5% range

Trends in R&W Insurance and Indemnification

- Carrier Comments
 - Most claims asserted under financial statements rep or reps on the company's relationships with customers / suppliers
 - Knowledge qualifiers (and limited definition of knowledge / scope of knowledge group)
 - Requirement that notice to be in writing
 - Limiting rep to top 10 customers /suppliers
 - Requirement that company make calls to material customers / suppliers
- “In excess of and no greater than”
 - Cyber / data privacy
 - Environmental
 - Product liability
- Damages caps
 - Hard caps on EBITDA multiples

Trends in R&W Insurance and Indemnification

- For deals with no R&W insurance, it's still a seller's market – lower cap, shorter survival periods, fewer carve-outs
- Often no survival except for fraud
- Sellers are negotiating harder on fraud carve-outs

Tax Insurance

Benefits of Tax Insurance



- **Provides certainty by removing potential tax risk**
 - Purchase-price certainty in connection with an acquisition
 - Tax results certainty in connection with any business restructuring or other tax planning
 - Tax benefit certainty (e.g., in relation to quality and quantity of NOLs, available tax credits and depreciable basis)
 - Compliance certainty in connection with tax return filings (e.g., corporate, partnership and amended tax returns)



- **Protects against liquidity impact arising from a tax assessment**



- **Facilitates equity and debt infusions by removing tax uncertainty**



- **Enables tax planning to move forward without financial statement impact for an uncertain tax position**



- **Facilitates balance sheet management** (e.g., to meet debt/ equity ratio under credit agt.)



- **Enables distribution or utilization of cash** (including cash generated from tax refunds) that would otherwise need to be held in reserve to cover potential tax claims or challenges by a taxing authority

Market Overview

Marketplace for Tax Insurance	
Well-developed	<ul style="list-style-type: none">Insurance companies and MGUs continue to invest in tax underwriting capabilities as brokers and underwriters continue to develop insurance solutions for an array of tax issues that render the product more agile and useful to clients.
Growing	<ul style="list-style-type: none">New entrants in the tax market driving competition leading to broader coverage for insureds and more favorable pricing.<ul style="list-style-type: none">14 primary U.S. markets in 2021Excess markets as needed
Capacity	<ul style="list-style-type: none">In excess of ~\$1 billion in coverage limits available, per transaction
Insurers	<ul style="list-style-type: none">AIG, Ambridge, ASQ, Berkley Pro, Berkshire Hathaway, BlueChip, Concord, Ethos, Euclid, Everest, Great American, Liberty, QBE and Vale