

Investment Management and Hedge Funds: What's Happening Now?

Gregory J. Nowak
Martin S. Bloor
Julia D. Corelli
Paul E. Pelletier
Robert E. Fay

Pepper Hamilton LLP
Attorneys at Law

December 13, 2016 | New York

Martin S. Bloor and Paul E. Pelletier

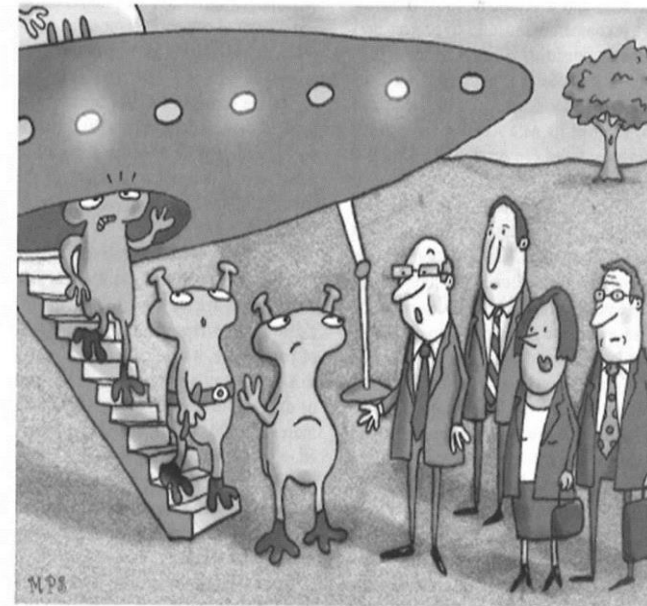
FCPA Enforcement in Investment Fund Industry

The Foreign Corrupt Practices Act ("FCPA")

- ▶ Anti-Bribery Provision: Makes it unlawful to offer or make a corrupt payment to a *foreign official* for the purpose of obtaining or retaining business for or with, or directing business to, any person.
- ▶ Books & Records Provision: Requires corporations to:
 - Make and keep books and records that accurately reflect the transactions of the corporation; and
 - To devise and maintain an adequate system of internal accounting controls.

Definition of Foreign Official

- ▶ “[A]ny officer or employee of a foreign government or any department, agency or instrumentality thereof”
- ▶ Whether an entity is an instrumentality of a foreign government depends upon whether the government “controls” the entity and whether the entity is recognized as performing a governmental or public function



‘We’d like to make a peace offering, but first, are you a government official or an instrumentality thereof?’

Definition of Foreign Official – In Practice

Chinese “**sovereign wealth fund officials** requested that BNY Mellon provide their family members with internships, and they made numerous follow-up requests about the status, timing, and other details of the internships for their relatives. BNY Mellon **employees viewed the internships as important to keep the sovereign wealth fund’s business.**”

“BNY Mellon deserved significant sanction for providing valuable student internships to family members of **foreign officials** to influence their actions.”

*Andrew J. Ceresney, Director of the SEC
Enforcement Division, Aug. 18, 2015*



DOJ Focus in FCPA Cases

The “recent boom of sovereign wealth funds is an area of particular interest to the Justice Department.”

DOJ is “looking at both passive and active investments by U.S. securities firms into sovereign funds, and vice versa.”

*Former Chief of DOJ Fraud Section, Steve Tyrrell
Financial Week, Oct. 7, 2008*



SWF Bribes – Och-Ziff

- ▶ 2011: SEC announced sweep of financial sector Sovereign Wealth Funds (SWF)
- ▶ Sept. 29, 2016: DOJ announced that Och-Ziff subsidiary pled guilty to FCPA violations
- ▶ Admitted knowing that part of a placement agent’s fee for a \$300M Libyan SWF investment would be paid to a government official
- ▶ Admitted facilitating payment of bribes to officials in the Democratic Republic of the Congo to win joint venture mining projects
- ▶ Gabonese individual “fixer” also charged
- ▶ Och Ziff executives still face criminal exposure



SWF Bribes – Och-Ziff

- ▶ Och-Ziff and sub must pay DOJ \$213M
- ▶ Must disgorge \$199M to SEC
- ▶ Compliance Monitor: 3 year term
 - Access to all employees and non-privileged info.
 - Evaluate internal controls related to recordkeeping, reporting
- ▶ Required to name CCO for 5 years and separate from other functions
- ▶ Must enhance internal controls/policies over foreign investments and establish investment committee



SWF Bribes – Och-Ziff

- ▶ Och-Ziff experiencing significant withdrawals
- ▶ \$2.4B on Oct. 1, 2016 ; \$102M during rest of Oct. (incl. Goldman's retirement plan)
- ▶ AUM down by \$2.3B since Sept. 30, 2016
- ▶ “S&P Global Ratings and Fitch Ratings have signaled that they may cut the company's ratings to junk. Fitch cited ‘reputational damage’ from the bribery case and concern about asset outflows.”



Bloomberg, Nov. 2, 2016

“Princeling” Hiring – BNY & JPM

- ▶ Aug. 2015: BNY agreed to pay SEC \$14.8M
 - Student “internships” for family members of officials “affiliated” with SWF
 - Internships provided “significant personal value” to SWF officials
- ▶ Nov. 2016: JP Morgan Chase paying DOJ & SEC combined \$264M
 - Asia affiliate provided jobs to officials’ children to obtain gov’t business
 - “Sons & Daughters Program”
 - Openly violated its compliance programs



Individual Prosecutions – Fund Employees

- ▶ Apr. 2016: Dmitrij Harder, owner/president of U.S. financial consulting firm pled guilty
 - Paid bribes to European Bank for Reconstruction and Development official to approve financing for Harder's clients
 - U.S. cooperating with foreign law enforcement and regulatory agencies
- ▶ May 2016: FINRA fined and suspended Raymond James' AML compliance officer for "egregious failures"



Individual Prosecutions – Broker Dealers

Direct Access Partners (DAP)

- ▶ 2013-2014: Five execs/employees pled guilty to bribing Venezuelan official to approve state bond trades
- ▶ Mar. 2015: CEO & managing director sentenced to four years in prison
- ▶ Apr. 2016: SEC Case
 - Permanently enjoined seven execs & employees from committing securities fraud offenses
 - Ordered five employees to disgorge \$42.5M



China's Approach

Aug. 2009: “China Executes Two for Defrauding Investors”

Law.com: China Executes Two for Defrauding Investors

LEGALTECH
ON DEMAND

Missed a session? Watch it here!

LEGALTECH
FEBRUARY 1-3, 2010
THE HILTON NEW YORK

LAW.COM

Select 'Print' in your browser menu to print this document.

Copyright 2009. Incisive Media US Properties, LLC. All rights reserved.

Page printed from: <http://www.law.com>

[Back to Article](#)

China Executes Two for Defrauding Investors

08-06-2009

China executed two business people for defrauding hundreds of investors out of more than \$127 million, calling the scam a serious blow to social stability, state media said Thursday.

China puts to death more people than any other country, although last month a high official for the Supreme People's Court, which reviews every death sentence, said the punishment should be used more sparingly.

Though usually reserved for violent crimes, death sentences are also applied for nonviolent offenses that involve large sums of money or are seen to threaten social order.

The two were executed Wednesday.

China's highest court said the fraud had "seriously damaged the country's financial regulatory order and social stability," the official Xinhua News Agency said.

The report said Du Yimin, a beauty parlor owner from eastern Zhejiang province, collected more than 700 million yuan (\$102.5 million) from hundreds of investors by promising them monthly returns of up to 10 percent from investments in beauty parlors, real estate and mining businesses owned by her company. She spent most of the money on houses, cars and luxury items, Xinhua said.

The second defendant, Si Chaxian, collected 167 million yuan (\$24 million) from 300 people by saying they could receive interest of up to 108 percent.

Xinhua said 270 million yuan (\$39.5 million) was still missing.

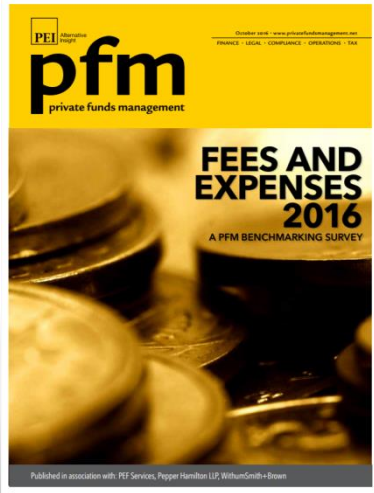
The two were sentenced by the Intermediate People's Court in the eastern city of Hangzhou.

Copyright 2009 Associated Press. All Rights Reserved. This material may not be published, broadcast, rewritten or redistributed.

Introducing the latest in
a new practice series

from the
New York Law Journal

[http://www.law.com/jsp/la/wLawArticleFriendly.jsp?id=1202432826454\[9/21/2009 3:36:36 PM\]](http://www.law.com/jsp/la/wLawArticleFriendly.jsp?id=1202432826454[9/21/2009 3:36:36 PM])



FEES AND EXPENSES 2016

A PFM Benchmarking Survey

Published in association with: PEI Services, Pepper Hamilton LLP,
WithumSmith+Brown

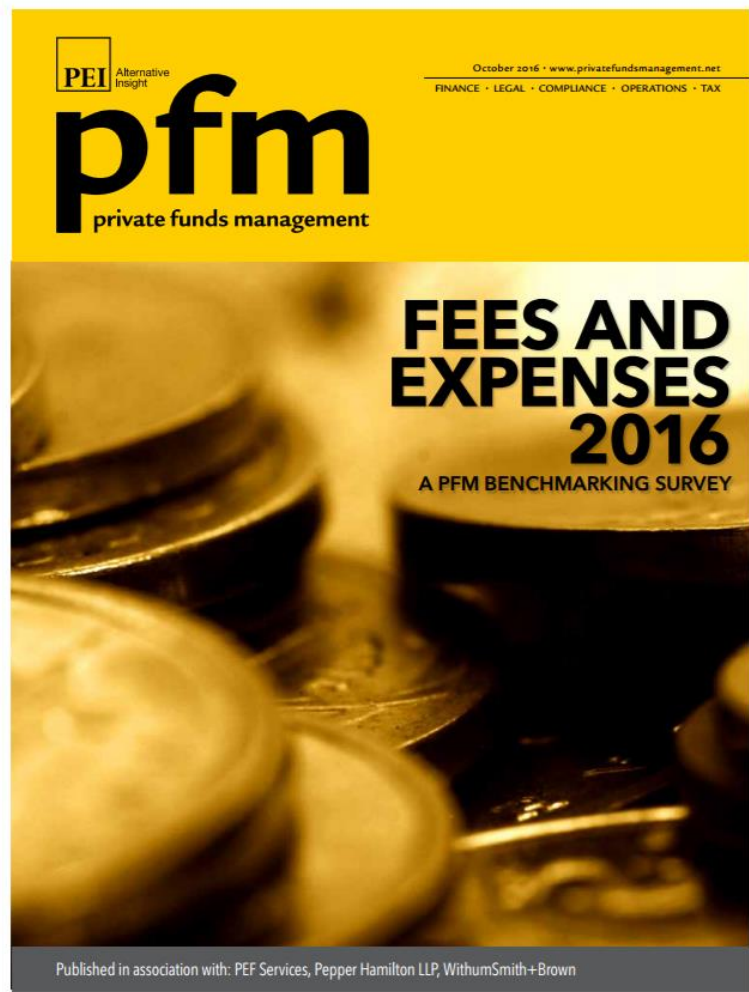
DECEMBER 2016

Pepper Hamilton LLP
Attorneys at Law

PEI Alternative Insight
pfm
private funds management



overview



- Survey of 101 U.S. alternative fund managers on their fee practices in June and July 2016 conducted by pfm
- Targeted CFOs because they are the most informed of these practices
- The emphasis is on private equity firms, but other alternatives, such as mezzanine debt, real estate, and infrastructure, have been included
- Update and expansion on the 2014 Fees and Expenses Survey
- Results released in November 2016 edition of pfm



Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

overview • SURVEY RESPONDENTS

Where is your firm headquartered? (%)

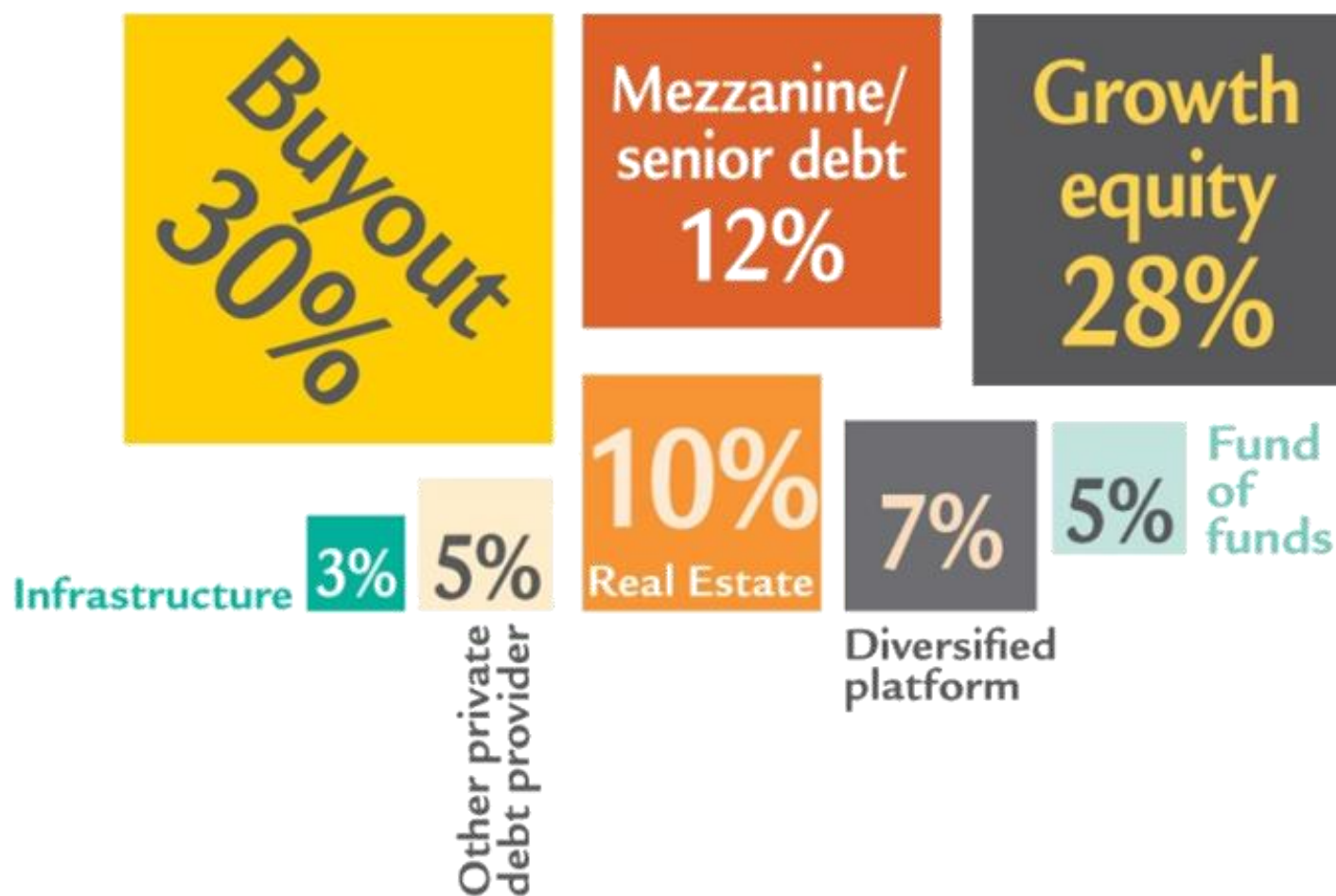




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

overview • SURVEY RESPONDENTS

Which of these definitions best describes your firm?

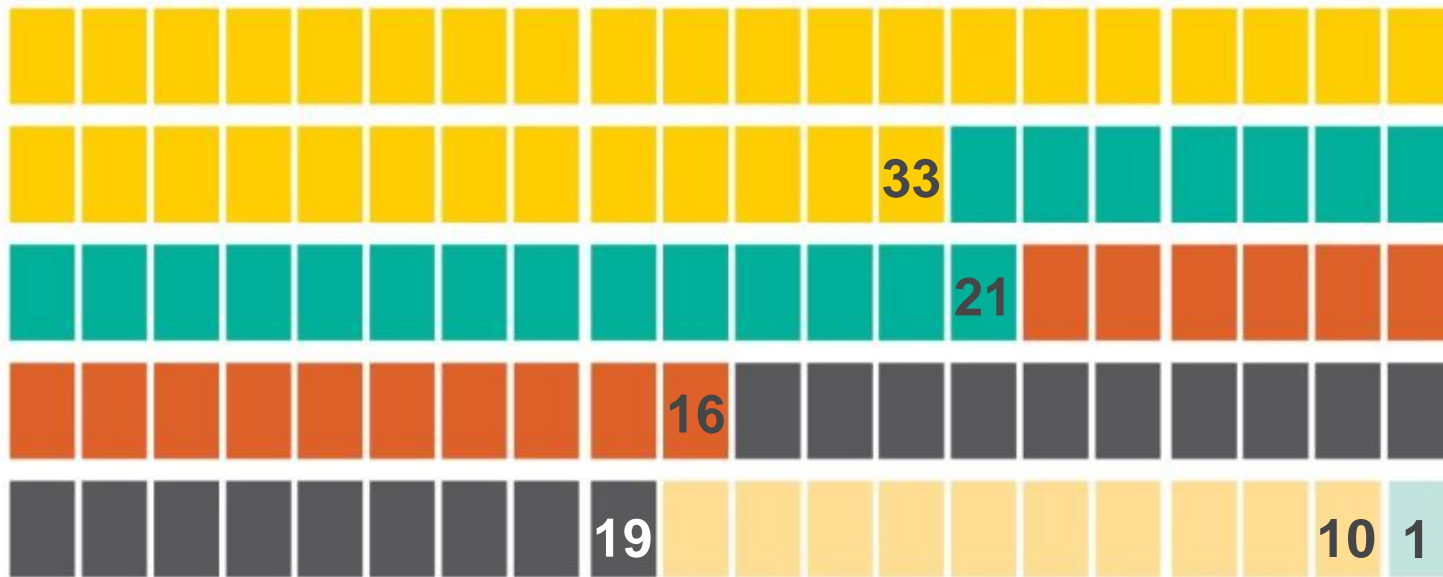




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

overview • SURVEY RESPONDENTS

What is the total value of the firm's AUM? (%)

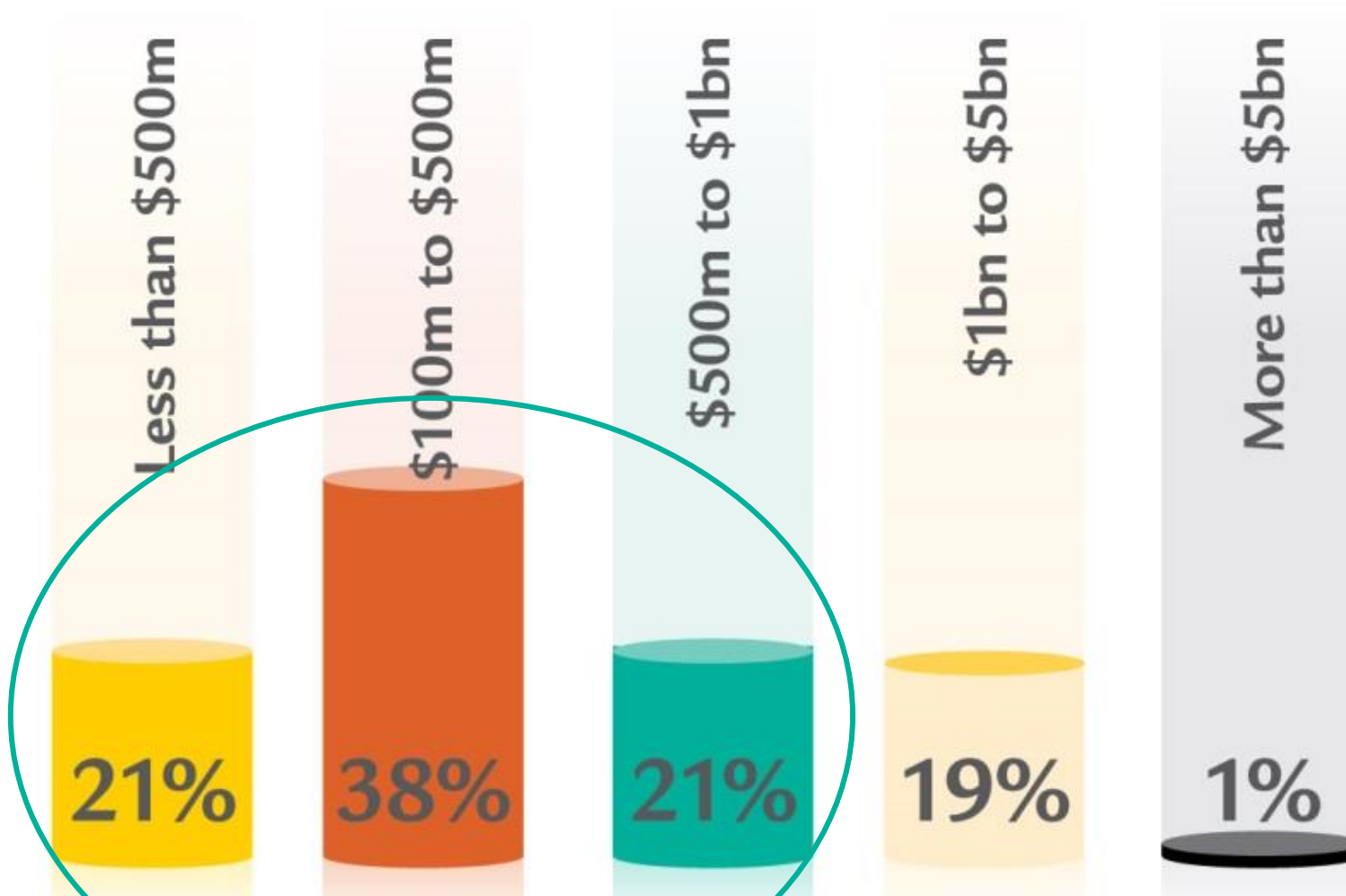




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

overview • SURVEY RESPONDENTS

What is the size of your most recently closed fund?

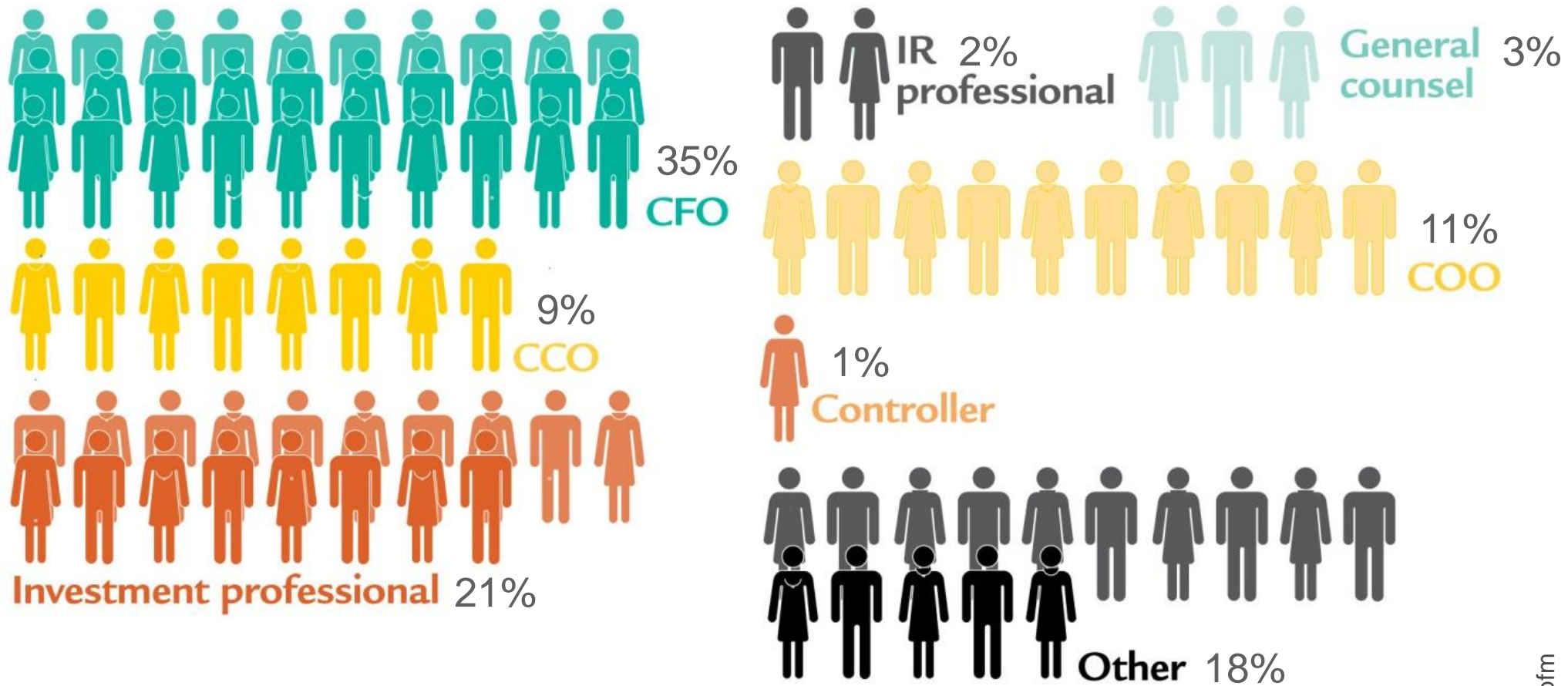




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

overview • SURVEY RESPONDENTS

What is your primary job title?

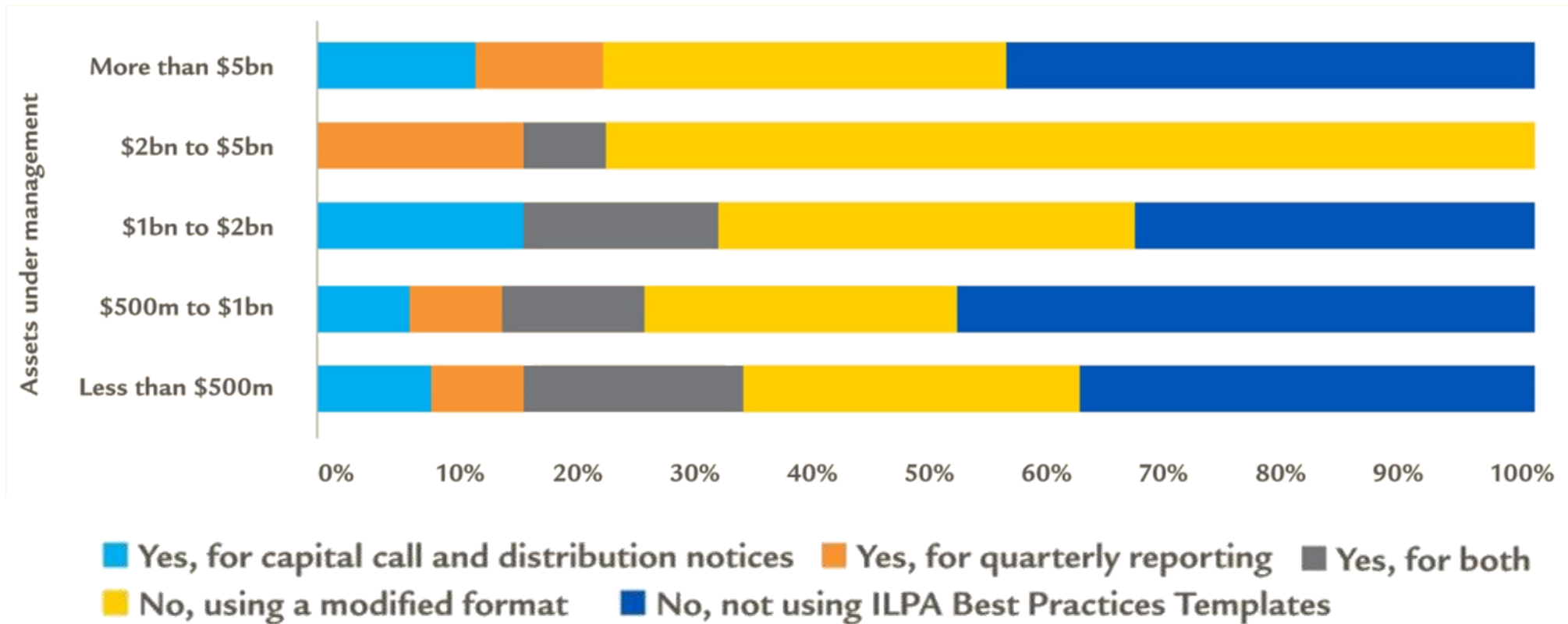




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • FEES TEMPLATE

Are you currently using the ILPA Best Practice templates?

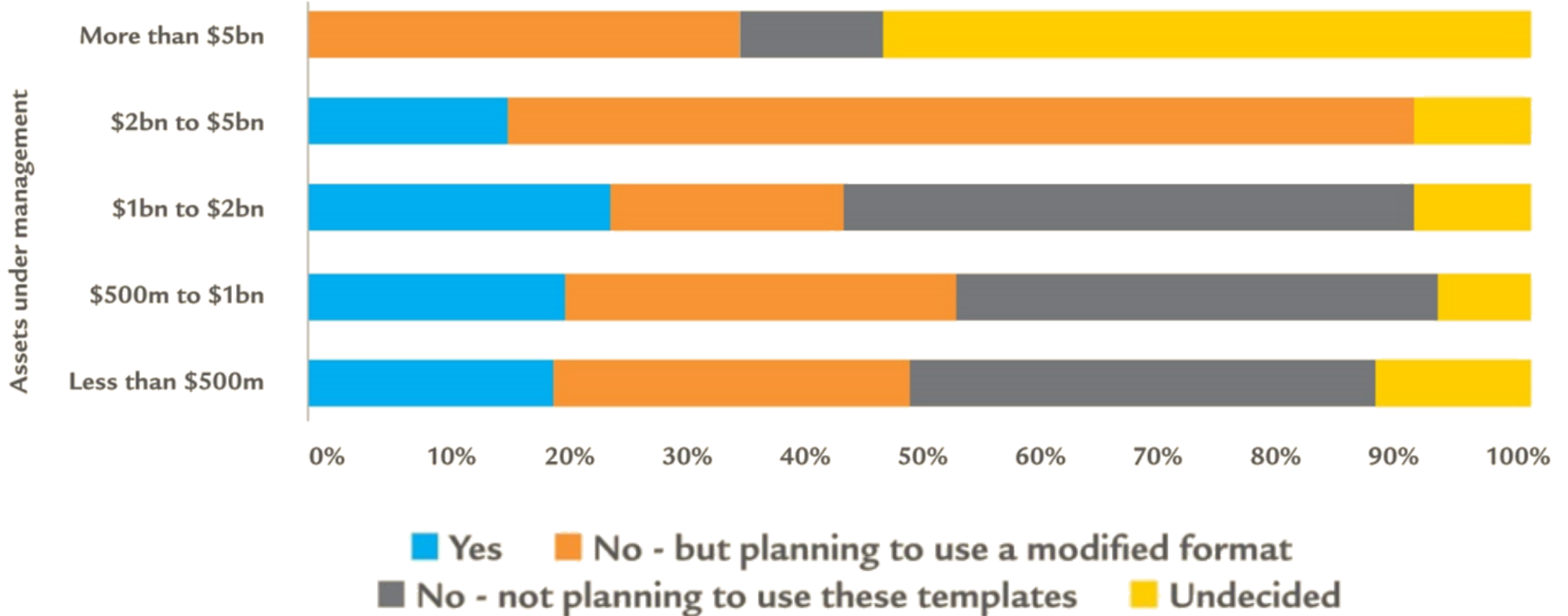




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • FEES TEMPLATE

Are you planning to implement the ILPA fee reporting template?

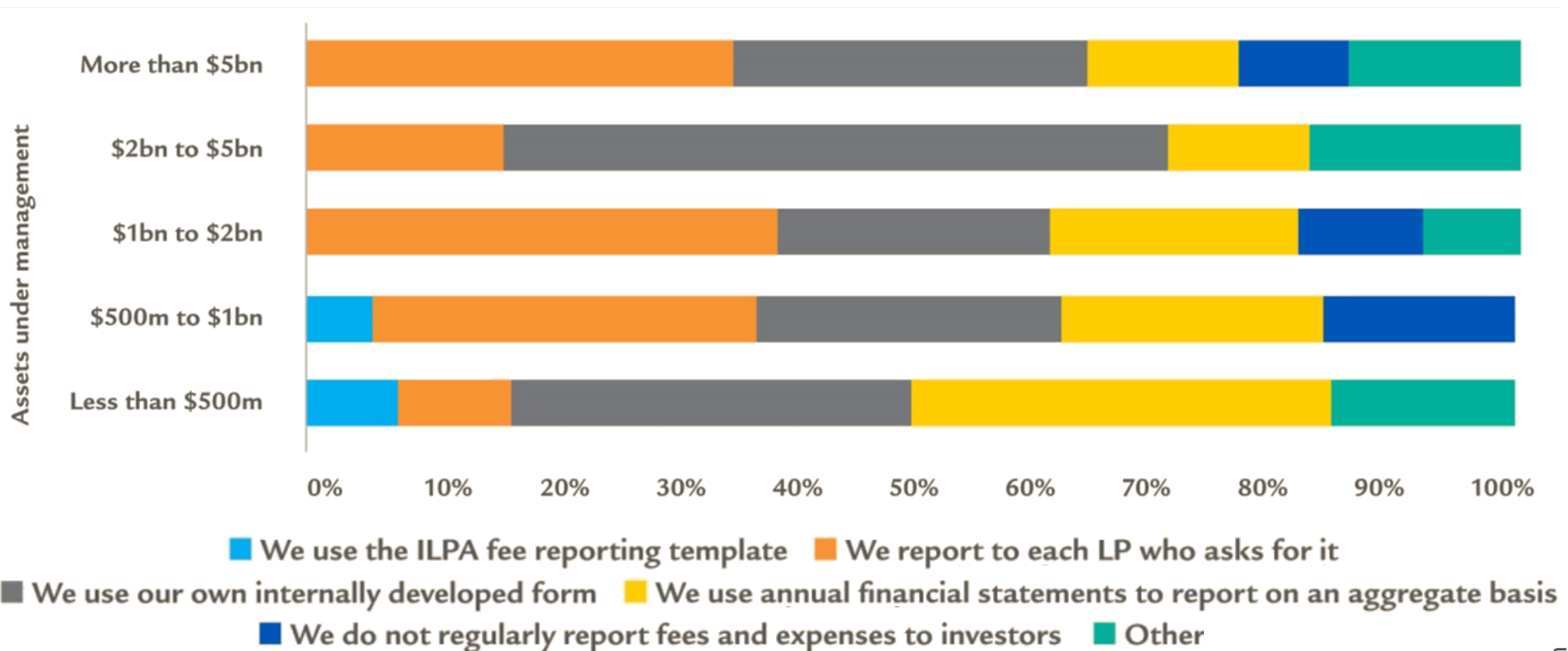




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • FEES TEMPLATE

How do you currently report your actual fees and expenses to investors?





analysis • EXPENSES

How do you answer expense-related queries that are not addressed in the PPM, LPA or policy documents?

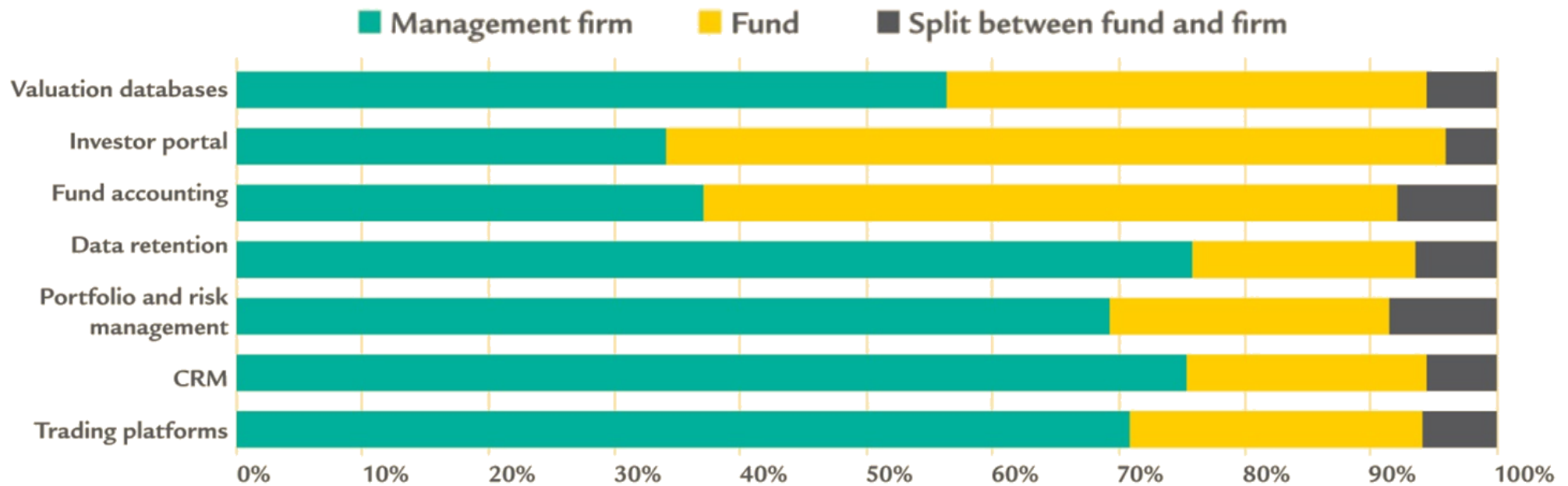




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • EXPENSES

When you bring in technology-driven systems for the following, who covers the cost?

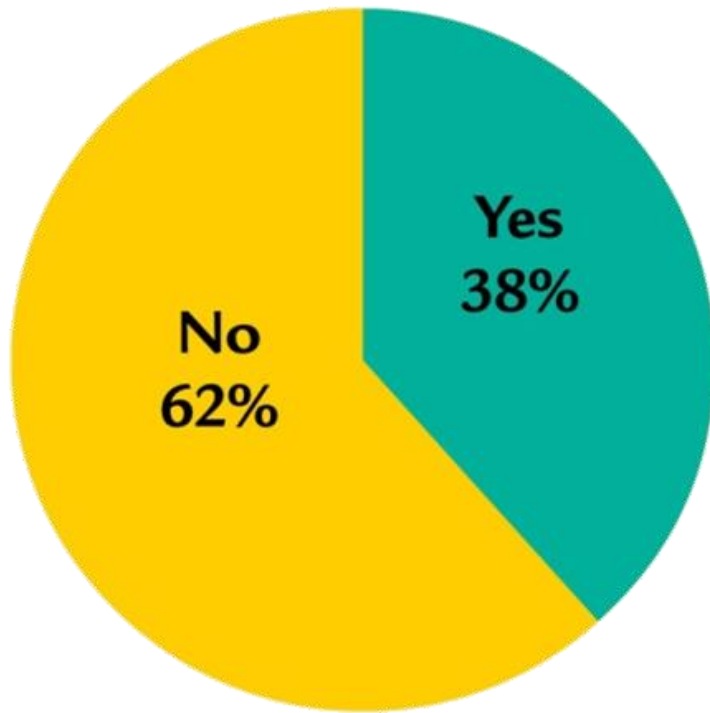




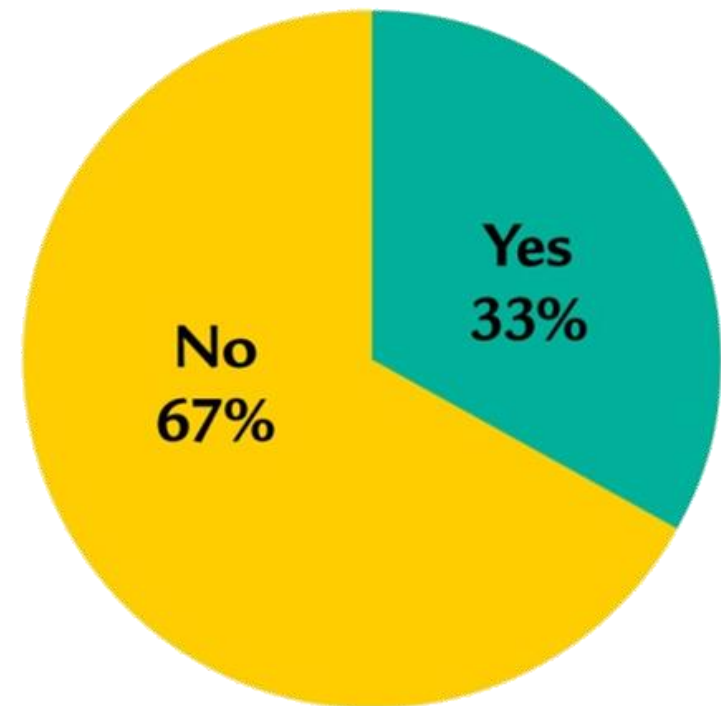
Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • OPERATING PARTNERS

When OPs sit on a portfolio company board, does it pay them director fees?



If you answered yes, if the firm ceases to pay them the retainer, would you offset the OP's cash director's fee against the fund's management fee?

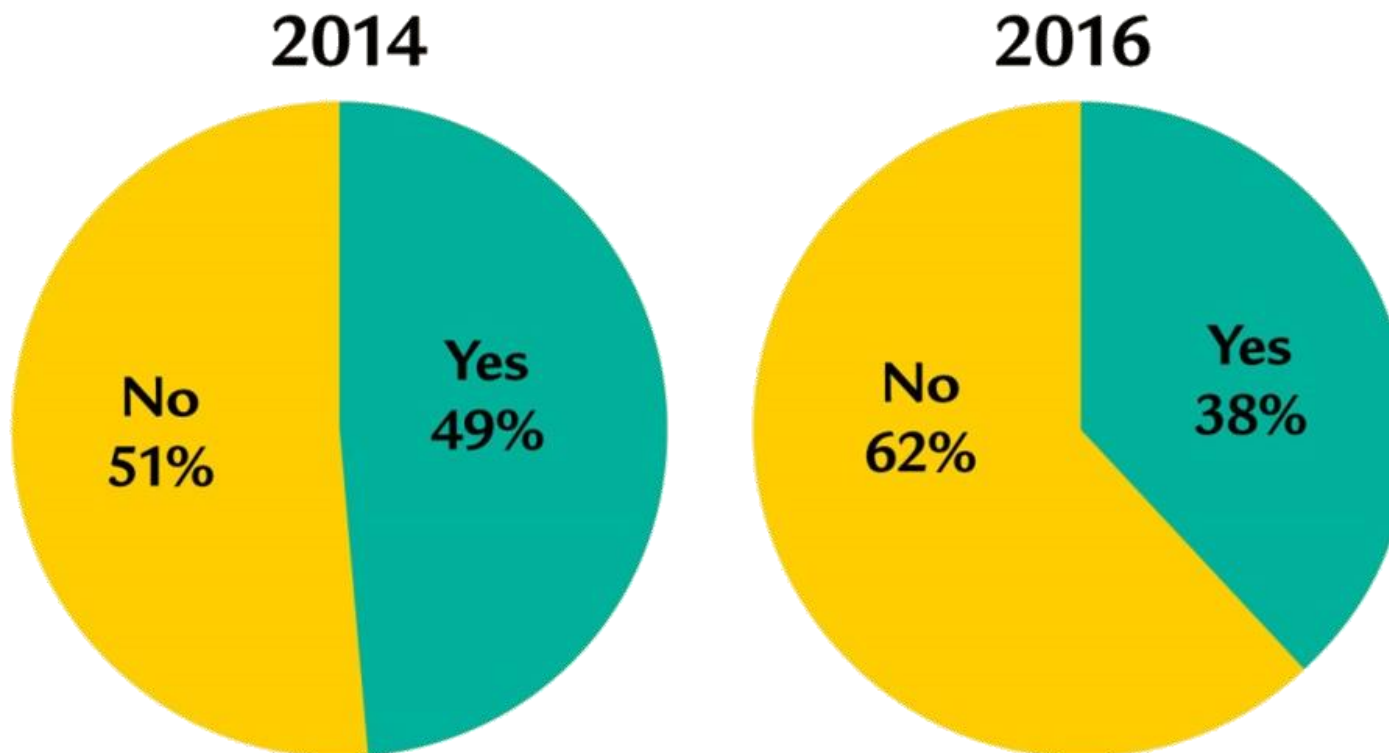




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • OPERATING PARTNERS

If an operating partner on retainer joins a portfolio company as an independent director, do you offset the cash director fee against the management fee?

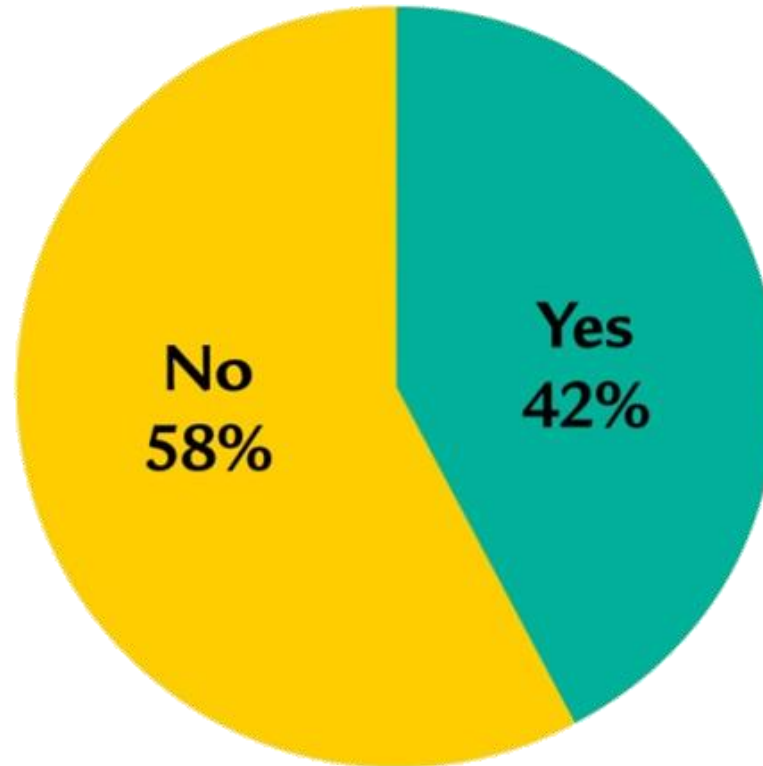




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • OPERATING PARTNERS

If you answered yes to the prior question and if the firm stops paying the OP's retainer, would you offset the partner's director fee against the fund's management fee?

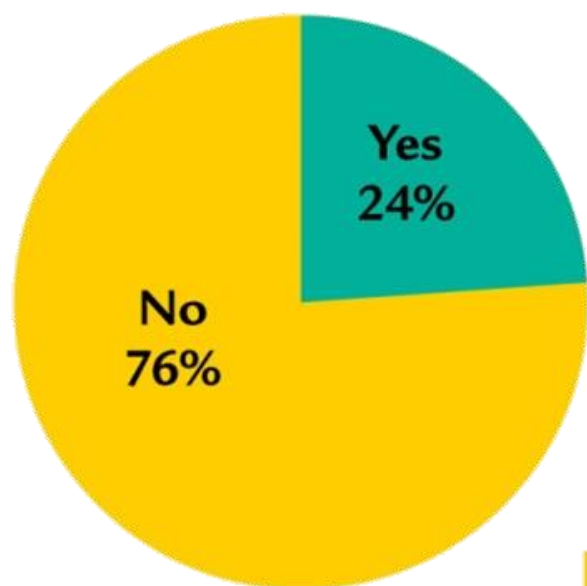




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • OPERATING PARTNERS

Would you offset any equity options the portfolio company grants to the OP?



What is the amount of the offset?

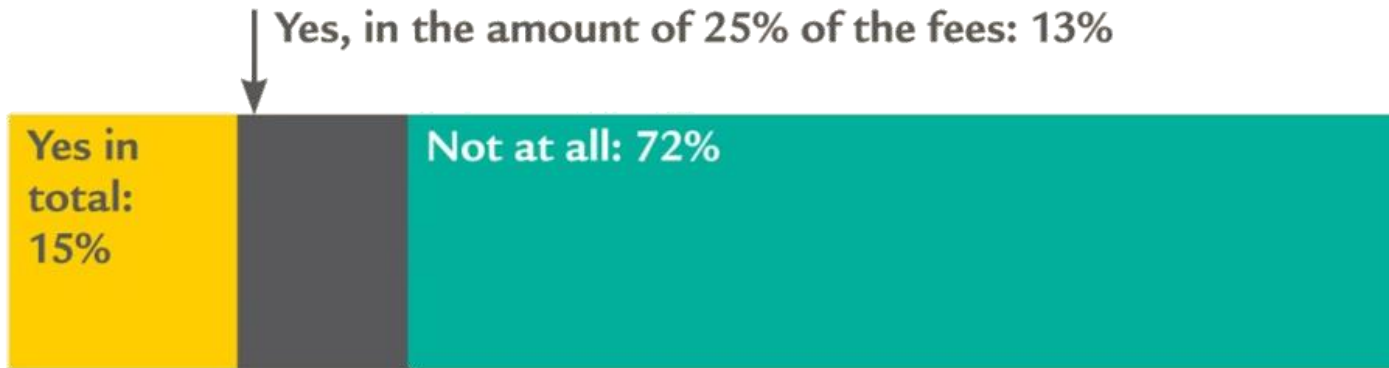




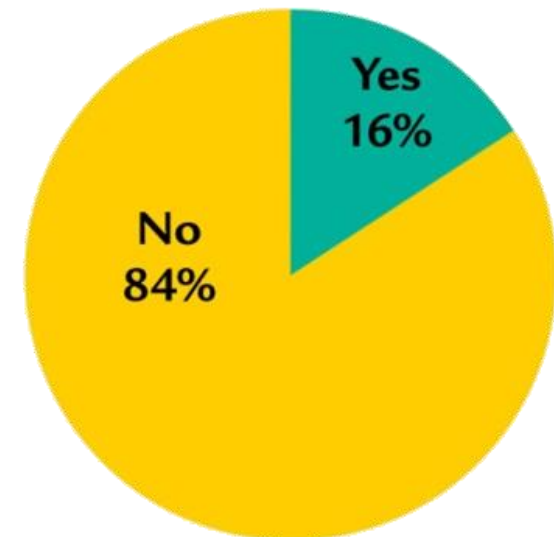
Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • OPERATING PARTNERS

If the portfolio company pays consulting fees to the OP's company and OP owns 25% of the consulting firm, would you offset the fees paid to the business against the management fee?



Would knowing what the consulting firm actually pays the OP make any difference to your answer?

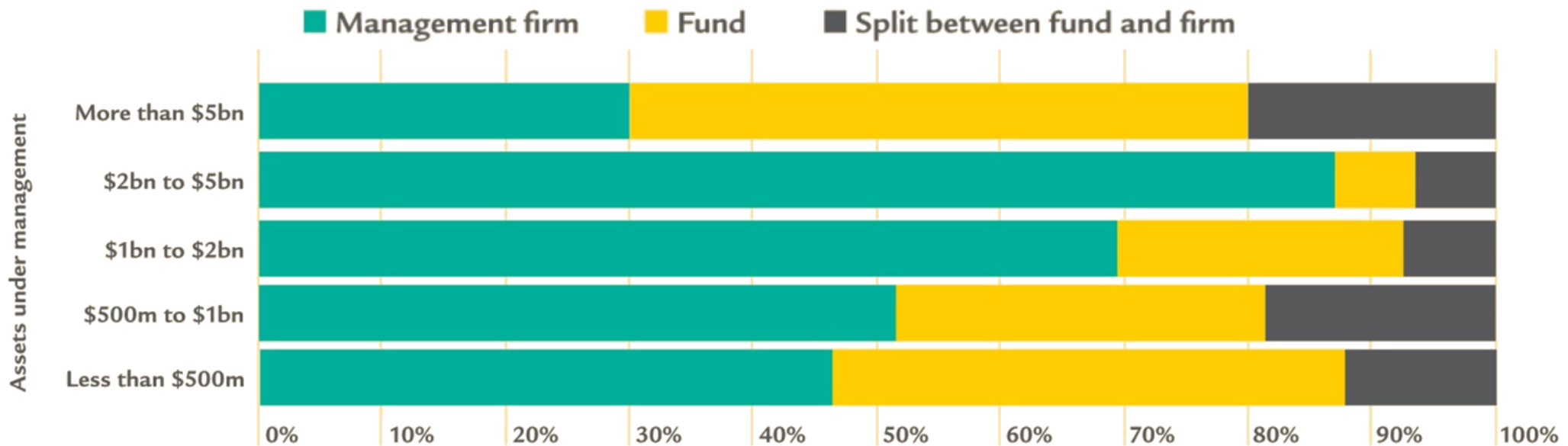




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

Following a routine examination, regulators found a deficiency around valuations. You redo the last two quarters' reports and deliver them along with an explanatory letter to your LPs. Who pays the accounting and legal costs?



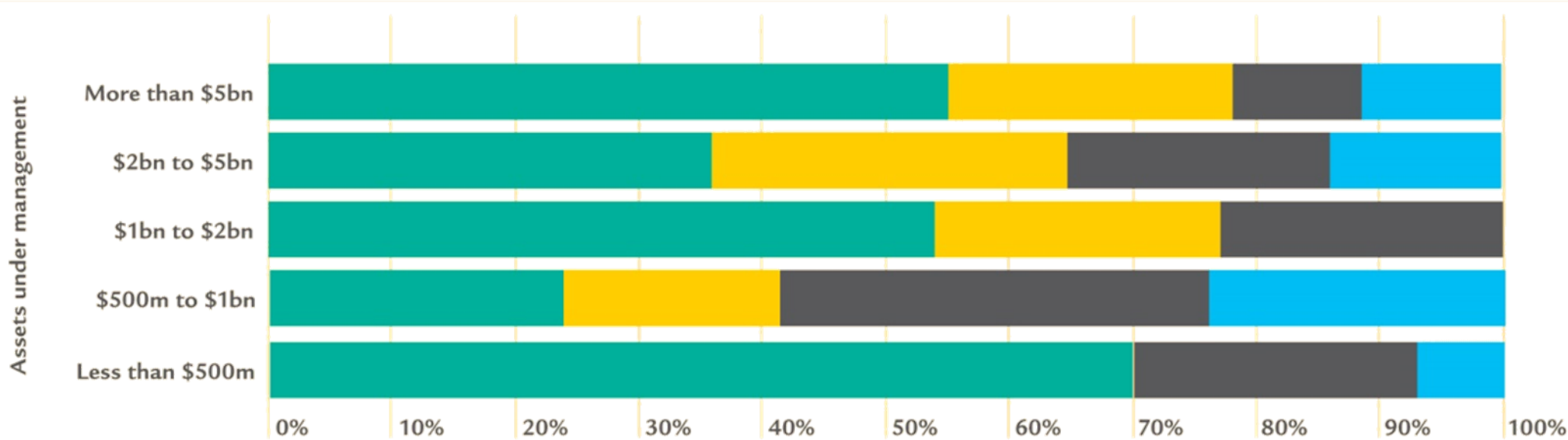


Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

As a result of a routine examination, the SEC highlights deficiencies in the examination report. Do you disclose these to your LPs?

- Yes, in all cases
- Yes, because we have side letters that require the disclosure and we disclose it to the side letter holder
- Only if the deficiency resulted in expenses to the fund
- We try very hard not to have to make any disclosure

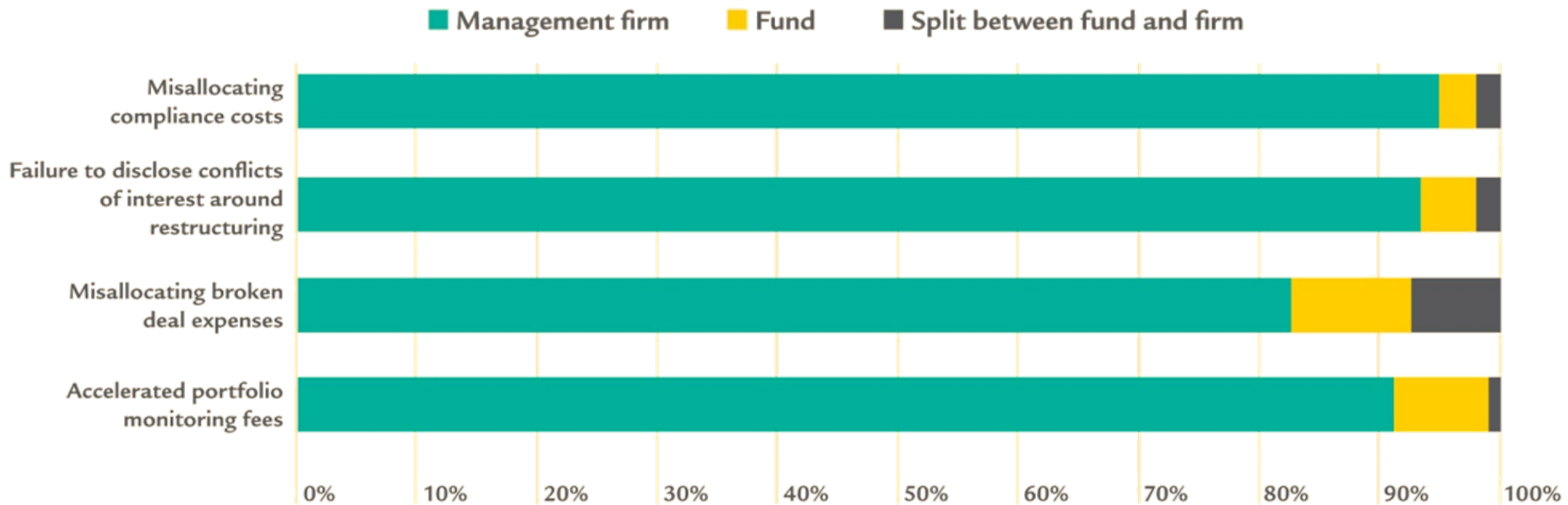




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

The SEC determines you had a problem with the below item. Who pays the financial penalty?

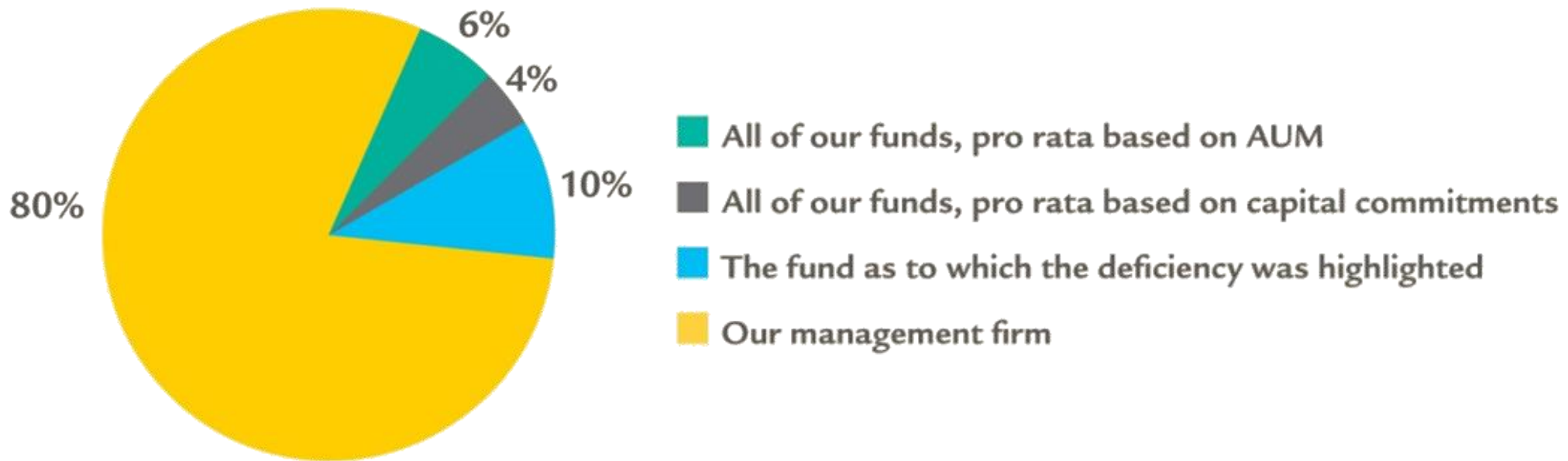




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

The SEC requires that you engage a compliance consultant to review your CCO's activities. Who pays the consultant?

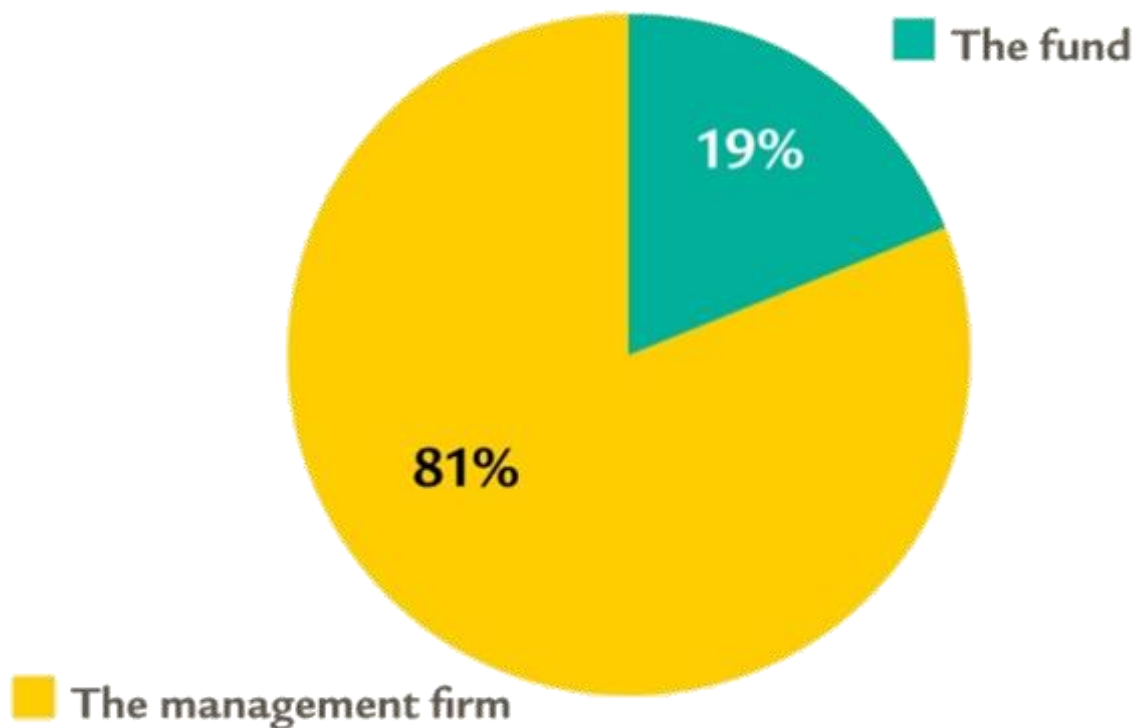




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

If you advance funds, who pays the amount advanced?

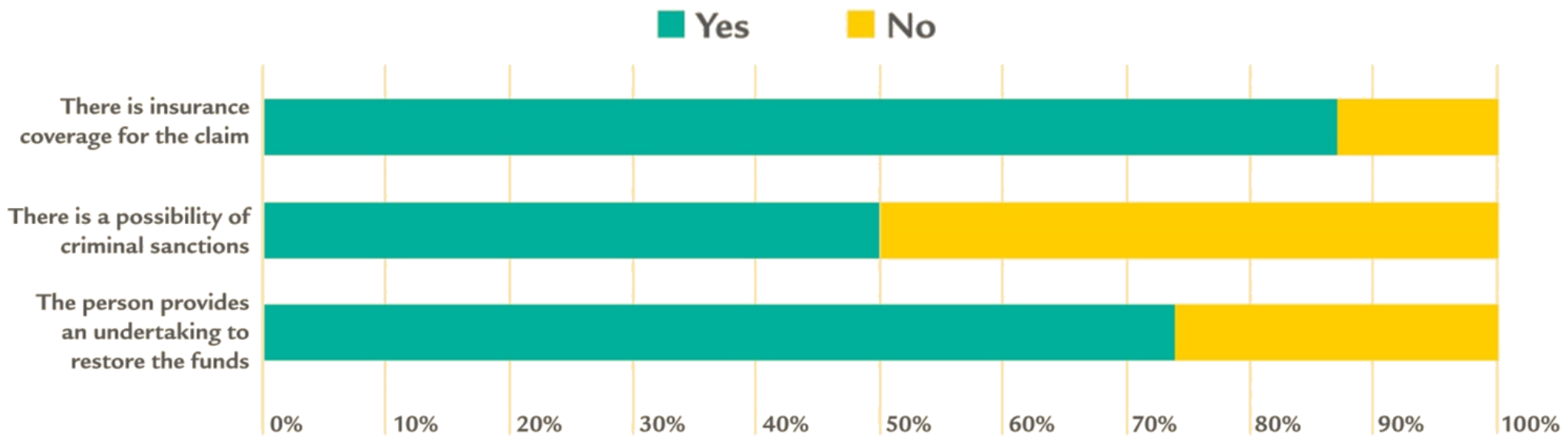




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • SEC EXAMINATIONS

A principal with your firm is subject to an SEC inquiry involving the activities of the firm and the funds you manage. Do you advance expenses for the principal's defense if:

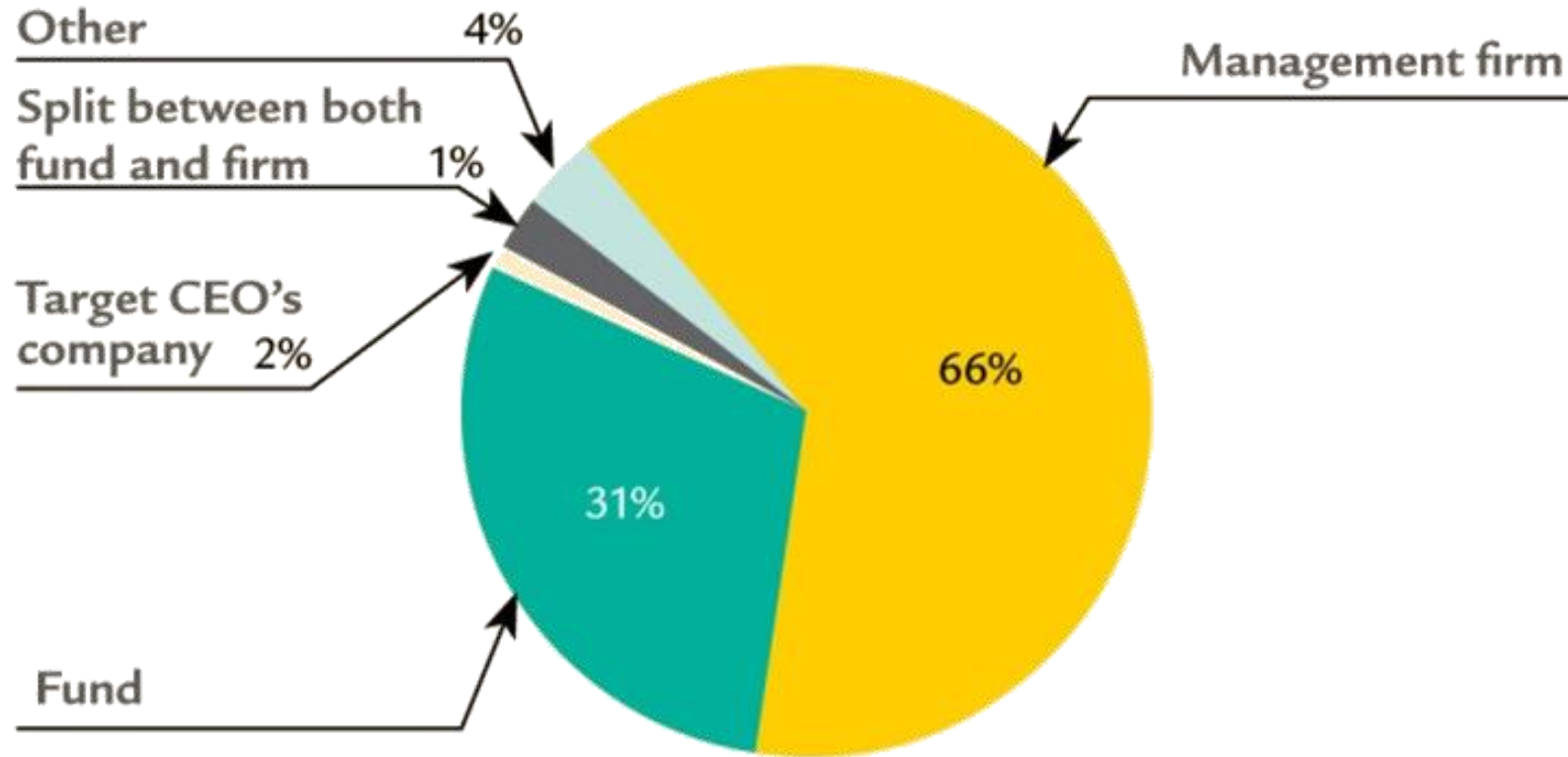




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • ENTERTAINMENT AND TRAVEL

A partner takes a target company CEO out to lunch but there is no letter of intent or pre-existing deal discussion. Who pays the tab?

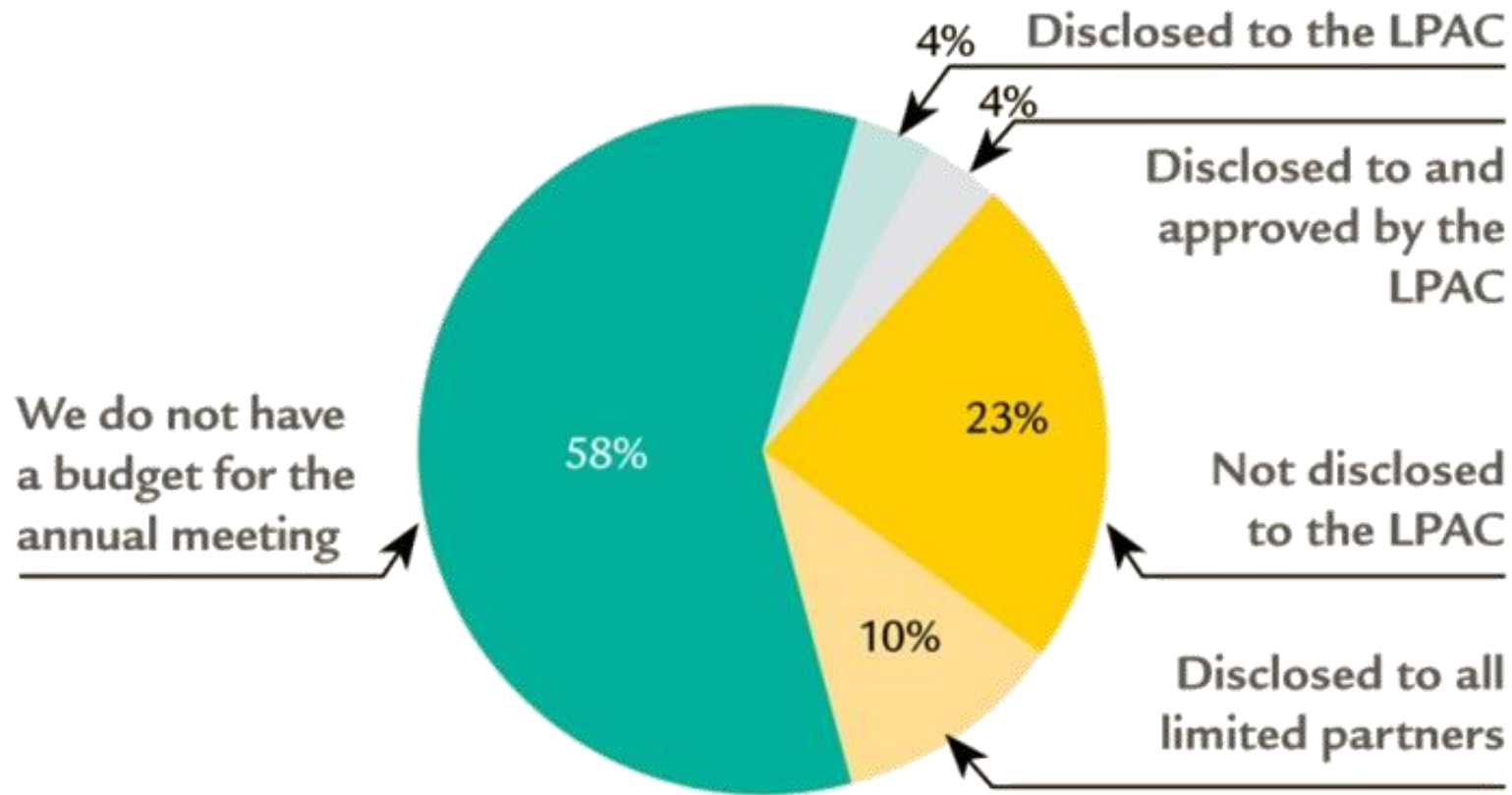




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • ENTERTAINMENT AND TRAVEL

If you have a budget for the annual meeting of limited partners, is it:

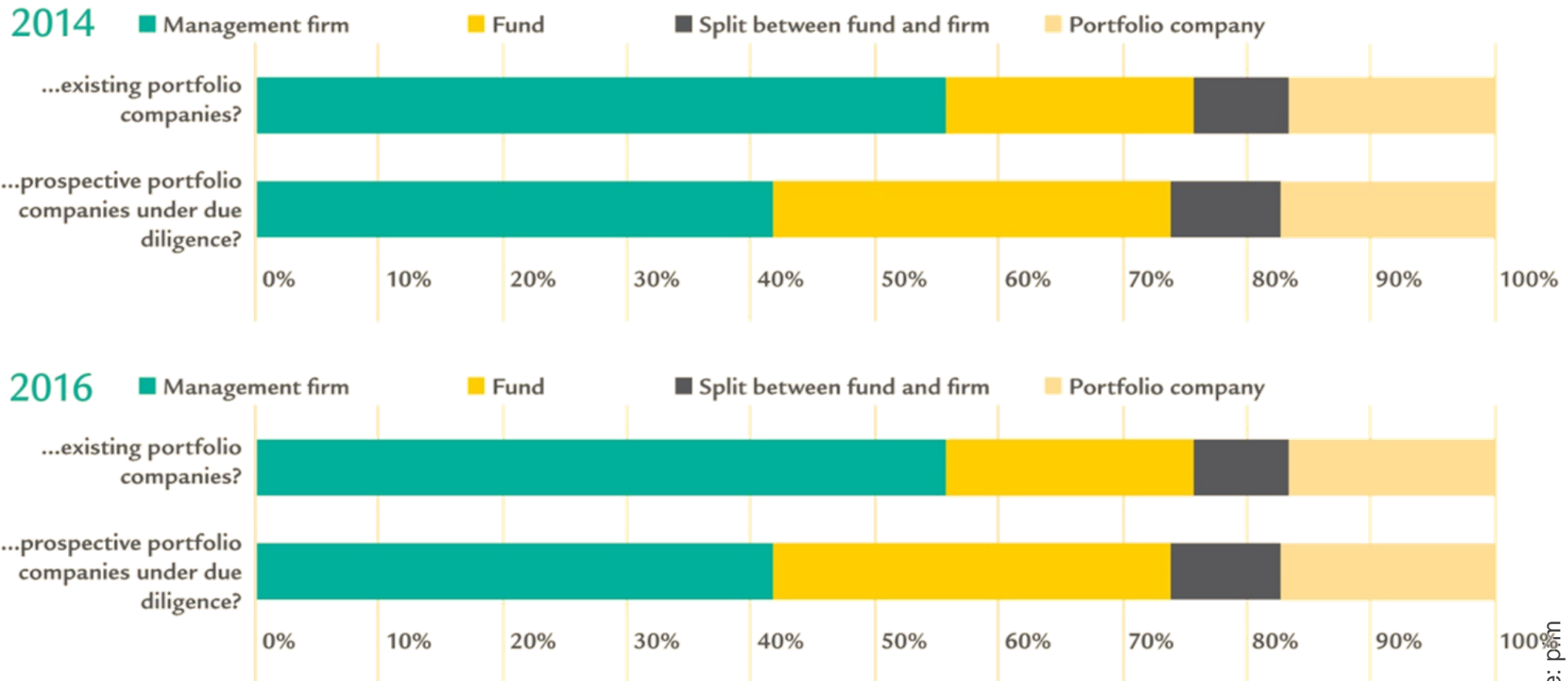




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • ENTERTAINMENT AND TRAVEL

At the annual meeting, who pays for the meals and entertainment of the CEOs of...



Source: pfm

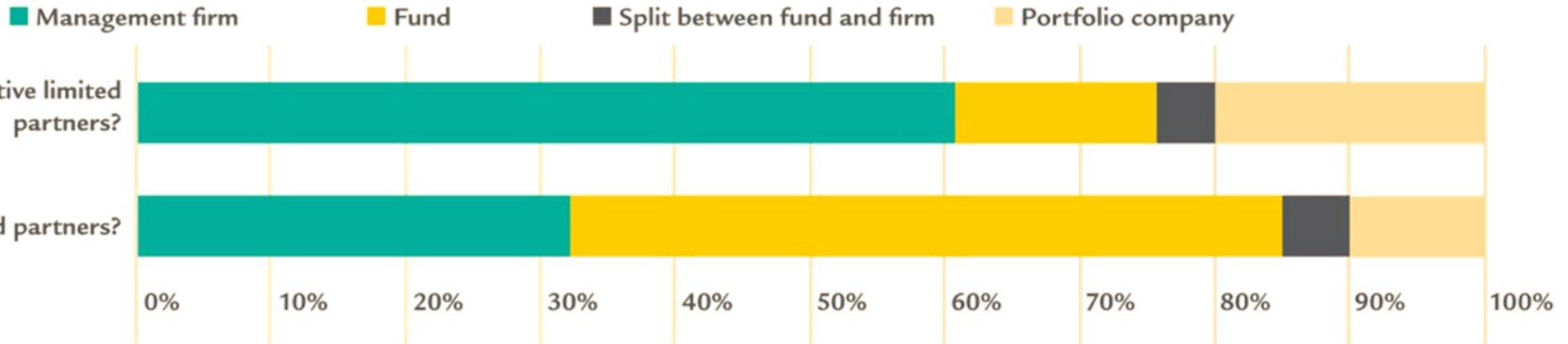


Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

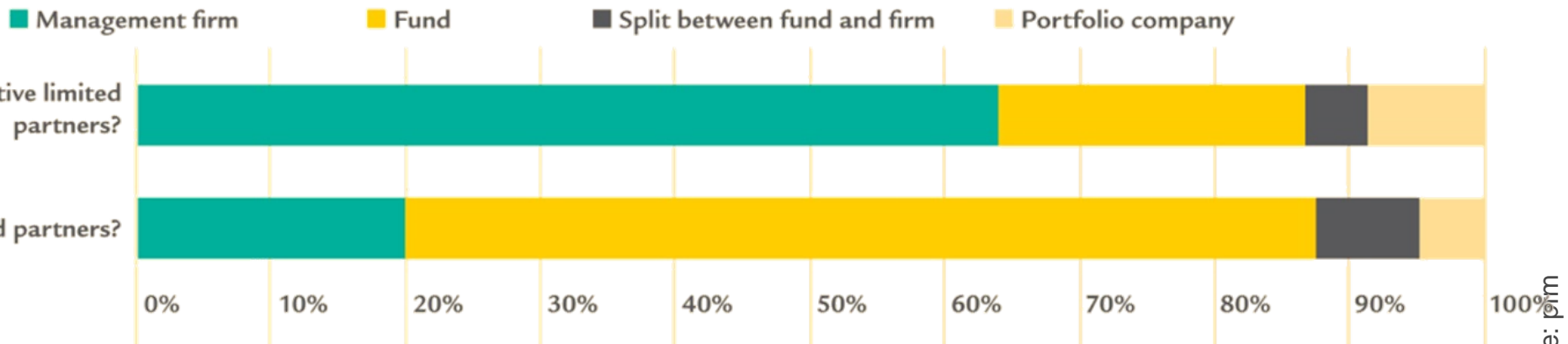
analysis • ENTERTAINMENT AND TRAVEL

At the annual meeting, who pays for the meals and entertainment of the...

2014



2016

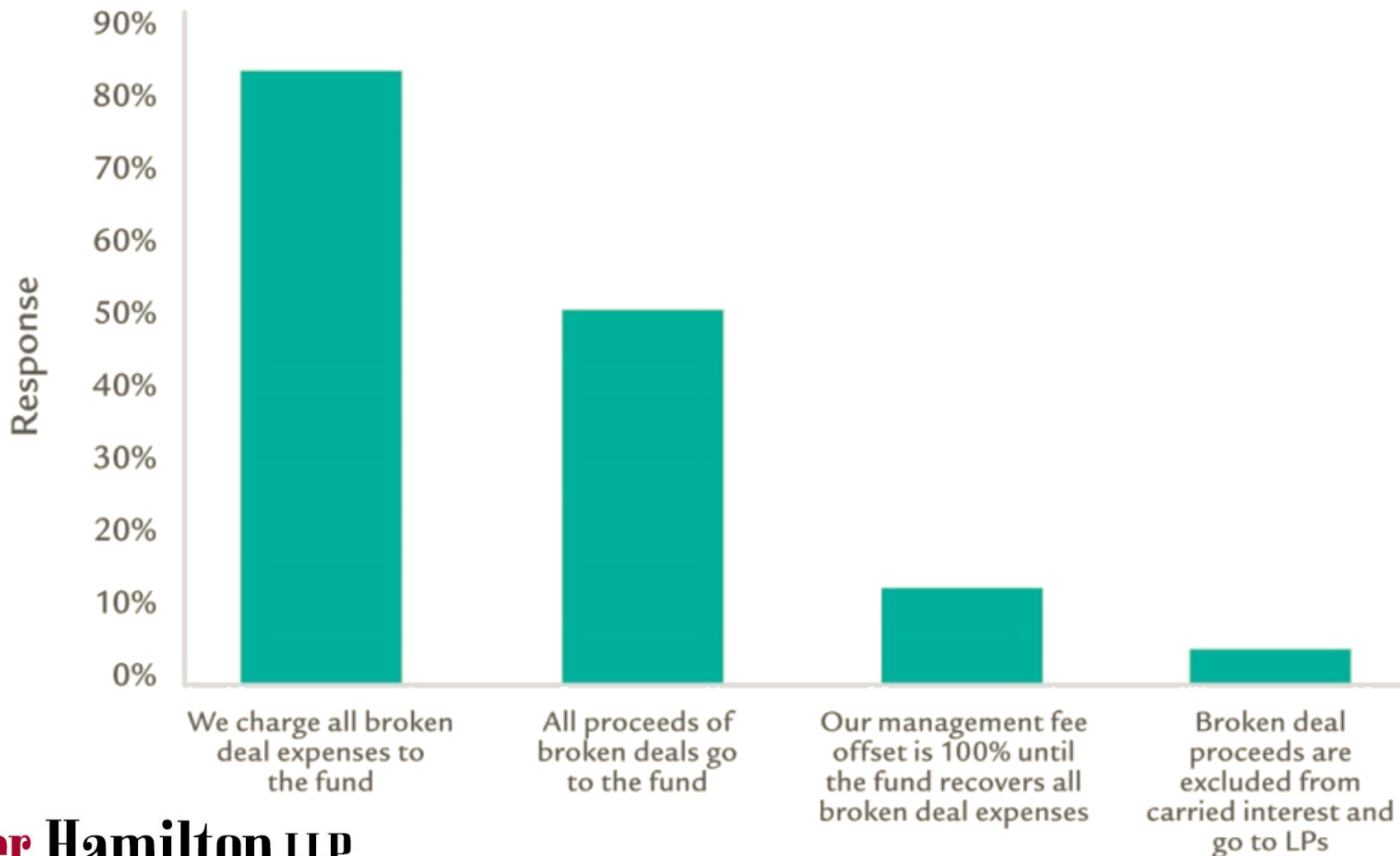




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • DEAL EXPENSES

In terms of broken deal expenses, which applies to you?

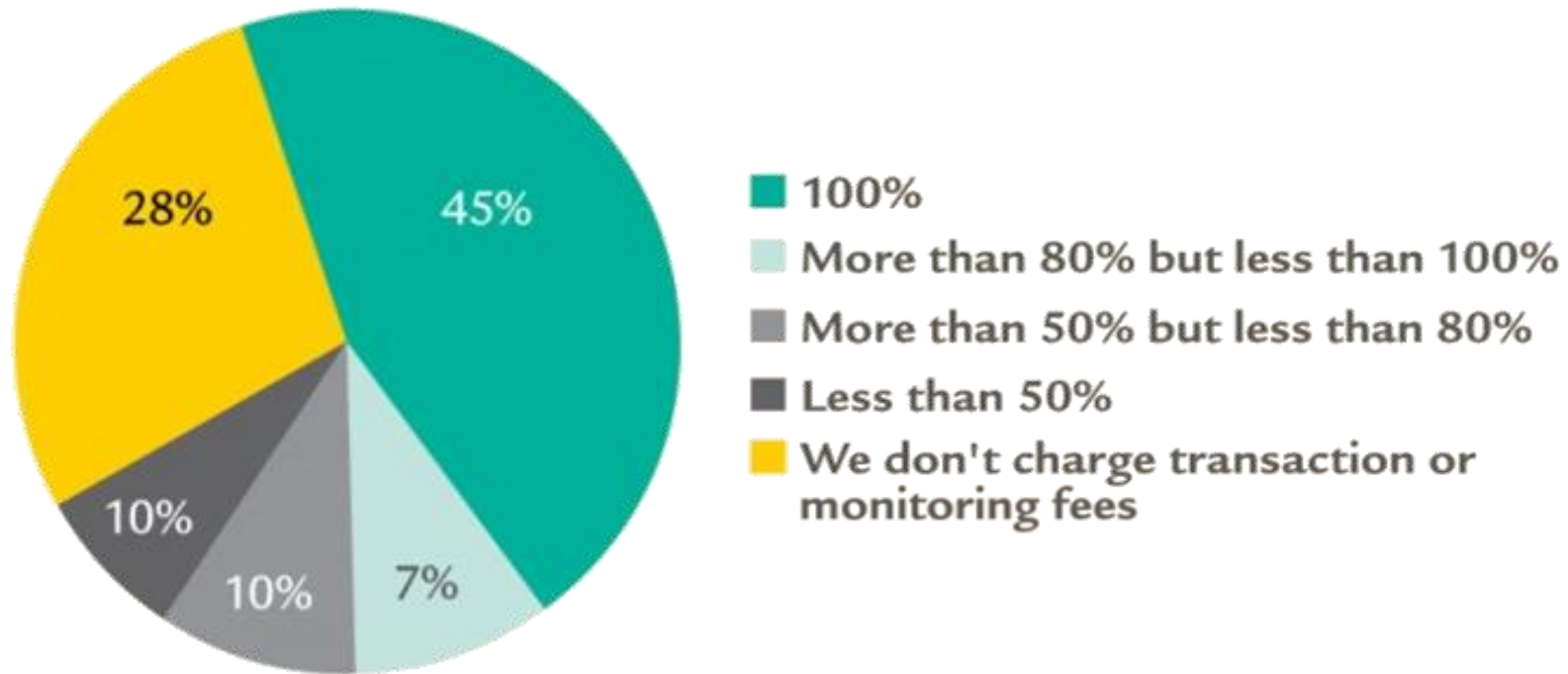




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • DEAL EXPENSES

What percentage of your transaction or monitoring fee is offset against your management fees?

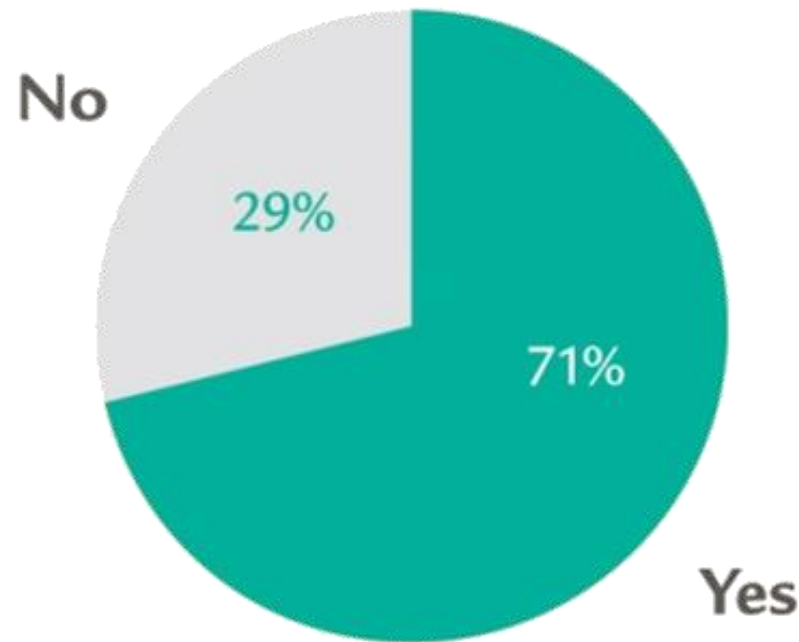




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

analysis • DEAL EXPENSES

Do you charge management fees during extension periods?

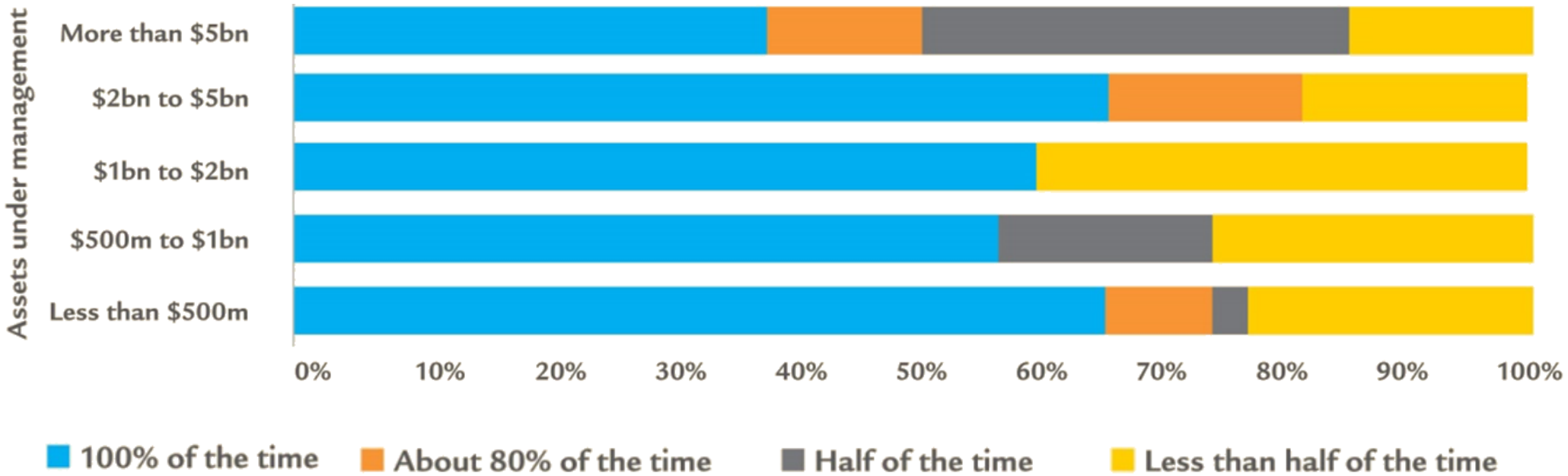




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • CO-INVESTMENT

If you offer co-investments, are your co-investments structured as separate entities?

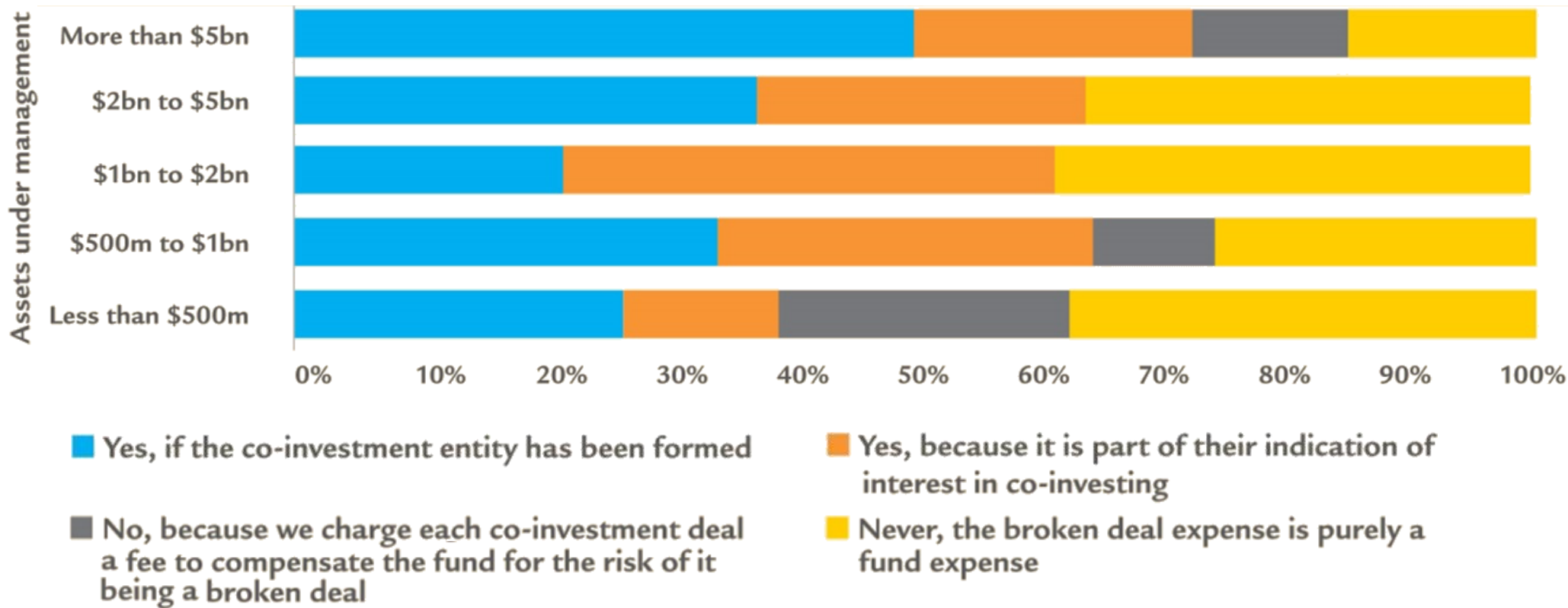




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • CO-INVESTMENT

Do the co-investors have any responsibility for broken deal expenses if the deal does not go forward?

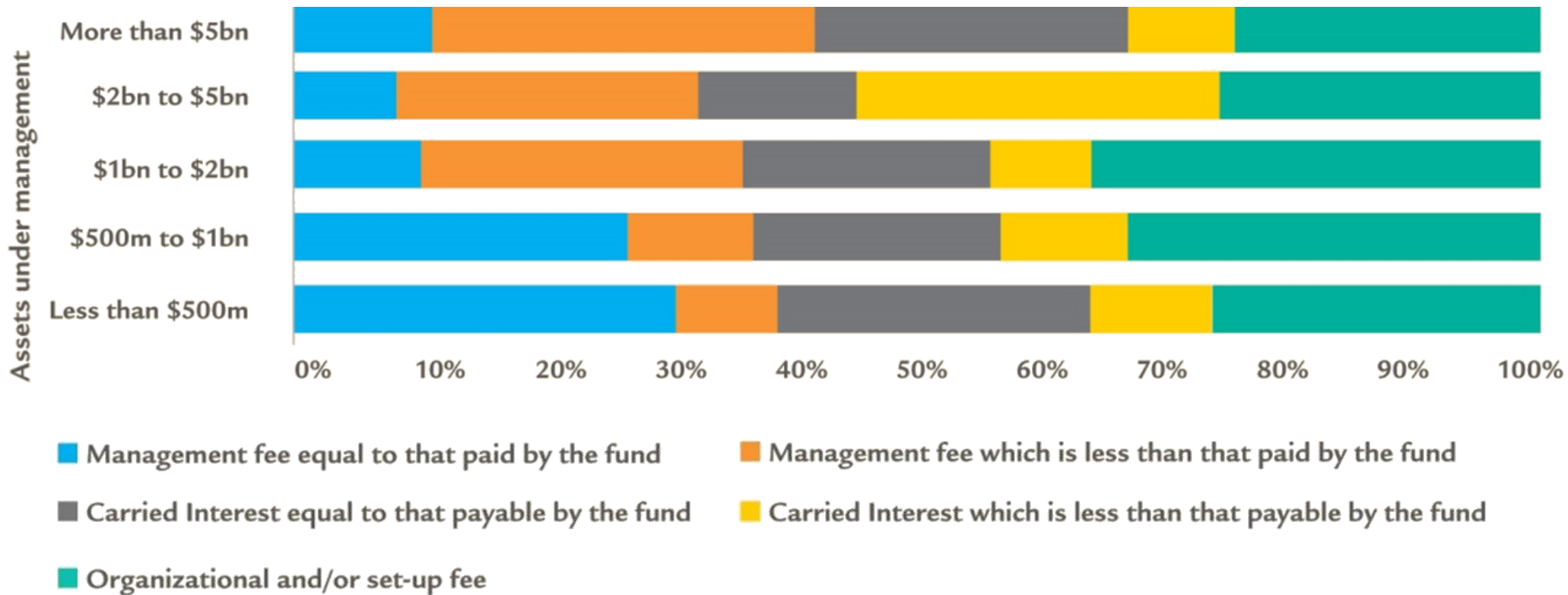




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • CO-INVESTMENT

Which of the following do you charge to our co-investment vehicles?

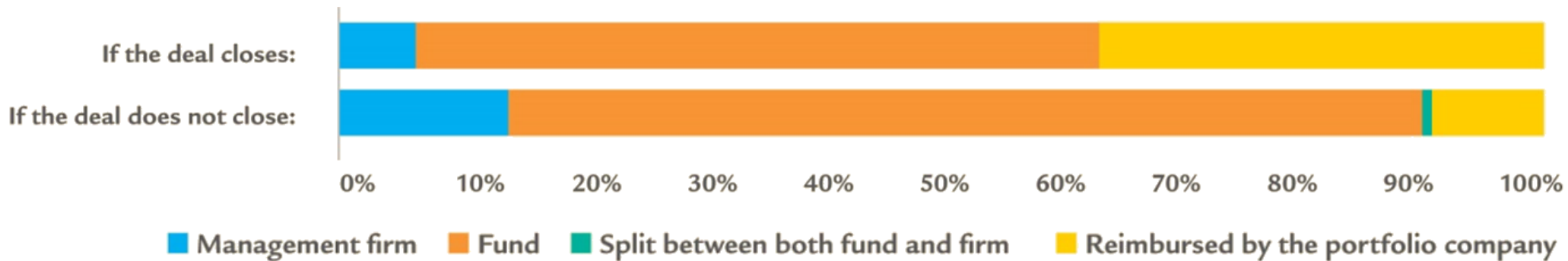




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • DEALS AND POLICIES

During due diligence and before any letter of intent is signed, the firm hires lawyers and other service providers to begin working on the transaction. Who pays these expenses?

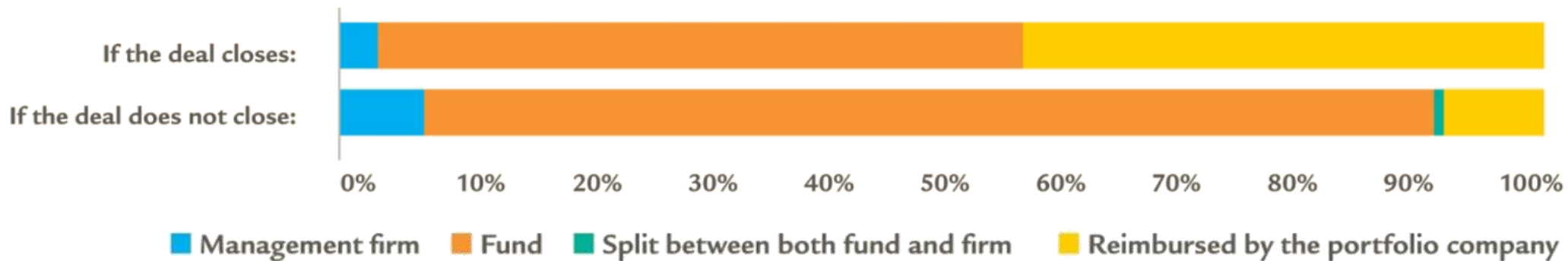




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • DEALS AND POLICIES

After a letter of intent is signed, the firm hires lawyers and other service providers to begin working on the transaction. Who pays these expenses?

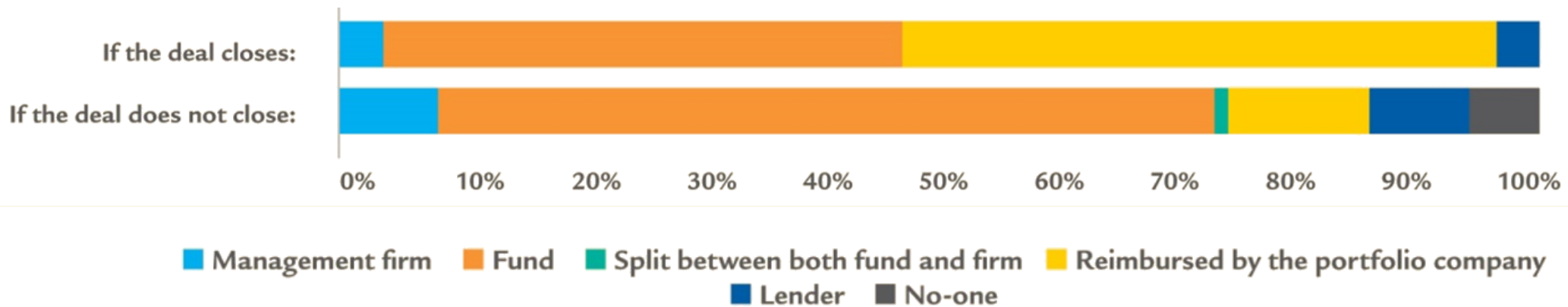




Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • DEALS AND POLICIES

After a definitive agreement is signed, the firm's financing team agrees on a lending package for the deal. Who pays legal fees incurred by the lender?

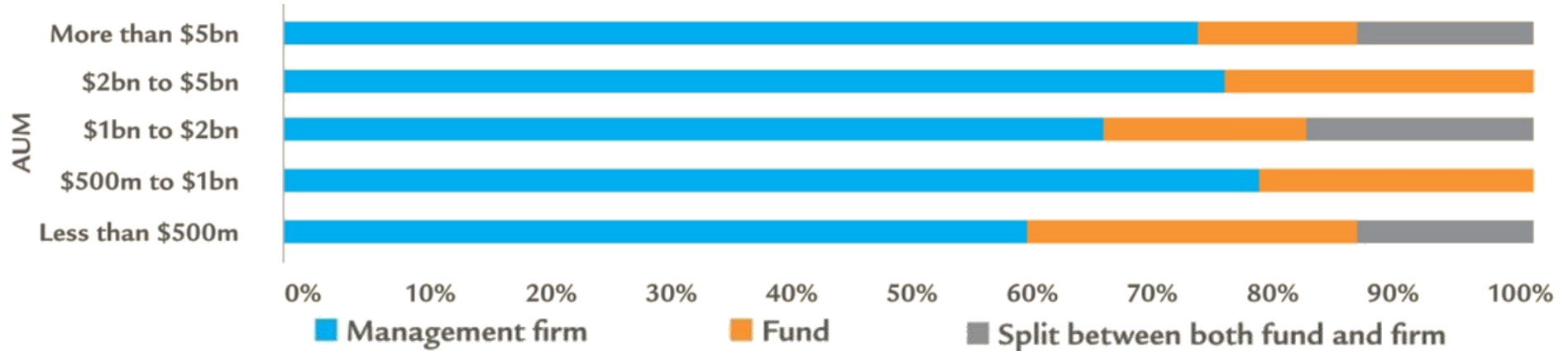




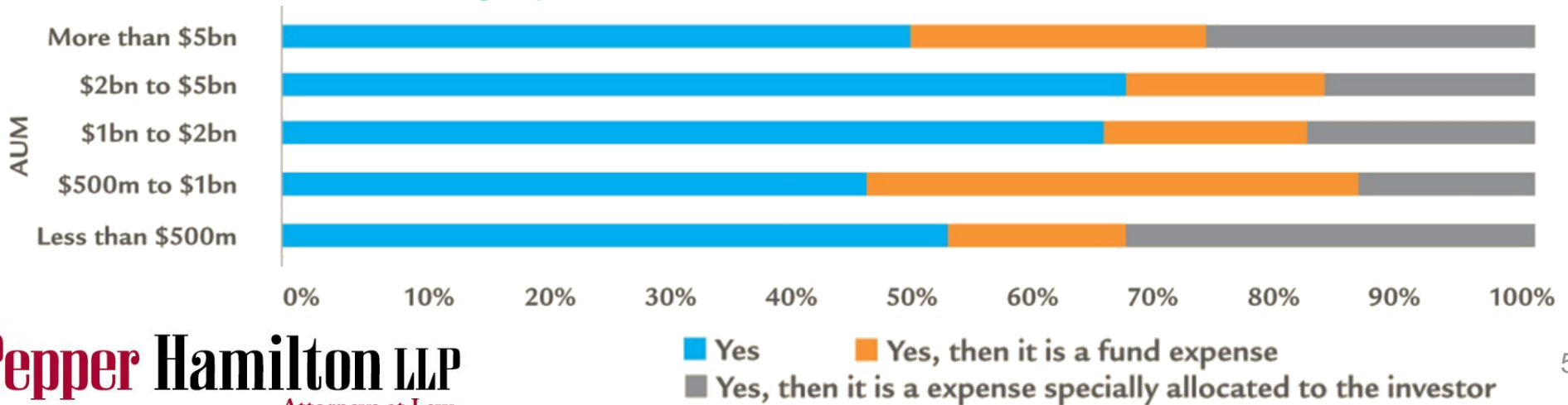
Published in association with: PEF Services, Pepper Hamilton LLP, WithumSmith + Brown

data room • DEALS AND POLICIES

Your firm employs an ESG consultant to advise on a new responsible investment policy across your portfolio. Who pays?



If an ESG consultant is a requirement of a particular limited partner, does this change your answer to the above question?



Questions & Answers

Gregory J. Nowak

Partner, Financial Services Group

215.981.4893

212.808.2723

nowakg@pepperlaw.com

- ▶ Concentrates his practice in securities law, particularly in representing investment management companies and other clients on matters arising under the Investment Company Act of 1940 and the related Investment Advisers Act of 1940, and broker dealers and commodity futures traders and pool operators.
- ▶ Handles mergers and acquisitions, corporate and regulated investment company tax work and other corporate matters.
- ▶ Also represents broker-dealers and CTAs and CPOs with respect to matters under the Securities Exchange Act of 1934 and the Commodity Exchange Act.
- ▶ Represents many hedge funds and other alternative investment funds in fund formation, investment and compliance matters, including compliance audits and preparation work.
- ▶ Writes and speaks frequently on issues involving investment management, health care and other matters and is the author of four books on hedge funds.



Martin S. Bloor

Partner, White Collar Litigation and Investigations

212.808.2733

bloom@pepperlaw.com

- ▶ Represents clients in white collar criminal matters, corporate investigations and complex commercial litigation.
- ▶ Practice is primarily focused on criminal and regulatory investigations of individuals and corporations, internal corporate investigations, particularly in connection with potential violations of the Foreign Corrupt Practices Act (FCPA), antitrust matters and securities and derivative litigation.
- ▶ Experience in complex commercial litigation and appellate matters before federal and state courts.
- ▶ Advises businesses on compliance issues under the FCPA, including drafting and implementing corporate compliance programs, and has extensive experience in conducting FCPA due diligence and advising on other FCPA risks in the context of mergers and acquisitions.



Julia D. Corelli

Partner, Corporate and Securities Practice Group

215.981.4325

corellij@pepperlaw.com

- ▶ Co-chair of the firm's Funds Services Group, vice chair of its Executive Committee and co-chair of its Commercial Department.
- ▶ Concentrates in private investment fund formation, operations and compliance, private equity investment transactions, venture capital investments, acquisitions, dispositions and financings of business enterprises, joint ventures, and intra-partner dealings.
- ▶ She also is experienced in matters of investment fund principal compensation and succession planning and serves as general outside counsel to family offices.
- ▶ The industry focus of funds and companies she counsels include biotechnology health care services, financial services, peer-to-peer lending, energy and natural resources, and real estate.



Paul E. Pelletier

Partner, White Collar Litigation and Investigations

202.220.1218

pelletierp@pepperlaw.com

- ▶ Represents public and private companies, executives and high-profile individuals from various industries in state and federal investigations, including health care, pharmaceutical, biotechnology, medical device and financial services.
- ▶ Experience in matters alleging international bribery, accounting fraud, the submission of false claims, and the provision of remuneration to induce referrals.
- ▶ Counsels and guides corporations on their anti-corruption compliance programs and advises businesses that have experienced data breaches on their various reporting obligations.
- ▶ Counsels and defends federal law enforcement agents in congressional hearings and matters before the IG.



Robert E. Fay

Associate, White Collar Litigation and Investigations

215.981.4149

fayr@pepperlaw.com

- ▶ Concentrates his practice in white collar defense.
- ▶ Practice spans a variety of industries, including pharmaceutical companies, health care consultancies, technology companies, insurers and government contractors.
- ▶ Experience conducting internal investigations, particularly in cases involving allegations of financial fraud or accounting irregularities.
- ▶ Served as a trial attorney in the U.S. Department of Justice Tax Division in Washington, where he litigated complex tax controversies and obtained injunctions against fraudulent tax return preparers and individuals promoting tax fraud schemes.



Capabilities

Best Lawyers

More than 70 lawyers listed, including 5 as Lawyer of the Year

100+

lawyers highly rated by Super Lawyers and Rising Stars

SERVICES

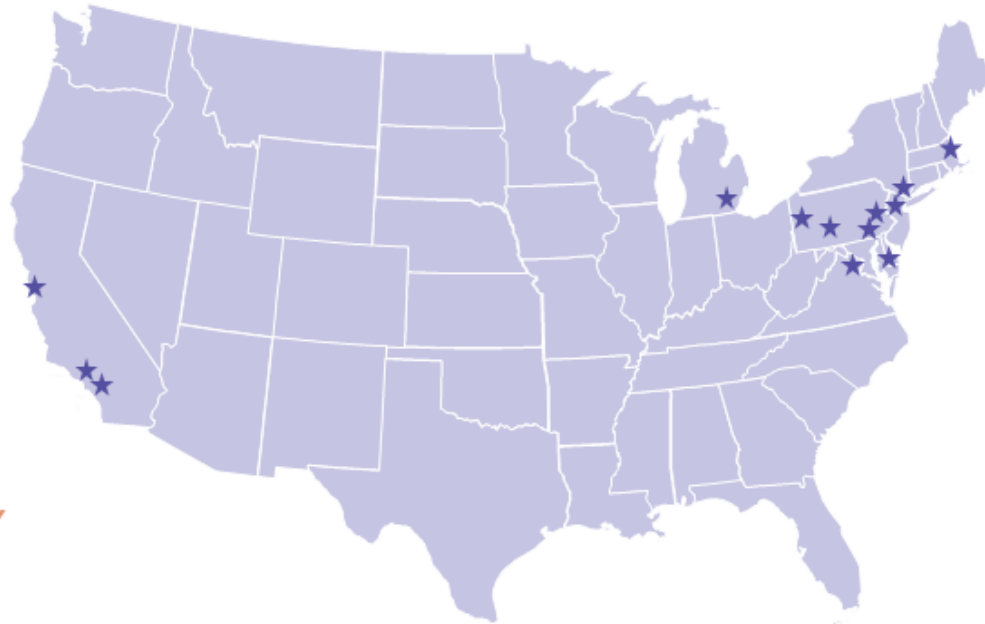
BUSINESS
INTELLECTUAL PROPERTY
GOVERNMENT REGULATION
INTERNATIONAL
LITIGATION

INDUSTRIES

CONSTRUCTION LAW
EDUCATION COUNSELING, LITIGATION AND INVESTIGATION
ENERGY
FINANCIAL
FOOD, ALCOHOL AND BEVERAGE
HEALTH CARE
INVESTMENT FUNDS
LIFE SCIENCES
MEDIA, COMMUNICATIONS AND ENTERTAINMENT
NONPROFIT ORGANIZATIONS AND FOUNDATIONS
PHARMACEUTICAL AND MEDICAL DEVICE
RETAIL
TECHNOLOGY
TRANSPORTATION

Locations

BERWYN
BOSTON
DETROIT
HARRISBURG
LOS ANGELES
NEW YORK
ORANGE COUNTY
PHILADELPHIA
PITTSBURGH
PRINCETON
SILICON VALLEY
WASHINGTON
WILMINGTON



Legal 500

Recommended firm for
Construction, Product
Liability and White
Collar Criminal Defense

500+ lawyers

13 offices in U.S.

125+ years of
serving clients

For more information, visit

www.pepperlaw.com