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The Impact Of The Coronavirus Crisis On Mergers And Acquisitions

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The coronavirus (COVID-19) crisis is having and will continue to have a material global impact on mergers and acquisitions ("M&A"). On a massive scale and in a very short period of time, hundreds of thousands of businesses have shuttered or cut back their operations significantly, millions of workers have been laid off or furloughed, consumer spending has been drastically reduced, supply chains have been disrupted, and demand for oil and other energy sources has plummeted.

The M&A world has endured and recovered from past economic crises, including the burst of the dot-com bubble in 2000-2002 and the Great Recession of 2007-2009. As in past financial and economic crises, uncertainties in the business and capital markets have already contributed to buyers delaying or cutting back on their acquisition plans. But this time things are different—the impact of the pandemic is not just on the financial system generally, the valuation of sellers, and the appetite of buyers to get deals done in the short term, but on a multitude of other factors affecting M&A deals.

These include deal terms themselves, new due diligence issues that have arisen, the manner in which due diligence is conducted, the availability, pricing and other terms of deal financing, and the time it will take to obtain necessary regulatory and other third-party approvals for transactions

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Moreover, unlike in past crises that have affected M&A deals and activity, this time there has also been a sea change in the manner in which M&A transactions are developed and negotiated. With all of the principal players working remotely, the effective use of new and creative collaborative tools, technologies and techniques have become more critical as buyers, sellers, providers of M&A financing, and all of their respective legal and financial advisors adjust to the changed environment.

In this article, we will discuss how the foregoing factors and others have already impacted M&A dealmaking and will likely continue to impact the M&A world for some time to come, including how buyers and sellers can each adjust to the changed circumstances to help minimize their exposure to the business risks resulting from the pandemic.

1. M&A Deal Activity

Global mergers and acquisitions have already plummeted as result of the coronavirus crisis, and by the end of March 2020 had reached a near standstill. M&A levels in the United States fell by more than 50% in the first quarter to $253 billion compared to 2019, but most of those transactions were entered into or closed earlier in the quarter before the crisis spread worldwide.

Among other things, executives of companies that would typically have been strategic buyers have been forced to redirect the focus and energy of their teams toward the immediate health of their own companies and away from longer term goals that include pursuing growth through acquisition strategies. Similarly, private equity sponsors have spent an increasing amount of time on efforts to strengthen or save their existing portfolio companies, at the expense of new deal activity.

Parties to pending M&A transactions are also abandoning significant deals that were pending, such as Xerox recently dropping its $34 billion offer for HP, after having postponed meetings with HP shareholders to focus on coping with the coronavirus pandemic. SoftBank has terminated its $3 billion tender offer for WeWork shares, citing the coronavirus impact together with the failure of a number of closing conditions. Bed Bath & Beyond has initiated litigation in Delaware with respect to delays in the pending sale of one of its divisions to 1-800-Flowers for $250 million. Boeing suppliers Hexcel and Woodward have called off their pending $6.4 billion merger of equals transaction noting the “unprecedented challenges” caused by the pandemic. Investment bankers report that most new sell-side assignments are being put on hold until things stabilize.

Of course, certain industries that have been disproportionately affected by the pandemic, such as travel and leisure, transportation, and oil and gas, may see upticks in M&A activity in 2020 as buyers see opportunities for bargains in these sectors. The existing M&A pipeline is thin, and the percentage of transactions involving rescue deals, restructurings, and distressed sellers will likely increase, both in dollar terms and as a percentage of overall M&A activity.

2. Timing and Delay in M&A Deals

For both existing M&A deals that survive the pandemic and new deals entered into during the pandemic, it is expected that deal timelines will be significantly extended. Each stage of a typical transaction, including preliminary discussions between the parties, the negotiation of letter of intent or term sheet, the negotiation of a definitive acquisition agreement, and the pre-closing period, will likely take longer to accomplish. These delays will result from a number of pandemic-related factors, including the following:

- Negotiations will take longer: the overused adage of “getting everyone in the room” to get a deal agreed is not currently possible.
- Due diligence will take longer, and new M&A due diligence issues will need to be addressed.
- Third-party consents (such as from landlords, customers, and intellectual property licensors) will take longer to obtain.
- There will be delays in obtaining any necessary antitrust or other regulatory approvals. The Department of Justice has asked firms involved in mergers and acquisitions to add 30 days to their deal timing agreements, and European competition regulators have suspended investigations of a number of proposed deals.
- Buyers and their boards of directors are going to be much more cautious, and internal justifications for dealmaking in this environment will need to be more compelling.
- M&A agreement terms will take longer to negotiate as buyers will want to shift more closing risk and (where applicable) indemnity risk to sellers, and sellers will seek comfort that the persistence of the pandemic will not permit buyers to walk away from deals based on “buyer’s remorse.”
- Buyers will have concerns about their ability to properly value a seller in this environment. Valuations from comparable transactions, even those entered into very recently, will likely be no longer applicable.

- Buyers requiring financing will encounter delays resulting from the unsettled state of debt markets and available liquidity, and M&A lenders may seek closing conditions that are even more stringent than those sought by buyers, increasing closing risk for both buyers and sellers.

3. Impact on Letters of Intent

Letters of intent, term sheets, memoranda of understanding, and the like are a common feature of the M&A landscape. Before investing heavily in due diligence and negotiating detailed transaction documents, buyers and sellers typically employ these preliminary, largely non-binding documents to memorialize their mutual understanding of all or some of the material deal terms. Further, since a grant of exclusivity by the seller (which frequently accompanies the execution of a letter of intent or completion of a term sheet) shifts negotiating leverage considerably in favor of the buyer, the seller will desire to nail down as many major deal terms as possible at this stage of the M&A process. Of course, it also is not unusual for a negotiated letter of intent or term sheet to address the purchase price and little else.

In light of the coronavirus pandemic, we expect to see buyers and sellers alike refraining from entering into (or even negotiating) a traditional letter of intent until the buyer first has performed incremental due diligence on the degree to which COVID-19 has adversely affected the seller's business, results of operations, financial condition, customers, suppliers, workforce, and business prospects. The length of this period of incremental due diligence will depend upon the seller's circumstances and the parties' relative bargaining power. A buyer can expect the seller to push hard for a short period while resisting concurrent exclusivity.

Once the letter of intent negotiation begins, buyers should expect sellers (in the context of the pandemic) to attempt to include in the letter of intent provisions relating to closing conditions (including the scope of the material adverse effect definition), pre-closing covenants and drop dead dates (which are discussed in more detail below). For most letters of intent, these are unusual provisions. But during the pandemic, thoughtful sellers will want to take advantage of any bargaining leverage they have to address closing risk and closing certainty.

Buyers will feel justified in seeking longer periods of exclusivity than in the recent past since the pandemic poses new due diligence challenges. Until now, sellers—especially in the technology sector—in many instances had been successful in keeping exclusivity periods to 30-45 days or so (and sometimes even less). Now, it will be more common to see buyers insisting upon at least 60-75 days, with the ability to extend, in anticipation of coronavirus fallout interfering with or delaying the buyer's due diligence investigation. In turn, well-advised sellers will seek provisions terminating exclusivity at the first sign that the buyer may be unwilling to proceed with the transaction on the terms set forth in the letter of intent or term sheet.

Related Article: How To Negotiate A Business Acquisition Letter of Intent

4. Availability and Terms of Debt Financing to Fund Acquisitions

Traditionally, a significant percentage of M&A deals are financed partially through debt, particularly in the private equity space. The volatility in the financing markets brought about by the coronavirus crisis has created challenges for transactions that depend on third-party debt financing, including injecting a fair amount of uncertainty about the availability and terms of such debt financing. The new financing-related questions and challenges facing buyers/borrowers will include the following:

- Will lenders underwrite new financing commitments?
- Will the buyer's committed debt financing actually be available when the time comes to close the acquisition?
- Will lead lenders whose commitments are conditioned on spreading the risk among a group of lenders have greater difficulty in syndicating the debt?
- Will lenders be willing to conform their closing conditions to the closing conditions in the acquisition agreement, or will they insist on more stringent terms (such as the ability to declare a "material adverse effect" even if the buyer is willing to proceed with the transaction)?
- Will the lenders increase pricing due to the risks of the coronavirus crisis, and insist on tighter financial covenants, increasing the risk of future events of default?

- Will the amount of debt leverage available be decreased from the levels that had been customary in recent times, requiring private equity buyers to inject more equity into buyouts?
- What additional due diligence will a lender insist upon, and how much delay will that involve?
- How marginally risk averse will lenders be in acquisitions involving industries particularly hard hit by the crisis?
- What obligations will buyers have in the event they cannot close a deal if debt markets become illiquid and lenders are unable to lend, and what remedies will sellers have in this circumstance? Will we see an increase in buyers seeking to use "reverse financing termination fees" in private company transactions to limit their financial exposure for broken deals?
- Will lenders have a renewed focus on the "outside date" in their financing commitments and loan agreements, and potentially require increased payments for any commitment extension?

5. Effect on Dealmaking and Deal Terms

Invariably, when there is significant economic or other uncertainty in the world of M&A dealmaking, leverage shifts toward buyers and away from sellers. This was certainly the case with respect to dealmaking in the context of the burst of the dot-com bubble and dealmaking in the context of the Great Recession.

There is no reason to believe that it will be any different this time, in the context of the coronavirus pandemic. While strategic and private equity buyers are of course facing their own business and operational challenges, many continue to be "cash-rich" and generally can afford to bide their time to find the right acquisition targets at the right price.

Although public stock valuations have declined significantly since the end of February 2020, and the number of deals using all-stock or part-stock consideration had increased in the last few years, cash continues to be king in the dealmaking world. Many buyers continue to have plenty of "dry powder," and the immediate slowdown in dealmaking as the crisis took hold in March 2020 will only serve to increase the relative leverage of buyers as the crisis continues to unfold.

Of course, some buyers may conclude that some of the cash that they would otherwise have used for M&A should be used for other obligations, including financing their own operating costs and replacing their own revenue lost as a result from the crisis.

Inevitably, as in past crises, the effect on deal pricing will not be uniform—sellers in industries that have been more significantly impacted by the pandemic (including retail, hospitality, travel, coworking spaces, and automobile and aircraft production) will be more significantly impacted than others (such as cloud computing, software, videoconferencing, other online technologies, biotech, food delivery, and online shopping) that have either been less impacted or have even thrived during the crisis.

To be sure, an increase in leverage for buyers in M&A dealmaking generally should not be misconstrued as suggesting that buyers will now be more likely to prevail in negotiating each individual deal term. Sellers will strenuously pursue deal terms that protect them from closing uncertainty, arguing that buyers in future deals will have had their “eyes open” about the pandemic and its consequences when they enter into acquisition agreements. While the pandemic (at least in the United States) was arguably not “foreseeable” when deals were entered into prior to March 2020, it certainly has become not only foreseeable, but the most significant factor in dealmaking since then.

In contrast, with respect to deals signed before the crisis unfolded that have not yet closed, buyers may have a degree of leverage to seek to terminate and walk away from deals, or renegotiate deal terms because of the effect of the pandemic on the ability of the seller to perform its pre-closing covenants and satisfy the buyer’s closing conditions.

The following is a summary of a number of M&A deal terms that have already been implicated by the coronavirus crisis, or with respect to which deal negotiations will likely be impacted by the crisis:

“Material Adverse Effect” Provisions. In most M&A transactions, the acquisition agreement has traditionally included a term commonly known as the “material adverse effect” (“MAE”) or “material adverse change” definition. The most important use of this definition is in the closing conditions—the buyer is not obligated to close the acquisition if the seller has suffered an MAE since the signing of the acquisition agreement (or the date of the seller’s most recent financial statements). The MAE provision seeks to allocate between the parties the risk of certain negative circumstances occurring or existing during the relevant period.

The question of whether a significant event such as the coronavirus pandemic constitutes an MAE depends on the specific contractual language used in the clause, as well as the current (or reasonably anticipated) impact of the pandemic on the seller's business. There is a good deal of variation among MAE clauses, but they typically include these two components:

- First, MAE clauses frequently include a number of "carve outs," which the parties agree in advance will not constitute an MAE. Some common examples include conditions affecting the industry in which the seller operates, the U.S. economy or financial markets or any foreign markets or any foreign economy or financial markets in any location where the seller has material operations or sales, and acts of God, calamities, acts of war or terrorism, or national or international political or social conditions.
- Second, they often include an exception to certain carve-out provisions, providing that the carve out only applies to the extent that the adverse effect of the identified matter (e.g., an act of God) does not "disproportionately" adversely affect the seller compared to other companies in the same industry.

Prior to the outbreak of COVID-19, if an MAE provision had included a carve out specifically referencing an "outbreak," "epidemic," "pandemic," or other similar medical event, then the coronavirus pandemic would pretty clearly not constitute an MAE with respect to such transaction (although the "disproportionality" clause could enable a buyer to still declare an MAE if the seller has been affected more than its competitors by the pandemic). However, historically only a relatively small percentage of acquisition agreements have included terms that specifically reference such dangers to public health.

Courts have traditionally construed MAE clauses very narrowly, and few buyers have successfully terminated M&A transactions on the basis of such provisions. In Delaware, for example, an event will only constitute an MAE if it “substantially threaten[s] the overall earnings potential of the target in a durationally-significant manner.” Thus, the question of whether the effects of the COVID-19 pandemic may constitute an MAE (where it is not specifically carved out from the definition) may depend on the ultimate duration of the crisis and the persistence of its effect on the seller in question.

In future deals, some buyers will likely seek to include specific contractual language, providing that the COVID-19 pandemic is itself an MAE, or at least seeking to exclude it from the carve outs. But just as surely, sellers will take the position that the pandemic represents a known risk that the buyer should fairly have taken into account in valuing the seller’s business and proceeding with the transaction. Certainly, at a minimum, buyers will likely insist on the inclusion of the disproportionality clause, so that they are protected against adverse pandemic-related developments that ultimately are not industry-wide but rather limited to (or with greater impact on) the particular seller.

Pre-Closing Business Covenants. M&A transactions that require regulatory approvals or third-party consents usually provide for a period of time between signing and closing during which such approvals and consents are pursued and obtained. During this period, the seller is required to continue to operate in the ordinary course of business, and to comply with a number of other business covenants. These obligations may be absolute, or the seller may be required only to use commercially reasonable efforts to comply with them. There are commonly permitted deviations from the covenants in order for the seller to comply with applicable law, to comply with the acquisition agreement, to carry out a directive from the buyer, or to take actions that have been pre-approved by the buyer.

One of the closing conditions is invariably that the seller has complied (or complied in all material respects) with these pre-closing covenants. Moreover, in private company deals where the buyer is entitled to post-closing indemnification, a breach of the pre-closing business covenants likely will be one of the indemnifiable matters.

The rationale for requiring these covenants is solid: the buyer wants the seller to protect and maintain the business being acquired, and thus wants the right to veto any actions or decisions by the seller that may threaten the value of the business. The seller, on the other hand, wants to continue to control the business in the manner that it sees fit (particularly given that the transaction may ultimately not be consummated), and minimize the likelihood that closing conditions may not be satisfied. For deals with purchase price adjustment provisions (based on closing working capital or other financial metrics), the seller also wants to run the business in a manner that minimizes the risk of a negative purchase price adjustment.

In the case of transactions entered into before the COVID-19 pandemic became generally known, the pandemic may result in the seller being incapable of complying with one or more of these covenants, including restrictions on workforce reductions, restrictions on capital or other expenditures, prohibitions on material changes to personnel policies, and prohibitions on changes in compensation or benefits. Where there is an exception for matters "required by law," the seller may be able to argue that shelter in place orders and similar governmental edicts permit it to deviate from these covenants.

For new transactions, the extent to which the performance of the seller's pre-closing covenants may be excused by the effects or consequences of the pandemic will be a hotly contested topic. The seller will want comfort that reasonable (or required) steps it takes in response to the pandemic are not breaches of the acquisition agreement. Sellers will want to be able to respond quickly and decisively to the pandemic, without fear of breaching the acquisition agreement. In contrast, the buyer may argue that notwithstanding this, it should not ultimately be required to acquire a seller whose business and prospects at the time of closing have significantly deteriorated, whatever the cause. Having the buyer pre-approve the seller's contingency plans in response to the pandemic could help avoid misunderstandings and disagreements on these topics.

"Drop-Dead" Dates and Termination Provisions. Another common feature of an M&A transaction with a delayed closing is the inclusion of a "drop-dead" date in the acquisition agreement. This is a particular date, typically several weeks (or months in the case of deals with potential regulatory issues) after the intended closing date, after which either party may terminate the agreement without consequence as a result of an unforeseen delay. If, for example, the closing of the deal has been unforeseeably delayed by the failure to obtain required antitrust or other regulatory approvals, or third-party consents, either party may terminate the transaction after the drop-dead date, provided that its own breach has not caused the delay.

The coronavirus crisis will cause both buyers and sellers to reconsider (and likely extend) the period of time between signing and the drop-dead date. Federal, state, and foreign governments have seen their operations, including their ability to complete M&A regulatory analyses, significantly impacted by the pandemic, delaying the turnaround times for such reviews and deal approvals.

With respect to transactions where the acquisition agreement was entered into before the COVID-19 pandemic but the transaction has not closed, the passage of the drop-dead date may provide an opportunity for a buyer with second thoughts about the deal to freely terminate the transaction. While the seller might believe it is unfair for the buyer to benefit from the unforeseen regulatory delay, the fact is that the possibility of such a delay is why the drop-dead provision was included in the first place.

Working Capital and Other Price Adjustment Provisions. Many private company M&A transactions include purchase price adjustment provisions based on the amount of the seller's cash and indebtedness at closing. There is also typically a purchase price adjustment based on a comparison of the level of the seller's working capital at closing to a target amount of "normalized" working capital. For transactions that were already signed (but not closed) before the coronavirus crisis, such adjustment provisions may result in reductions at closing to the net purchase price that the seller had previously expected to receive. For transactions yet to be signed, the COVID-19 pandemic will undoubtedly result in changes to practices associated with these provisions.

The question of what level of working capital is appropriate will likely be subject to new levels of scrutiny by buyers in light of the pandemic. Buyers may seek greater levels of normalized working capital (to help assure there will be sufficient working capital for the continued operations of the acquired business following the transaction in light of reduced revenues and new categories of expenditures). Sellers that become illiquid as a result of the crisis may also come under pressure from buyers to leave behind a portion of the purchase price credit they would otherwise have received for their closing cash balances.

The desire to avoid such price reductions may lead sellers to propose that the working capital-based price adjustment provisions be "collared" so that there is a band (above and below the agreed level of normalized working capital) within which the price reduction does not kick in, but buyers may be reluctant to accommodate such requests. The need to negotiate these types of new and more complex provisions may further delay transactions.

Alternative Forms of Consideration. The financial crisis associated with the COVID-19 pandemic will likely result in both downward pressures on deal values and a greater focus on the possible use of stock consideration in lieu of (or supplemental to) the buyer's cash, as well as pricing structures involving earnouts or milestone payments.

These alternative forms of consideration traditionally become more prominent whenever, as a result of a financial crisis, there is a reduction in equity values that creates a fundamental disconnect between the price expectations of buyers and sellers. In the case of public buyers that have seen the pandemic reduce their market capitalizations, the use of their stock as acquisition consideration (where the seller has also lost value) may help to bring the parties together from a valuation perspective. Similarly, earnout and milestone structures, notwithstanding their complexities and flaws, could help enable buyers and sellers that cannot agree on valuation to reach an understanding that enables each party to feel that it is fairly sharing in the risks and uncertainties, and possible benefits, of the seller's future performance.

Antitrust and Other Regulatory Approvals. Like other participants in M&A transactions, for the duration of the crisis it appears that most regulators will be working remotely, and paper filings will be discouraged or prohibited. This and other factors have severely disrupted the ordinary procedures for reviewing and approving transactions. For example, the Department of Justice and the Federal Trade Commission (FTC), after implementing an e-filing system for deal notifications under the Hart-Scott-Rodino Act, initially suspended the practice of granting early termination of the 30-day waiting period. The FTC has announced delays of several months in a number of high-profile administrative antitrust merger challenges, citing disruptions caused by the coronavirus outbreak. The speed at which regulators are able to adapt to the new environment and make continued changes in their procedures will be an important factor in dealmaking for buyers, sellers, and their legal and financial advisors.

Subsequently, the U.S. antitrust agencies announced that they would begin to allow early terminations on a limited basis, but also made clear that they would resolve any doubts in favor of not granting early termination. However, parties to transactions that do have antitrust implications may continue to expect routine clearance at the end of such period. It also can be expected that the agencies more frequently will ask parties to pull and refile notifications in order to give the agencies an additional 30 days to complete their review. International competition authorities, particularly in the European Union, have also significantly altered their deal review procedures in light of the pandemic.

For transactions that receive “second requests” from U.S. antitrust authorities, parties should expect that the crisis will add an additional two to three months to the already lengthy process of responding and resolving the regulatory concerns. Already several significant M&A transactions, including a generics merger between Pfizer's Upjohn unit and Mylan, and a $63 billion merger of AbbVie and Allergan, have been delayed or postponed as a result of these regulatory developments.

For sensitive transactions involving foreign investment that must be cleared by the inter-agency committee known as the Committee on Foreign Investment in the United States (CFIUS), the relevant agencies are struggling with their caseload due to work-at-home requirements. The percentage of M&A transactions requiring CFIUS reviews has increased significantly as a result of the expansion of the scope of CFIUS coverage since 2018. One unique and critical challenge is that government officials are not permitted to access classified information from home or other remote locations. As a consequence of this and other related factors, in certain cases such agencies simply have not been commencing official CFIUS reviews during this period, and for deals where the official review has commenced, lengthy delays in obtaining clearance can be expected.

Representations and Warranties. The pandemic will lead to a demand by buyers for a number of additional focused representations and warranties from the seller, and associated disclosures, including with respect to the following areas:

- The effects and consequences of the pandemic on the financial condition, results of operations, and prospects of the seller;
- The seller’s compliance with applicable laws and governmental orders relating to the pandemic and development of contingency plans and processes to ensure business continuity;
- The effect of the pandemic on the seller’s workforce, supply chain, inventory, accounts receivable, ability to perform material contracts, and solvency;
- The potential availability to the seller of loans and other financial assistance associated with the pandemic;
- Full or partial business closures (whether mandated by the government or as a result of changes in demand for the seller’s goods and services); and
- The ability of the seller to adjust its business practices to minimize the short-term and long-term effect of the pandemic on its business.

The purpose of such enhanced representations and warranties, from the standpoint of the buyer, is to give the buyer a potential right to walk away from the deal if it were to learn before closing that such representations and warranties were untrue when made or have become untrue with the passage of time, and (in private company transactions) to enhance the buyer’s post-closing indemnification remedies associated with inaccuracies in the seller's representations and warranties.

Of course such enhanced disclosures also serve to assist the buyer in effectively integrating the seller's operations with its own, which will now include the new challenge of understanding the manner in which the seller has responded to the pandemic so that its response can be effectively melded with the buyer's own response as quickly as possible following the closing.

Indemnity and Escrow Provisions; Representation and Warranty Insurance. In private company acquisitions, it is expected that the coronavirus crisis will put upward pressure on the size (typically expressed as a percentage of deal value) of indemnity escrows or holdbacks. This may be particularly the case in transactions where a seller has been successful in maintaining its expected top-line price notwithstanding the pandemic. In return for agreeing to such a "high" value, the buyer it is expected that the buyer may attempt to shift to the seller more of the risk of any breach by the seller of the acquisition agreement. In addition, it is expected that buyers will be less reticent to ask for "special indemnities" when they identify a particular risk in the seller's business, and the post-closing consequences of such risk are less foreseeable or predictable as a result of the pandemic.

For private company acquisitions (primarily those involving private equity buyers) where representation and warranty insurance has become more prevalent in recent years, it is important to understand that insurers have been developing new underwriting policies and procedures to address the business risks of the pandemic. In certain cases, these new policies may exclude coverage for representations and warranties focused on pandemic-related topics. Insurers may also be increasingly reluctant to cover certain categories of buyer losses, including business interruptions and other consequences of the pandemic, consistent with their long-standing practice of seeking to exclude “known risks” from policy coverage. Predictably, representation and warranty insurers, just like buyers, will also likely insist on enhanced or extended diligence before underwriting policies.

If buyers that would otherwise rely solely or primarily on representations and warranty insurance start to perceive that they are not receiving appropriate coverage for deal-related risks, they may bring pressure on sellers to contribute increasing amounts to indemnity escrows or holdbacks as a backup to the insurance. Premiums also may increase as a result of these developments, which could contribute to an increasing percentage of deals where parties choose to utilize traditional escrow and holdback arrangements, rather than turning to insurance.

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6. New M&A Due Diligence Issues

Acquirers are undertaking significant additional due diligence to assess the effect of the coronavirus crisis on the seller’s business. The expanded due diligence issues include the following:

- In a world where physical contact is next to impossible, what strategies should the buyer implement to get to know the seller’s management and key employees? What can the buyer do to get comfortable without a physical visit/inspection?

- What is the seller's cash position? Does it have enough liquidity to fund its near-term obligations?
- Are the seller's revised financial projections reasonable and believable?
- How has the seller's workforce been impacted by the coronavirus? Does the seller have enough employees and third-party contractors to successfully continue its business?
- Has the seller complied with federal and state laws in connection with furloughs and layoffs?
- What is the cost to the seller of continuing to provide health care benefits to furloughed workers?
- Has the seller defaulted on key contracts and/or leases?
- Who are the counterparties to the seller's key contracts and are they performing under those contracts?
- What are the termination rights under key contracts? Do the seller's contracts include "force majeure" clauses that may enable it or the counterparty to terminate the agreement or suspend performance or payment?
- Is the seller in compliance with financial covenants and other terms of debt instruments?
- Has the seller been able to work with landlords to defer rent payments? Has the seller started to search for alternative, lower cost space to rent?
- Is the seller overly dependent on suppliers in certain geographic regions hard hit by the coronavirus?

- What is the financial condition of the seller's key customers?
- What are the risks on collectability of accounts receivable?
- What insurance (including business interruption insurance) does the seller have available to cushion losses? Are those losses insured if they are consequences of the coronavirus pandemic, or are they subject to policy exceptions? Have claims been made to the insurers?
- What long-term liabilities does the seller have and will the seller be able to satisfy them?
- Are there solvency or going concern risks?
- Are there sufficient business continuity plans and crisis management procedures?
- Who are the key employees? What happens to the seller's business (and its value to the buyer) if they succumb to COVID-19?
- What is the seller's ability to control or reduce operating expenses? What contracts is the seller attempting to renegotiate to lower expenses?
- What is the effect of "working from home" for employees (e.g., data privacy and privacy breaches)? What expenses is the seller incurring to provide equipment to employees working from home?
- What IT, cybersecurity, and data breach issues has the seller encountered? Has the seller had problems with hackers

interfering with video conferences or taken steps to prevent that risk?

- Is the seller at risk of having insufficient inventory or parts?
- Is the seller able to take advantage of the favorable loans under the Coronavirus Aid, Relief, and Economic Security (CARES) Act? If so, what are the terms of these loans and how do they affect the buyer's plans and expectations going forward?
- Is the seller in compliance with federal, state, and local orders related to the pandemic?
- Is the seller in compliance with health and safety laws with respect to its workplaces and employees in light of the danger posed by the pandemic?
- If all or a portion of the seller's workforce is unionized, what is the state of relations between the union(s) and the seller? Is there a strike or walk-out risk?

7. The WARN Act and Consequences of Layoffs and Furloughs

The coronavirus crisis has led a significant number of employers across the country to seek to control costs through massive workforce reductions and furloughs. Over 20 million new applications for unemployment payments have been filed just within the last few weeks. Companies considering these reductions and furloughs must consider the impact of the Worker Adjustment and Retraining Notification (WARN) Act, and careful compliance with relevant federal and state laws impacting employment will be particularly critical for sellers considering participating in M&A in the near future. The WARN Act generally requires employers to provide written notice at least 60 days in advance of significant layoffs or other covered activities (such as plant closures), or pay in lieu of such notice.

Layoffs of less than six months in duration do not constitute a mass layoff under the WARN Act. But since coronavirus-related reductions in force may, at least initially, be of uncertain duration, sellers will need to be careful to comply as soon as practicable if a delay in reactivating a furloughed workforce brings the WARN Act into effect.

The Warn Act sets forth certain exceptions that may affect its applicability to sellers that would otherwise be covered by its terms in the context of the coronavirus crisis. There is an "unforeseeable business circumstances exception" that applies to reductions in force that are made based on changes in the business environment that were not reasonably foreseeable at the time when the written notice would otherwise have been required to be given, such as circumstances "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." There is also a "natural disaster exception" that covers "floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature."

Employers that would otherwise be covered by the WARN Act could potentially take the position that the pandemic qualifies for one or both of these exceptions. However, the safer course of action, particularly for a company involved or likely to be involved as a seller in an M&A transaction, is to simply comply with the WARN Act, as the buyer in the transaction may predictably not wish to run the risk that a claim of an exception might be challenged by the government for affected employees following the closing. Compliance with employee-related laws and regulations will clearly be an area of increased due diligence by buyers in the new business environment.

Sellers and buyers should also be aware that a number of states have laws that provide employees with rights that are more generous than those provided under the federal WARN Act (often referred to as "mini-WARN Acts." These laws often have lower thresholds before compliance is required or employee benefits are triggered. Sellers should also be careful to comply with their own existing employment policies and plans in connection with any of these matters.

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- A Comprehensive Guide to Due Diligence Issues in Mergers and Acquisitions
- What You Need to Know About Mergers & Acquisitions: 12 Key Considerations When Selling Your Company

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