

## A Proactive Approach to Private Equity Acquisitions

**March 20, 2020**

With the ongoing global healthcare pandemic surrounding the COVID-19 outbreak, companies across all sectors are faced with uncertainties and challenges at nearly every level of their business. The current crisis has broadly impacted many areas, including employment, supply chain, private mergers and acquisitions, and private equity.

Given the recent developments and the enactment of various laws, policies and guidelines to combat the spread of COVID-19, businesses are faced with rapidly evolving circumstances that may slow down existing transactions or disrupt investment opportunities. However, companies that proactively identify and respond to these challenges, while mitigating risks, will better position themselves to accomplish their objectives.

The following is a brief overview of certain relevant issues relating to private equity acquisitions that buyers may consider.

### Deal-Making

In response to the events in recent weeks, government officials have introduced new legislation, policies and guidelines, including restrictions on travel, public gatherings, and mandated social isolation, which can have a significant impact on private equity acquisitions. These restrictions, along with any future policies implemented, can have immediate consequences for sourcing and executing on deals, as well as fundraising.

While the situation is evolving on a daily basis, pending transactions may experience significant delays and renegotiation of material terms, or in some cases, termination of negotiations. Many deals may also be put on hold to allow for additional time to assess the situation and to monitor the impact of the restrictions and policies being introduced.

Depending on the stage of a transaction, there are a number of different factors and considerations that may apply. Deals in the preliminary stages of negotiations may slow down, pause or even come to an abrupt end. Other transactions with a signed term sheet with commonly binding provisions, such as diligence, exclusivity, non-solicitation, and confidentiality, may also experience disruption. Deals with executed agreements that have not closed and which may require third-party consents, regulatory approval, or satisfaction of financing conditions, may be affected as well, triggering the exercise of seldom considered contractual rights and remedies. Even transactions that have closed that are subject to post-closing adjustments, payments, or transition services agreements (e.g., payroll, subleasing, accounting, customer

relationship management), may be impacted under the current circumstances requiring the parties to position themselves differently than they might have in less disruptive times.

In particular, fund sponsors can expect to face challenges with deals awaiting regulatory approval. These deals may be delayed by potential government shut-downs and the resulting closure of regulatory agencies. Fundraising may also be difficult as a result of travel restrictions and the adoption of remote working measures. If these restrictions continue for a long period of time, fund sponsors are likely to seek investor approval for both longer fundraising and investment periods (to deploy committed capital).

## Fund Investment Management

As the situation continues to develop, fund sponsors should consider whether the risks associated with the current circumstances are accurately reflected in the fund's offering documents and confirm that they are as up-to-date as possible and consistent with the fund's investment strategy. Risk factors may need to be updated to address general risks associated with the crisis, as well as any specific risks that a fund may be exposed to, including investments in travel, hospitality, healthcare, sports and entertainment industries.

If the crisis has materially affected a fund's original investment strategy and the fund sponsor wishes to adopt a change in direction, the fund sponsor should analyze the scope of the investment purpose as stated in the fund documents to determine its ability to shift the investment focus of existing funds, or alternatively, the level of consent (whether of investors or the limited partner advisory committee) required to change the investment purpose.

Managers can expect to receive questions from existing investors regarding their management teams and their ability to conduct business during the crisis. Managers should be prepared with answers to such questions and ensure that communication with investors maintains consistency.

## Due Diligence

Under the current circumstances, those sectors most affected by the current crisis may require an enhanced due diligence process with a risk-based approach. Target businesses in sectors directly affected by the current crisis (e.g., retail, travel and hospitality, and healthcare) and those indirectly affected (e.g., operations, supply chains, and customers in high-risk areas) may require enhanced due diligence procedures.

Buyers conducting due diligence should be particularly focused on items impacting the target business (e.g., contract terminations, force majeure clauses, existing obligations, travel requirements to execute obligations, and government-mandated policies) and the target's operations (e.g., supply chain, inventory,

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payroll, insurance coverage, business contingency plans, and emergency preparedness). In addition, active buyers will also need to consider some of these same factors as they rebuild their acquisition pipelines.

Other related areas may be indirectly impacted, including privacy, intellectual property, cyber security and capital markets.

## Delays in Closing

It may be expected that the due diligence process, deal execution and closing procedures will experience delays and inefficiencies as a result of travel restrictions, social distancing, and remote working measures. Products specializing in virtual sites and channels for secure document sharing and review, AI-assisted extraction of key provisions and concepts during document review, and electronic closings and e-signature may help to alleviate logistical delays by streamlining these processes.

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## Conclusion

A flexible approach and proactive response in identifying current issues, establishing contingency plans, and mitigating risks will help private equity funds and their portfolio companies complete their acquisition objectives. Funds and their portfolio companies that can successfully weather the current crisis and navigate the associated pitfalls may also take advantage of new transaction opportunities that arise.

Under the current circumstances, vigilance and thoroughness are key in addressing these issues.

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