Private Equity

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Making the Most on the Sale of Your Business – An Owner's Tax Considerations on Earnouts

Authors: Richard Nickels | Kacy Joy

As the economy starts to open, sellers of businesses are uniquely positioned to potentially capture a piece of the recovery through the way mergers and acquisitions ("M&A") transactions are priced, negotiated and closed. Changes are inevitable in all aspects of the sales process, but sellers' greatest opportunity lies in valuation. Differences of opinion as to the value of a privately owned company ("target") between the seller ("owner") and the acquirer ("buyer") are commonplace. Earnouts have traditionally been used to bridge the valuation gap. As the gap widens so too will the bridge. Rather than despair a delay in payment, an owner can take proactive steps to consider how an earnout will be taxed on the sale of the target. That exercise should include a fresh look at the "open transaction" doctrine. Recognizing that earnouts are likely to represent a much larger percentage of the total consideration that a buyer is willing to offer for target than they may have before COVID-19, this article starts sellers down that path.

Possible Tax Treatment of Earnouts

Earnout payments are taxed generally as ordinary income or as purchase price consideration (i.e., capital gain). Considering that the top marginal income tax rate is currently 37%, while the highest tax rate for long-term capital gains is currently 20%, the difference to the owner could be an almost 20% difference in cash in hand. If the payments are characterized as consideration for services performed, the owner will be taxed on the payments as ordinary income. Additionally, the owner will need to consider whether the earnout payments trigger the "golden parachute rules" or deferred compensation provisions of Section 409A of the Internal Revenue Code of 1986, as amended ("code"). If the earnout payments are treated as deferred purchase price consideration for the owner's stock in the target, the owner will receive capital gain treatment on the portion of the payments that represents profit to the owner. Of course, each framework comes with other likely costs to be considered, such as the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) employment related withholding and taxes for ordinary income and the 3.8% net investment income tax for capital gains.

Determining Proper Tax Treatment of Earnouts

Equipped with the options, an owner can assess proper tax treatment for the specific earnout. An earnout is a contingent payment, typically earned upon attainment of post-closing financial benchmarks by the target. The most common benchmarks are based on increases in revenue or earnings before interest, taxes, depreciation and amortization (EBITDA) over one to five years. Because the target's owner is often employed by the buyer to assist with the integration of the target into the buyer, the owner often has some leverage to control attainment of the earnout. The owner's and the buyer's interests are generally aligned in maximizing the target's earnings, but the owner should also give thought to how those earnings will ultimately be taxed when paid through the earnout. While not a definitive framework, precedent suggests some guiding principles on when earnout payments will be treated unfavorably as compensation to the owner and when they will receive favorable capital gains treatment.

1. An owner's employment term relative to the earnout period: The closer the terms align, the more it favors ordinary income treatment;
2. An owner's post-closing employment compensation: The closer to market, the more it favors capital gains treatment; and
3. A buyer's earnout obligation if Owner's employment is terminated: The closer to continuing obligation to make payments, the more if favors capital gains treatment.

Timing of Tax to Owner

Successfully structuring an earnout to receive capital gains treatment can also mean the difference between paying tax pursuant to the installment method under Code Section 453 (i.e., paying overtime) and paying all taxes due in the year the payment is received. Under the installment method where the total purchase price is fixed, the owner will recognize the capital gain on each payment in proportion to what the gross profit on the sale bears to the purchase price for the stock.

For example:

- The owner's basis in the target stock: $5 million
- The purchase price: $30 million, paid in installments
- Capital gains: $30 million - $5 million = $25 million
- Gross profit percentage = $25 million / $30 million = 83% recognized gain on each installment

This pro rata calculation does not lend itself well to earnouts because the future payments are contingent and potentially variable. Even so, the Department of the Treasury regulations promulgated under Code Section 453 ("regs") make clear that installment method of reporting applies to a "contingent payment sale" where the total sales price cannot be determined by the close of the tax year in which the sale occurs. Unfortunately for sellers, most earnouts fall under that definition. To calculate the gross profit percentage for a contingent payment sale, the regs assume that 100% of the possible contingent payments will be made in the shortest period of time permissible and use that maximum purchase price to calculate the gross profit percentage. If the maximum purchase price is not available, but the maximum period over which the earnout payments can be made is available, the capital gain is recognized ratably over the fixed period. If neither the maximum purchase price nor the maximum payment period can be determined, the capital gain is recognized ratably over 15 years.

Imputed Interest

An owner will also need to consider imputed interest. Interest will apply to the earnout payments and be taxable as ordinary income to the owner. Section 483 of the code governs imputed interest on earnouts. Code Section 453A may be applicable as well. It is essentially an interest charge on deferred tax. If, following the year of sale, the potential earnout obligation of the buyer exceeds $5 million dollars an additional tax, roughly equivalent to the amount of underpayment interest that would be charged if all payments were due in the first year, will be assessed to the owner.

Open Transaction Alternative

If an owner successfully structures an earnout to be taxable not as ordinary income compensation but rather as deferred purchase price consideration, are they stuck with the installment sale reporting rules and accompanying interest imputation rules? Probably. However, before summarily accepting that result, an owner may wish to consider whether the open transaction doctrine may apply. If it does, the owner will be able to recover his or her entire basis in the stock sold before recognizing any gain. The interest imputation rules also do not apply.

Key applicable rules quickly reveal the difficulty in achieving open transaction treatment:

1. The regs expressly state that a "contingent payment sale" does not include a transaction "where the installment obligation represents, under applicable principles of tax law, a retained interest in the property which is the subject of the transaction, an interest in a joint venture or a partnership, an equity interest in a corporation or similar transactions, regardless of the existence of a stated maximum selling price or a fixed payment term." Packing more of the potential purchase price consideration into an earnout moves the transaction closer to the installment obligation representing an equity interest in the buyer or the target.

2. The regs provide that open transaction reporting is limited to "rare and extraordinary" cases where the fair market value of the contingent payment obligation cannot be reasonably ascertained. The economic chokehold of the COVID-19 pandemic is "rare and extraordinary," even more so for a target in an industry hit especially hard by the pandemic such as the hospitality industry, but not certain to guaranty favorable treatment for any industry.

3. The open transaction rule is based on common law. The basic premise is that the contingent payments are so uncertain that the parties cannot calculate with any measure of certainty what, if anything, the seller will receive. However, be cautious. The tax court in *Friedman v. Commissioner*, TC Memo 2015-177, denied open transaction treatment and the 20% accuracy related penalty applied because the taxpayer did not have substantial authority for its position.

Earnouts will likely be used more frequently to address valuation uncertainties. A prudent owner will consider more closely the tax implications of earnouts to potentially avoid compensation income treatment. If the earnout is purchase price consideration, it will most likely be treated as a contingent payment sale, allowing the owner to use the installment method of payment. If the earnout constitutes a significant portion of the total consideration and the owner has a measure of control over the target post-closing, the open transaction doctrine should be considered.

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Navigating the Plan Asset Rules: ERISA Plan Investment in Private Equity Funds

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Pension funds subject to the Employee Retirement Income Security Act of 1974, (ERISA) serve as a significant source of institutional capital for the private equity market. As a result, many private equity funds seek ERISA investors. But ERISA plan investors are subject to a statutory and regulatory regime that imposes a very high standard of care (the "fiduciary standard of care") and a number of prohibitions in connection with the investment of ERISA plan assets. Depending on a fund's structure and operations, the unwary private equity manager of a fund with ERISA plan investors can find itself an ERISA fiduciary, subject to many of the same stringent rules that apply to ERISA plans. Therefore, it is critical, private equity fund managers understand the plan asset rules, including how to be exempt from them, and the unique interests of ERISA plan investors.

Background

If an investment fund is deemed to have plan assets, the general partner or managing member of the fund will become an ERISA fiduciary to its ERISA plan investors and subject to the ERISA fiduciary standard of care.

Congress adopted ERISA's fiduciary standard of care to safeguard the investment of retirement assets, and in doing so, made ERISA fiduciaries subject to the highest standard of care under the law. An ERISA fiduciary is anyone who has, or exercises discretion over the assets of an ERISA plan. An ERISA fiduciary must discharge its duties prudently, solely in the interests of plan participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries.

An ERISA fiduciary must also avoid direct or indirect plan transactions involving "parties in interest" and conflict of interest transactions (referred to as "prohibited transactions"). The definition of "party in interest" under ERISA is far reaching, and the consolidation of the financial services industry has extended its reach to entities without any apparent relationship to a plan. Fiduciaries can incur personal liability for fiduciary breaches, and the penalties for prohibited transactions can be extreme, ranging from excise taxes and restoring plan losses to disgorging profits and undoing transactions.

Should an investment fund be found to have plan assets, any transaction with the fund may be deemed a transaction with each ERISA plan investor, which in turn, creates the risk that any transaction entered into by the fund in the ordinary course of its business could be a prohibited transaction.

Neither ERISA nor the Code explicitly defines the term "plan assets" as applied to entities in which an ERISA plan invests. However, the Department of Labor (DOL) adopted regulation 29 C.F.R. Section 2510.3-101, as amended by ERISA Section 3(42), which addresses investments by ERISA plans (Plan Asset Regulations). In the preamble to the Plan Asset Regulations, the DOL emphasized that Congress could not have intended for ERISA's fiduciary responsibilities to apply when a plan directly retains an investment manager, but not when a manager is retained indirectly through a plan's investment in a fund.[1] Accordingly, under the Plan Asset Regulations,

1 The DOL also observed that such a conclusion would be "inconsistent with the broad functional definition of 'fiduciary' in ERISA if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rules of [ERISA] by the interposition of a separate legal entity between themselves and the plans (for example, by providing services to a limited partnership in which plans invest)."

when an ERISA plan acquires an equity interest in an entity that is neither publicly traded nor a security issued by an investment company registered under the Investment Company Act of 1940 (e.g., a mutual fund), the assets of the ERISA plan investor include its acquired equity interest as well as an undivided interest in all of the underlying assets of the entity unless an exemption applies.[2] This is often referred to as "look-through plan asset treatment," and it can have severe consequences for the unknowing fund manager.

Exemptions to Look-Through Plan Asset Treatment

In simple terms, the purpose of the Plan Asset Regulations is to prevent investment fund managers from circumventing ERISA's investment-related rules by providing investment services indirectly to ERISA plans (i.e., to entities in which ERISA plan investors invest). However, the Plan Asset Regulations provide exemptions from look-through plan asset treatment to certain types of entities, including certain investment funds as further described below.

Operating Companies

Traditional Operating Companies: Look-through plan asset treatment does not apply to traditional operating companies. If an ERISA plan makes an equity investment in a traditional operating company, its investment includes only its equity interest in the operating company rather than an undivided interest in all the operating company's underlying assets.

An operating company is defined as a company primarily engaged in the production or sale of goods or services directly, or through a majority-owned subsidiary(ies). For example, a company that makes widgets is an operating company. This exception makes sense because an ERISA plan that invests in an operating company does not indirectly avail itself of investment services.

VCOCs and REOCs: The Plan Asset Regulations provide that two types of investment funds—venture capital operating companies (VCOCs) and real estate operating companies (REOCs)—are considered operating companies because they are more similar to traditional operating companies than pure investment funds, and, as a result, these hybrid type funds are exempt from look-through plan asset treatment. Note that both exemptions are largely based upon the types of investments the fund makes, and the activity in which the fund engages as a result.

A fund will qualify for the VCOC exemption if, on the date of its first long-term investment and on at least one day during each annual valuation period thereafter,[3] at least 50% of its assets are invested in operating companies (other than VCOCs) with respect to which the fund has management rights (referred to as "venture qualifying investments").[4] The fund must also exercise its management rights over at least one of those operating companies in the ordinary course of business during each year. Management rights are direct contractual rights held by the fund to substantially participate in or influence the conduct of the operating company's management. [5]

As long as a fund's investment strategy is to invest in operating companies, the fund will be able to comply with the requirements of the VCOC exemption with relative ease. Additional flexibility is afforded to a VCOC during the period that it makes distributions to its investors, which lasts through the earlier of the date it makes a new portfolio investment or 10 years. However, note that if a fund does not structure its first long-term investment as a qualifying VCOC investment, the fund can never qualify as a VCOC. As a result, fund managers who intend to utilize the VCOC exemption should pay particular attention to structuring the fund's first long term investment correctly.

The REOC exemption is similar to the VCOC exemption. For a fund to qualify as a REOC, at least 50% of its assets must be invested in qualifying real estate as of the date of its first long-term investment and on at least one day during each annual valuation period that follows. Like a VCOC, a REOC's first investment must be in qualifying real estate to qualify for the exemption. In addition, the fund must possess and actually exercise the right to directly manage or develop the real estate in its ordinary course of business.

The DOL has made clear in the preamble to and in an example in the Plan Asset Regulations that a fund will not fail to be a REOC solely because independent contractors are used in real estate management or

2 The Plan Asset Regulations also apply to non-ERISA plans, such as IRAs, that are subject to the largely parallel fiduciary and prohibited transaction provisions of the Section 4975 of the Code.
3 An annual valuation period is a pre-established annual period of no more than 90 days and begins no later than the anniversary of an entity's first long term investment.
4 Derivative investments can also count toward the 50% ratio. Derivative investments are venture capital investments for which management rights have ceased in connection with the operating company's public offering or have been exchanged for other investments in connection with a public offering, merger or reorganization.
5 Contractual rights will not constitute management rights for purposes of the exemption if they run to multiple investors or if they are held by a fund's holding company as opposed to the fund itself.

development activities, provided that the independent contractors remain subject to supervision and termination by the fund. Whether a particular entity's own employees engage in development or management activities is only one factor used to determine whether the entity is actively managing or developing real estate.

The DOL noted that whether a fund is engaged in management or development activity must be determined on a case by case basis. However, two examples inform this analysis. One example clarifies that a fund that is invested in property subject to long-term leases under which maintenance and management responsibilities fall on the lessee would not be engaged in management activity. Another example describes a fund that is invested in shopping centers with individual short-term leases and common areas under which the management and maintenance responsibilities are the landlords and concludes the entity is engaging in management activity. Management or development must be more than just assuming the risk of income producing property.

The Insignificant Benefit Plan Investment Exemption

The Plan Asset Regulations also provide that if benefit plan investment in a fund is "not significant" within the meaning of the regulations, the fund will not be subject to look-through plan asset treatment. The exemption exists because the DOL believed that a fund which has not particularly solicited ERISA plan investment should be exempt from the rules that directly apply to the investment of ERISA plan assets.

Participation will not be considered significant if benefit plan investors hold less than 25% of the value of each class of the fund's equity interests. While the DOL believes this calculation should be "relatively easy," it is far from straightforward. For example, a benefit plan investor is defined as an ERISA plan, a plan subject to Section 4975 of the Code (including IRAs) and any entity which is deemed to have plan assets under the Plan Asset Regulations (but only to the extent of the percentage of equity interest held by the benefit plan investors in such entity). Additionally, the value of equity interests held by certain persons with discretion or control over the entity, such as the general partner and/or an investment manager and their affiliated entities, are excluded for purposes of the benefit plan investment calculation. The level of participation by benefit plan investors requires continuous monitoring as the level must be calculated after every new purchase, transfer, or redemption, of any equity interest in the fund. The continuous monitoring requirement is less onerous for private equity funds than it is for hedge funds because private equity ownership tends to be more stable.

For any period that the percentage of benefit plan investors of any class of equity interests in a fund is 25% or more, the fund, and anyone with discretion over the assets of the fund, will be required to comply with the fiduciary standard of care and prohibited transaction rules under ERISA. If, however, the percentage of benefit plan investors drops below and remains less than 25%, the fund, from that point forward (but not retroactively), will no longer be required to comply with the fiduciary and prohibited transaction rules.

Exceptions to the Exemptions

In a word of caution, the Plan Asset Regulations contain certain rules that override the exemptions. For example, an asset wholly owned by an ERISA plan investor will always be considered a plan asset even if it is a REOC.

Determining Plan Asset Status

In light of the foregoing, it is critical that the fund manager determines in advance whether the fund will hold or avoid holding plan assets and, if applicable, on which exemption the fund will rely. As a threshold matter, a sophisticated benefit plan investor will look to the fund's documents for the plan's asset status, and the asset status will determine the underlying provisions that a benefit plan investor will expect with respect to the fund's structure.

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M&A Insights for the New World

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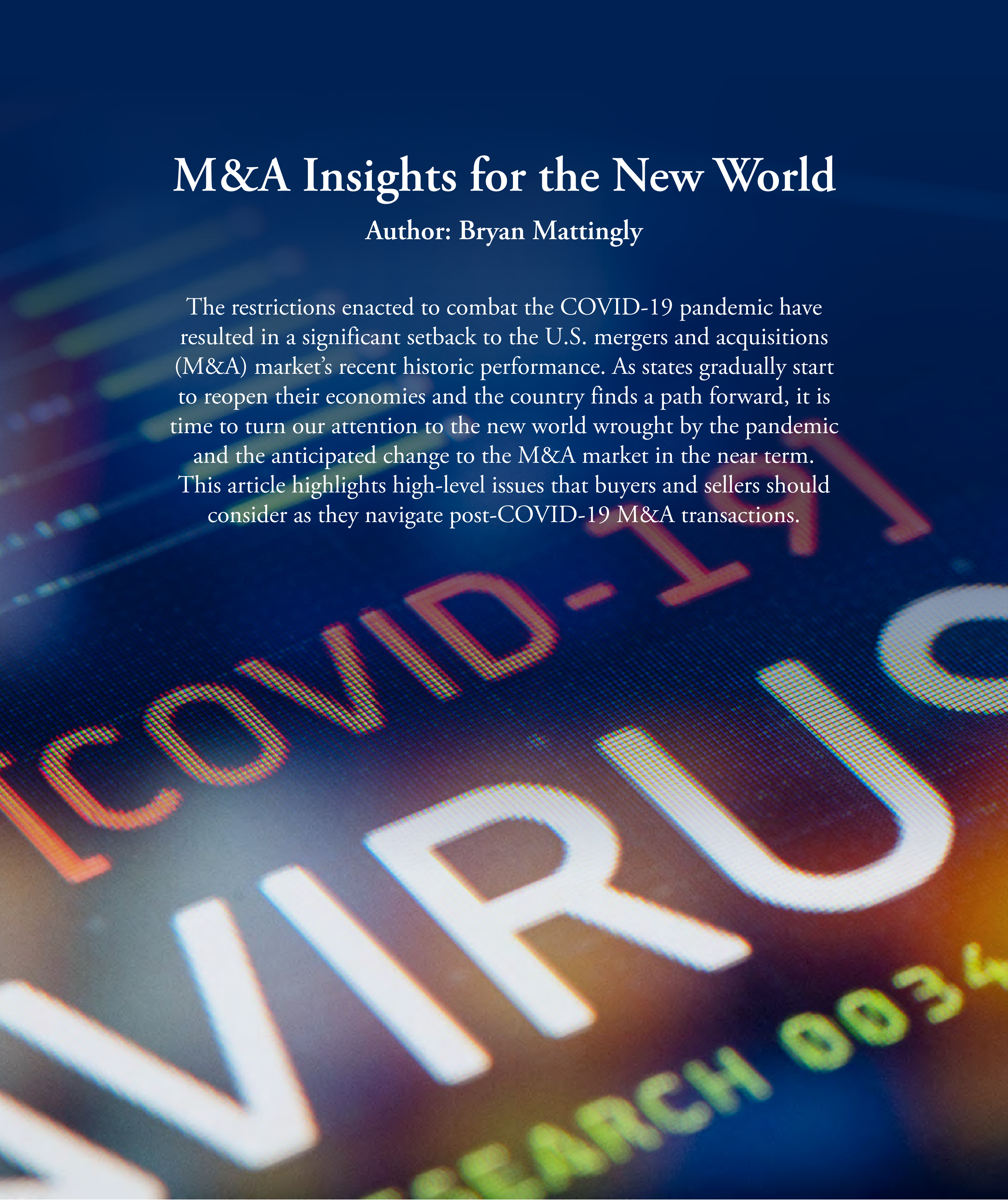
The restrictions enacted to combat the COVID-19 pandemic have resulted in a significant setback to the U.S. mergers and acquisitions (M&A) market's recent historic performance. As states gradually start to reopen their economies and the country finds a path forward, it is time to turn our attention to the new world wrought by the pandemic and the anticipated change to the M&A market in the near term. This article highlights high-level issues that buyers and sellers should consider as they navigate post-COVID-19 M&A transactions.



Diminishing Demand

While the current level of inactivity will not continue, sellers should prepare for a much less frothy market in the near term. It is likely there will still be mandatory or self-imposed restrictions on travel and in-person activities, which will have some negative impact on M&A activity. Many private equity and other financial buyers, as well as strategic buyers, will be focused on keeping portfolio companies and business lines alive, rather than considering new purchases. Notwithstanding the Federal Reserve's efforts to maintain liquidity in the market generally, tightening credit markets may also drag down M&A activity. There will still be uncertainty in the market as to future consumer behavior, government reactions, the true value of a business and other factors that will keep many buyers on the sidelines or will substantially dampen their views on business valuations.

Considering these circumstances, sellers should expect that leverage may begin to swing back to buyers. This will be especially true in those industries disproportionately affected by COVID-19, such as transportation and hospitality. However, it is fair to note that, as mitigating factors in favor of sellers, there remains significant dry powder that will need to be deployed, there will likely be interest in distressed transactions, and many private equity and other financial buyers may begin to look for more add-on acquisitions as they attempt to grow their existing portfolio companies, much like strategic buyers. So, while the leverage pendulum may be swinging back toward buyers, there are counterbalances that may limit the swing.

Sale Timing and Homework

For sellers that were considering a sale in the near term prior to the COVID-19 pandemic, it may well be prudent to prepare for a transaction but wait until later in the year to determine the proper time to pursue a sale, unless there is an urgent need to sell or a unique value-maximizing opportunity (for instance, your business involves remote work capabilities or another product or service that has suddenly become critical due to the pandemic). Notwithstanding such a delay, there is homework to be done. During this "wait and see" period, a seller could effectively invest in itself by performing a COVID-19 impact analysis, implementing process improvements, analyzing and preparing its management presentation, organizing its records for inevitable due diligence requirements and taking other sale-related actions.

The COVID-19 impact analysis may be the most critical of these potential actions. The pandemic's impact on a seller's business will be a significant issue to address in any potential sale transaction. The more comprehensive, thoughtful and organized a seller is in its analysis of those impacts, the more comfortable a buyer will be in its ability to assess the value and viability of the business going forward. In fact, the analysis of, and response to, the pandemic could be viewed as management's audition for a continued role with the business and, if done correctly, could provide a potential buyer with greater confidence in the strength of the business.

Valuation Challenges

One of the most fundamental components of a sale transaction is the determination of value. The COVID-19 pandemic has created uncertainties regarding the impact of the pandemic on both the historical operations and future prospects of a business, which in turn have made the determination of a business's value more challenging than ever. Further exacerbating this challenge is the reduction in market comparable sales data brought on by the reduction in M&A activity. While the pandemic has made valuation more challenging, buyers and sellers occasionally have to deal with significant disagreements over value in the normal course. Some of the mechanisms used to bridge those gaps in the past could be used, possibly with modifications, to address challenges brought on by the pandemic.

Stock-for-stock transactions, for instance, provide some measure of protection, as any over or undervaluation of the purchased company stock may be offset by a similar over or undervaluation of the buyer's stock; however, stock transactions are often not feasible or not preferred and usually do not satisfy a seller's desire to exit the business and achieve immediate liquidity. Equity rollover transactions (where a seller takes stock of the buyer or its affiliate as a portion of the sale price) provide similar benefits and have similar drawbacks to stock-for-stock transactions, but to a lesser degree because only a portion of the purchase price is paid in stock. But such transactions may be more acceptable to sellers and, therefore, may be more readily available to address valuation gaps.

Earnouts typically are a contractual right by which a seller is entitled to an additional post-closing purchase price if certain agreed-upon targets are achieved. While earnout provisions often are difficult to negotiate, they do provide for more precision in identifying and quantifying additional value drivers; however, it may be that earnout targets need to be specially tailored to the impacts of the pandemic, such as customer retention, rather than more customary financial metrics. Seller financing may enable a buyer to agree to a seller's view on valuation and, if properly structured, could serve a similar function to an earnout. Finally, a high-quality COVID-19 impact analysis mentioned above should only help the valuation negotiation, regardless of the value gap bridging measures available to the parties.

Financing

Similar to the swing in the buyer's market, the credit facility drawdowns and operating uncertainties created by COVID-19 will likely cause the debt and equity financing markets to become more lender and investor friendly. Additionally, funding sources for non-traditional or unregulated lenders may be drying up as a result of the pandemic fallout, further reducing access to key financing.

With recent historical financial results and near-term viability for many companies being clouded by the pandemic, it is prudent to expect that lenders and investors may tighten loan terms, including shorter maturities, tighter covenants with shorter triggers, increased borrowing costs, reduced leverage, enhanced preferred liquidation preferences and expanded voting protections, as applicable.

It is also worth noting that traditional, regulated financing sources, who are generally more risk-averse and methodical about their underwriting process, may reassert their dominance in the market, which, coupled with the lender-/investor-friendly changes noted earlier, may make financed transaction closings less certain and more time consuming. In this environment, preparation and organization will be key to a successful financing, including having a solid grasp on the pandemic's impact on the business in the past and the future.

Transaction Timing

With the entire world dealing with the ramifications of the COVID-19 pandemic, buyers and sellers should expect to throw the typical M&A transaction timeline out the window, at least in the near term, as lingering restrictions, uncertainties, backlogs, reprioritization and new market dynamics continue to impact a wide range of transaction activities. Social distancing and remote work arrangements will add time to even the simplest of tasks. Analyzing the impact of the pandemic on the business and performing diligence on sensitivities, such as supply chains, may add time to the process. But this additional time may be minimized if a seller has done its homework and prepared a COVID-19 impact analysis. Negotiating purchase price may also take more time, as buyers and sellers struggle to determine the true value of the business. Federal and state government agencies that have developed a backlog of transfer and approval applications due to reduced operations will struggle to respond in anywhere near their normal timeframes.

As noted above, it likely will take longer to obtain financing. Even when limitations on travel and larger in-person gatherings are lifted, it may be some time before people are comfortable resuming normal business activities. This may add further delays because, while management meetings can be conducted by videoconference and plant tours may be performed virtually, many buyers might not be willing to close without performing those activities in person. In this environment, it will be critical for buyers and sellers to acknowledge the new challenges and plan for a flexible, extended timeline that will allow the diligence, financing and negotiation processes to proceed in concert with one another.

Purchase Agreement Impacts

As the purchase or merger agreement is the primary document governing an M&A transaction, it is reasonable to assume it will be impacted by the various changes triggered by the COVID-19 pandemic. Potential impacts include:

- MAE/MAC – The Material Adverse Effect or Material Adverse Change definition typically impacts a seller's disclosure obligations and a buyer's closing obligations. The issue raised by the pandemic will be whether the MAE/MAC definition includes (buyer's position) or excludes (seller's position) the results of an epidemic, pandemic or other significant public health crisis and, if included, whether the results are included in their entirety or only to the extent they disproportionately affect the business. Alternatively, the buyer and seller could include a provision in the MAE/MAC definition that includes the results of epidemics, pandemics or other public health crises only if they have a negative impact on the business in excess of a specific dollar threshold (note that such a provision could also apply to any or all other events included in the MAE/MAC definition).

- Financing: The reduced availability of financing may require a loosening of the covenants regarding a buyer's financing efforts, which may also necessitate the inclusion or modification of termination fee provisions for the benefit of the seller.

- Timing: Various closing conditions and termination rights place deadlines on sellers' and buyers' rights and obligations to take certain actions. Given the timing challenges noted above, the parties should carefully consider the appropriate deadlines for these actions in the near term.

- Pre-Closing Operating Covenants: The ongoing restrictions and impacts of the COVID-19 pandemic, as well as the actions necessary to recover from it, present significant challenges to sellers and significant risks to buyers. During the pre-closing period, sellers will need to be comfortable they have the flexibility to comply with ever-changing restrictions and address the COVID-19 impacts and recovery efforts. Buyers, by comparison, will want protection from unexpected risks and material changes to the business, such as changes to supply chains, production volumes and the workforce.

- Representations and Warranties: A seller may wish to make general disclosures about the pandemic to qualify its representations and warranties regarding the business. While this desire is, in some respects, understandable, a buyer's willingness to accept such general disclosures likely will be impacted by the risk or value associated with the operational area being addressed and the buyer's visibility into the risk from sources other than the seller. A buyer, on the other hand, may be interested in having increased representations and warranties in areas more significantly impacted by the pandemic, such as A/R collectability, supplier and supply chain issues, customer orders and relationships, and labor and employment.

- Indemnity: Given the uncertainty created by the COVID-19 pandemic, a buyer may attempt to broaden and strengthen its indemnity rights against a seller by reducing deductibles, increasing caps and/or requiring larger escrows or holdbacks. Such attempts may increase if, as preliminarily appears to be the case, issuers of representation and warranty insurance, which has become a more common component of certain M&A transactions, exclude COVID-19 impacts from coverage under those policies.

Takeaways

While economic uncertainty probably will continue in the very near term, buyers, sellers and their advisors can proactively chart a path forward through this uncertainty. Fortunately, past events, while very different from the impact of COVID-19, have given us many tools to use or modify for these times. Some of those tools are noted above, but no doubt others will be developed over time.

By now, all have heard, or been reminded, that we should never waste a crisis. There are many lessons to be learned by the business community from this pandemic. The importance of supply chain redundancy and worker safety are currently at the forefront. But, as we transition forward, less immediate but more constant and transferable lessons can be learned or reinforced, including the importance of continuous business planning and experienced, trusted business advisors.

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New Opportunities for Private Equity as Component Part of 401(k) Investment Options

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Defined benefit plans (traditional pension plans) have long been a source of institutional capital for private equity, but defined contribution plans have not been. Typically, a defined contribution plan is an account-based retirement plan sponsored by an employer, such as a 401(k) plan, where a participant manages the investment of his or her account balance. The general tendency of defined contribution plans has been to avoid the private equity space, which is likely in no small part due to concerns held by plan fiduciaries about liability under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA imposes a high standard of care on plan fiduciaries, and litigation risks associated with plan investments are magnified in the context of participant-directed defined contribution plans where participants contribute their own money and bear the investment risk.

However, the Department of Labor (DOL) may have recently alleviated some of those concerns. In an Information Letter (Letter) dated June 3, 2020,[1] the DOL clarified that defined contribution plan fiduciaries can offer participants plan investment options that include a private equity component without violating their fiduciary duties under ERISA, provided the investment options are selected through a prudent process. As a result, expanded sources of capital may become available to private equity funds that become a component part of a professionally managed fund with a private equity allocation.

The investment options contemplated by the Letter include professionally managed asset allocation funds with exposure to private equity structured as custom target date, target risk or balanced funds. Participant-directed, account-based defined contribution plans generally allow participants to change their account investments daily and to take distributions from their accounts upon certain circumstances. The asset allocation funds contemplated by the Letter would provide plan participants limited exposure to private equity in the context of a diverse fund with investments in a range of asset classes with differing risk/return characteristics and investment horizons. The funds would have a limit on private equity to ensure that the fund's overall exposure does not exceed a specified portion of the fund's assets, and the remaining allocations would be in publicly traded securities, or other liquid investments with readily ascertainable market values to support private equity capital calls at the fund level, and investment exchanges and participant withdrawals at the plan level. The DOL

1 An Information Letter is a written statement by the DOL that calls attention to a well-established interpretation or principle of ERISA; it is informational only and not binding on the DOL on any particular factual issue.

acknowledged that such funds could be structured as "pre-packaged investment option(s)" offered by financial institutions as funds of funds (structured as, e.g., collective trust funds or other pooled vehicles), with one of the underlying funds being a fund that invests primarily in private equity.

Notably, the Letter does not address any ERISA fiduciary or other issues presented by direct participant investment in private equity. In fact, the DOL emphasizes such direct investments in private equity involve specific legal and operational issues for fiduciaries of defined contribution plans.

In the DOL's view, asset allocation funds with a private equity component still present unique challenges for fiduciaries of participant-directed, account-based defined contribution plans. Private equity investments typically have more complex organizational structures and strategies, longer investment horizons, opaque valuations, and complex and likely higher fees compared to public market investments. Moreover, private equity investments tend to maximize investor returns over a multi-year period during which investors' ability to redeem, sell, or obtain a return of capital may be limited. These factors are particularly relevant for participant-directed individual accounts in defined contribution plans that generally allow participants to change their investments regularly, if not daily, and upon certain circumstances allow participants to have access to some or all of their account balances.

Prudent selection of plan investment offerings is a fiduciary obligation with respect to any fund offered by a retirement plan. Whether a particular fund or investment alternative satisfies ERISA's fiduciary requirements is an inherently factual question that the DOL has declined to answer. However, the Letter outlines key considerations for fiduciaries to evaluate the risks and benefits associated with asset allocation funds that contain a private equity component.

Those considerations include, in relevant part:

1. Is the allocation fund overseen by plan fiduciaries (using third-party investment experts as necessary), or managed by investment professionals, in either case, that have the necessary investment management skills and expertise, given the nature, size, and complexity of the private equity activity?
2. Has the allocation fund limited the allocation of investments to private equity in a way that is designed to address its unique characteristics, including cost, complexity and disclosures?
3. Has the allocation fund adopted features related to liquidity and valuation that are designed to provide liquidity for participants to take benefits and direct exchanges among the plan's investment line-up consistent with the plan's terms (such as ensuring the investments are independently valued according to agreed-upon procedures that satisfy certain accounting standards)?
4. Do the characteristics of the allocation fund (e.g. fees, liquidity restrictions and investment allocation, and strategy) align with the plan's features and characteristics, including participant profiles (e.g. participant ages, normal retirement age, anticipated turnover and contribution, and withdrawal patterns), participants' ability to access funds in their accounts and change their investment choices on a potentially frequent basis?

The DOL acknowledges that there may be many reasons why the fiduciary of an individual account defined contribution plan might choose to offer an asset allocation fund with a private equity component as a part of the plan's investment line-up. While it is unclear how many plans will choose to take advantage of this guidance, the Letter nevertheless presents a new opportunity for private equity funds to market themselves to professionally managed funds intended for retirement plans.

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COVID-19: Buyer Considerations for M&A Due Diligence

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Although some mergers and acquisitions (M&A) have paused in light of the uncertainty and economic impact that COVID-19 has created, many companies continue to enter into new M&A transactions. As the long-term effects of COVID-19 continue into the foreseeable future, buyers and sellers will need to consider new and novel pandemic-related issues in M&A transactions. This article discusses important issues and considerations a buyer should focus on during the critical due diligence step of an M&A transaction. While this article focuses on considerations from a buyer's perspective, a seller or target company may find it useful to understand a buyer's concerns, to improve its present operations, or to assist in preparing for an upcoming or possible deal.

Buyers should expand and tailor their customary due diligence in order to understand the impact COVID-19 has on a target company's business. Some key issues and concerns that buyers should consider incorporating into their due diligence investigation include:

1. Supply and Distribution Chain – Buyers should determine what disruptions, if any, have occurred to the target company's supply and distribution chains. Questions to ask include: Have suppliers' ability to provide products or services been impacted? Does the target company have readily available alternative suppliers? Has the target company's ability to produce goods or provide services been impacted? Are customers reducing their spending on products or services?
2. Material Contracts – Buyers should review material contracts for termination rights, force majeure, and material adverse change provisions. Buyers should also pay close attention to a seller's attempts to avoid disclosing COVID-19-related adverse changes on the business through exclusionary language in defined terms and seller representations and warranties in the purchase agreement. Questions to ask include: Has the target company issued or received any force majeure notices to excuse non-performance of contractual obligations due to business interruptions caused by COVID-19? Have any material contracts been terminated, modified, accelerated, or have material terms of any such contracts been waived? Has there been any threatened or actual breach or default due to business interruptions caused by COVID-19?
3. Business Operations Generally – Buyers should understand what changes have occurred to the target company's normal operations of the business and the target company's preparedness for responding to the effects of the pandemic.
4. Workforce – The health and well-being of employees has become a top concern and some companies have experienced a rise in labor and employment and Occupational Safety and Health Administration ("OSHA") claims. Buyers should understand the target company's health and safety policies and procedures and the status of the target company's workforce. Questions to ask include: What policies, measures,

or accommodations has the target company adopted or implemented to ensure the safety of its employees, including working remotely? Has the target company received any complaints or claims for failing to provide a safe work environment or accommodation in response to COVID-19? How many employees are working remotely and what is the effect of this? How many employees, if any, have been furloughed or laid off?

5. Compliance with Laws – Buyers should assess the target company's compliance with applicable laws, including employment, privacy, and employee benefits, and new regulations, orders, and guidelines implemented in response to COVID-19, including business closures and re-openings and stay-at-home orders.

6. CARES Act Relief – The Coronavirus Aid, Relief, and Economic Security ("CARES") Act created loan programs and tax incentives and deferrals to provide relief to businesses across the U.S. Buyers should identify if a target company has received funding or other benefits under the CARES Act as this directly impacts earnouts, working capital calculations and purchase price adjustments. If a target company has obtained a loan under the CARES Act, buyers should review and analyze the target company's application and eligibility, including, for example, the basis for the target company's necessity certification. Buyers should also assess the target company's compliance with the loan obligations, confirming, for example, that the target company has only used the loan proceeds for permissible purposes. Buyers should ensure that the contemplated transaction would not violate the terms of the target's loan agreement or adversely impact any requirements under the loan. In the event an earnout will be utilized in the transaction, the buyer will need to understand how discharge of indebtedness income resulting from a PPP loan will be treated in the calculation of earnings before interest, taxes, depreciation and amortization ("EBITDA") or other metric used for the earn-out calculation. Of importance in a stock purchase, if the target company has deferred its Federal Insurance Contributions Act ("FICA") taxes, the buyer should ensure that it will not have to bear this cost after closing. Careful attention should be paid in addressing this item in the working capital calculation, pre-closing taxes, or indebtedness provisions of the purchase agreement, as appropriate.

7. Logistics – Travel restrictions, social distancing, and office closures have created challenges to conducting aspects of due diligence, including onsite visits and inspections, in-person management meetings, title exams, and environmental testing. Buyers and sellers should understand title exams and environmental testing may take longer due to shutdowns and social distancing. However, buyers and sellers are also finding ways to adapt, such as holding video conferences in place of in-person meetings.

8. Representation and Warranty Insurance – It should also be noted that if the parties have agreed to obtain representation and warranty insurance ("RWI"), the insurers will identify their own diligence areas requiring increased scrutiny. While RWI often excludes known risks, insurers are now adding exclusions for losses arising out of or relating to COVID-19. These COVID-19 related exclusions may be broad or may be tailored based on the due diligence conducted by the insurer which includes the impact of COVID-19 on the target company's business and operations. Buyers should consider whether an indemnification escrow or other risk allocation measures should be used to address the gaps in coverage created by any COVID-19 exclusions.

Although COVID-19 has created challenges to conducting due diligence and created new issues that buyers must investigate, with a thorough consideration of these issues, buyers can understand how COVID-19 has affected a target company in an M&A transaction.

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An Introduction to the Use of Blocker Corporations in M&A Transactions

Author: Scott Dolson

In an earlier article titled "Rollover Equity Transactions 2019," we discussed the various business and tax issues associated with transactions involving private equity (PE) buyers who include rollovers of target owner equity in their leveraged buyout (LBO) transactions. Here, we take a deeper dive into the ramifications of having some PE investors invest in target companies through blocker corporations.

What are "blocker corporations?"

Blocker corporations are corporations that effectively "block" taxable income at the corporate level for U.S. federal, state and local income tax purposes. When a PE firm structures an LBO transaction, some PE investors, generally tax-exempt and foreign investors, will invest directly or indirectly in portfolio company equity through one or more newly-formed Delaware C corporations (the blocker corporation). The right of tax-exempt and foreign investors to use blocker corporations and provisions protecting the economic rights of tax-exempt and foreign investors are often spelled out in PE firm's fund documents and limited partnership agreement.

Why are "blocker corporations" used when a PE fund invests in a U.S. based business taxed as a partnership for federal income tax purposes?

Taxable income passed through on a Schedule K-1 by a portfolio company generally falls into the category of income "effectively connected with a U.S. trade or business" for foreign investors and unrelated business taxable income (UBTI) for U.S. tax-exempt investors. Foreign investors want to avoid being allocated effectively connected income because exposure to an allocation of that income subjects them to a U.S. income tax filing requirement and potentially to U.S. federal income and withholding taxes. Tax-exempt investors want to avoid being allocated income that is UBTI because that income will subject the otherwise tax-exempt investor to U.S. excise taxes. So, neither foreign or tax-exempt investors want to hold directly an equity interest in a U.S. business taxed as a partnership. Hence, the use of a U.S C corporation as a "blocker corporation" to block the flow-through of income on a Schedule K-1 at the corporate level.

PE investors also favor the use of blocker corporations because when the portfolio company investments held by the blocker corporations are eventually sold, the stockholders will sell their blocker corporation stock instead of having their blocker corporations directly sell the portfolio company investments. In a sale of blocker corporation stock, tax-exempt and foreign investors will generally avoid U.S. income taxes because neither foreign nor tax-exempt investors are subject to U.S. federal income tax on capital gains.[1] In contrast, if a blocker

1 Gain on the sale of blocker corporation by a foreign investor could be subject to U.S. federal income tax under the FIRPTA rules if the blocker corporation's assets are primarily composed of U.S. real estate at any time during the five-year period preceding the sale.

corporation sold its portfolio company investment and then liquidated, the blocker corporation would be subject to federal, state and local income taxes. Blocker corporation investors generally negotiate for the right to sell blocker corporation stock when they invest with the PE firm.

So, when a sale process in undertaken with respect to a portfolio company, the PE firm will conduct a sale process that includes the sale of blocker corporation stock by its stockholders and the sale of portfolio company equity by the remaining PE investors and rollover participants. After closing, a buyer presumably has the choice of either liquidating the blocker corporation and take the tax hit associated with a deemed sale of the blocker corporation's assets or holding the blocker corporation stock (and indirectly that portion of the portfolio company's equity). Either way, the buyer won't benefit from the full tax basis step-up otherwise associated with the purchase of a portfolio company's equity (i.e., the typical 15-year amortization of goodwill under Section 179). The portion of the purchase consideration paid for the blocker corporation stock cannot be amortized. For example, if the equity of a portfolio company taxed as a partnership is purchased for $100, and its assets consist solely of goodwill, the buyer will be able to amortize this $100 investment over 15 years. In contrast, if the buyer purchases 80% of the portfolio company's equity directly and 20% indirectly through the purchase of blocker corporation stock, the buyer will be able to amortize only the $80 investment in portfolio company equity. The buyer won't be able to amortize its $20 investment in the blocker corporation's stock. The buyer is worse off in terms of future tax benefits. So, unless a buyer is entirely tax insensitive (e.g., perhaps a public company that strictly views the purchase in terms of whether it is accretive to earnings?), the buyer will make some adjustment to the purchase price to reflect the loss of future tax benefits.

Most blocker corporations are C corporations domiciled in the United States, so taxable income from an equity investment in an LLC taxed as a partnership passes through on a Schedule K-1 to the blocker corporation, taxes are paid at the corporate level at the current 21% federal income tax rate, and stockholders do not report income and are not taxed unless a taxable distribution is made by the blocker corporation to its stockholders. There is the potential for double taxation with blocker corporations if after-tax profits are distributed to stockholders. Non-liquidating distributions made by blocker corporations to foreign investors are generally subject to a 30% U.S. withholding tax, but there are exceptions to double taxation where distributions are made to U.S. tax-exempt investors, non-U.S. governmental entity investors, or non-U.S. investors qualifying for tax-treaty withholding exemptions or reductions. However, the threat of double taxation is generally an empty one because prior to the sale of a portfolio company investment, most distributions from portfolio companies acquired through an LBO will be limited to tax distributions. There generally won't be any excess distributable cash that could potentially be subject to double taxation prior to the sale of the portfolio company.

Foreign corporations are generally not used as blocker corporations to invest in U.S. target companies because foreign owners don't want to expose the foreign corporation to a U.S. tax return filing requirement, along with a potential exposure to U.S. income tax and withholding requirements.[2] Instead, foreign corporations will also make their U.S. equity investments through U.S. based blocker corporations.

Does the use of blocker corporations result in a misalignment between the economic interests of blocker corporation stockholders, on the one hand, and other PE investors and rollover participants, on the other hand?

Generally, the interests of blocker corporation stockholders, on the one hand, and PE investors and rollover participants, on the other hand, are not aligned because in spite of the fact that a buyer might reduce the overall purchase price solely due to the presence of a blocker corporation, blocker corporation stockholders typically share equally in the sale proceeds. Further, it can be argued that the inclusion of the requirement that a buyer purchase blocker corporation stock, places foreign and tax-exempt investors in a better tax position that other holders of portfolio company equity. Finally, although it is difficult to quantify, it is possible that the pool of interested buyers is reduced if buyers must purchase blocker corporation stock.

2 Foreign corporations are taxed on income allocated to them on a Schedule K-1 as effectively connected income subject to U.S. corporate income tax, along with a 30% "branch profits" tax on the after-tax effectively connected income withdrawn from the U.S. flow-through portfolio company's U.S. business (unless otherwise reinvested in a U.S. business). Also, a sale by a foreign corporation of a U.S. based pass-through entity interest will be subject to unfavorable tax treatment under Section 864(c)(8) of the Internal Revenue Code when contrasted with the tax treatment afforded foreign investors who sell U.S. blocker corporation stock.

To summarize, rollover participants (and other PE investors) generally are told that there are the following requirements with respect to blocker corporations: (i) some investors (foreign and tax-exempt investors) will invest through blocker corporations, (ii) when the target company's equity is eventually sold in a sale process three to seven years down the road, the sale process will include the sale of blocker corporation stock, and (iii) blocker corporation investors will share equally (pro rata with the indirect interest in the portfolio company equity) in the sales proceeds, disregarding any differentiation in purchase price paid for the blocker corporation stock. A reasonable question to ask is why PE firms cooperate with the demands of foreign and tax-exempt investors if structuring an LBO with blocker corporations puts other PE investors and rollover participants in a worse position?

A big part of the work of PE firms is attracting investors and competition for those investors' dollars is intense. A healthy slice of many PE firm's investor pool consists of tax-exempt and foreign investors. For those reasons, PE firms are highly motivated to make investing in their funds attractive to foreign and tax-exempt investors. As a result, PE firms routinely include in their fund documents the blocker corporation provisions discussed above. In some cases, particularly where a minority interest in a business is acquired in a partial recapitalization, the sale of blocker corporation stock is not required but is expected to be pursued on a commercially reasonable best efforts basis. Few if any PE agreements require blocker corporation stockholders to shoulder the purchase price haircut imposed by a tax sensitive buyer (e.g., even where the buyer expressly reduces the price paid for the blocker corporation stock because of the loss of future tax benefits[3]). Our experience has been that most PE firms treat these provisions as a non-negotiable aspect of a purchase transaction. Of course, everyone hopes that the future buyer of the portfolio company won't be particularly sensitive and reduce the purchase consideration. But at the end of the day, rollover participants and other PE investors should recognize that their interests are not aligned on these issues with those of the blocker corporation shareholders and this misalignment generally translates into some economic cost borne by the rollover participants and some PE investors.

Is it really necessary for blocker corporation stockholders to sell stock rather than have the blocker corporation sell its equity interest in a portfolio company?

If a PE firm is asked why it is necessary for some PE investors to invest through a blocker corporation, a likely response is a discussion of the problems associated with "effectively connected income," "UBTI" and double taxation. While we agree that blocking "effectively connected income" and "UBTI" is necessary, we question whether most blocker corporation stockholders would be subject to double taxation if the blocker corporation sold its equity interest in the portfolio company and then liquidated. If a blocker corporation sells its portfolio company investment, it will be taxed at the 21% federal corporate tax rate on taxable gain on the sale. A subsequent liquidation of the blocker corporation would be treated as a stock sale for federal income tax purposes. Tax-exempt and foreign investors are not generally subject to U.S. federal income tax on the capital gains triggered by a corporate liquidation. So, the net result of a blocker corporation's sale of its portfolio company investment would be to place its stockholders (the tax-exempt and foreign investors) on par with other PE investors and rollover participants in terms of the overall tax burden generated by the sale (e.g., a 21% federal corporate income rate for the blocker corporation and a 20% or 23.8% federal income tax rate for other investors).[4] What PE firms really should be saying to PE investors and rollover participants is that tax-exempt and foreign investors are accustomed to an overall 0% tax rate for U.S. income tax purposes and the blocker corporation structure allows these investors to avoid U.S. income taxes. Again, what the PE firms could be saying is that in reality, the demands of tax-exempt and foreign investors must be met and blocker corporations help those investors maintain their accustomed favorable tax treatment.

How should PE investors and rollover participants view the issue of blocker corporations?

It is a fact that PE investors investing in portfolio companies through blocker corporations are afforded special treatment at the expense of other investors in portfolio companies. This fact might appear unfair to non-blocker corporation investors and rollover participants, but the difference in tax treatment among

3 Most letters of intent and purchase agreements are silent about price reductions associated with buyer's loss of tax benefits. Generally, buyers will take this reduction in tax benefits into account when setting the purchase price rather than expressly addressing the reduction through a formula or otherwise. But, of course, silence doesn't mean that the buyer isn't taking the loss of those benefits into consideration.

4 For the non-corporate taxpayers' portion of the gain may be subject to taxation at ordinary income rates under Section 751. This differential in tax rates doesn't apply when blocker corporation stock is sold or the blocker corporation sells its portfolio company equity.

the investors is more a result of the way tax-exempt and foreign investors are accorded special favorable treatment under U.S. income tax laws than a result specially engineered through blocker corporations. Blocker corporations preserve the disparity in treatment created by Congress through the Internal Revenue Code – the fact that while most investors will be taxed on their capital gains, foreign investors and tax-exempt investors avoid taxation. For rollover participants, the participation of blocker corporations on the PE firm side of the equation is certainly worth taking note of, but the potential incremental haircut on the sales proceeds received in connection with a future sale of a portfolio company represents just one of numerous economic and business factors that merit close attention when selecting target company's buyer. Our experience has generally been that the consequences of blocker corporations aren't well understood by sellers, and when the ramifications of blocker corporations are fully explained and considered, the issue seldom rises to the level of a deal-breaker for the target company's owners. Rollover participants are usually more focused on the amount of up-front cash, and gauging whether the PE firm will contribute towards a successful future sale of the portfolio company.

Finally, a factor to keep in mind with respect to foreign investors who invest through blocker corporations is that they may be subject to tax in their home jurisdiction on gains from the sale of their blocker corporation stock. For example, when blocker corporation stock held by a Canadian resident is sold, the Canadian investor may escape U.S. federal withholding or income tax liability but will be subject to tax on the gain in Canada. On the other hand, this might not be true for foreign investors residing in tax havens who may not be subject to U.S. federal withholding or income tax or foreign taxation on the sale of the blocker corporation's stock.

Should rollover participants and other non-tax-exempt or foreign investors invest through blocker corporations or should a pass-through portfolio company be converted into a C corporation?

This question sometimes comes up when rollover participants look at the benefits of blocker corporations for tax-exempt and foreign investors. While the basic choice of entity analysis is beyond the scope of this article, there are a few general thoughts that should be kept in mind. First, if a U.S. taxpayer isn't a tax-exempt investor, there won't be a problem with UBTI and the investor is already filing a U.S. federal income tax return. When the portfolio company is sold, owning the pass-through LLC interest through a blocker corporation won't significantly decrease an owner's tax liability because the portion of the gain taxed at ordinary income rates under Section 751 (e.g., accounts receivable, appreciated inventory and depreciation recapture) doesn't typically represent a significant percentage of the sale consideration. So, for the U.S. taxpayer, the blocker corporation doesn't generally improve the tax result. Investors and rollover participants should keep in mind that if the portfolio company is a C corporation or a significant percentage of its owners hold their interests through a blocker corporation, a buyer might calculate a significant reduction into the purchase price if it is tax sensitive (i.e., the buyer strongly objects to the loss of future goodwill amortization and prices the deal accordingly). Perhaps one situation where the use of a blocker corporation would be worth pursuing is if there is a reasonable possibility that the blocker corporation's stock could be treated as qualified small business stock (QSBS) for purposes of Section 1202's generous gain exclusion.[5]

5 If all of the requirements of Section 1202 are met, each individual taxpayer might qualify for at least a $10 million gain exclusion with respect to the sale of an issuing corporation's stock. The application of Section 1202 to portfolio company investments and equity rollover arrangements has not been fully explored and certainly represents an interesting opportunity for tax savvy PE firms and venture capitalists.

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About Frost Brown Todd

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13 MARKETS ACROSS 9 STATES

INDIANA
Indianapolis

KENTUCKY
Florence
Lexington
Louisville

MICHIGAN
Ann Arbor

OHIO
Cincinnati
Columbus
West Chester

PENNSYLVANIA
Pittsburgh

TENNESSEE
Nashville

TEXAS
Dallas

VIRGINIA
Richmond

WEST VIRGINIA
Charleston

INDUSTRIES

Energy
Financial Services
Franchise & Hospitality
Health Care Innovation
Manufacturing
Mobility & Transportation
Private Equity
Technology

PRACTICES

Bankruptcy & Restructuring
Business & Commercial Litigation
CMBS Lending & Servicing
Construction
Corporate Law
Employee Benefits & ERISA
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