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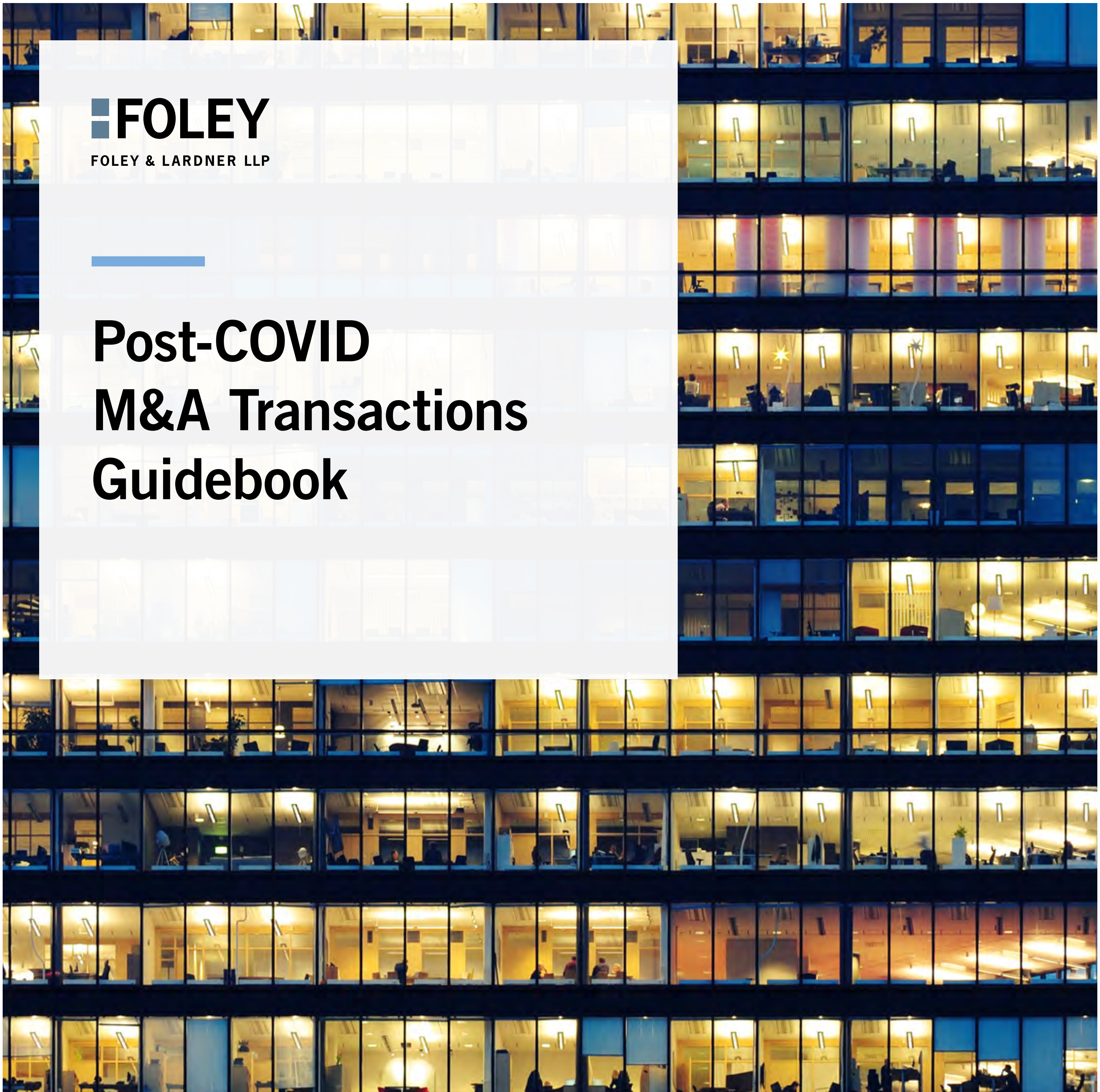
FOLEY & LARDNER LLP

Post-COVID M&A Transactions Guidebook



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PREPARED BY THE FOLEY & LARDNER TEAM IN THE AREA OF:
MERGERS & ACQUISITIONS

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Introduction

The COVID-19 pandemic has had far-reaching effects to date, including economic uncertainty and widespread business interruptions. This environment may raise unique considerations for parties contemplating an M&A transaction. This guidebook is intended to provide a summary of key considerations for M&A transactions in a post-COVID-19 era.

Key Considerations for Diligence and Representations and Warranties

- Certain standard representations and warranties may be impacted by existing business disruptions and the uncertainty of future activities. We have highlighted key considerations below for each topic of focus.
  - Buyers may focus particularly on relationships with key customers and suppliers, and are likely to pay focused attention to issues related to labor and employment, insurance, material contracts and financing (among others).
  - Target companies may seek to limit certain representations depending on business disruptions, and may wish to include express language to limit the buyer’s ability to rely on information provided outside of the representations and warranties.
- Due diligence always requires synchronization among teams, but diligence teams should consider the below key points in preparing for a due diligence process in a post-COVID-19 environment. In particular, site visits, physical inventory review, and retrieval of certain paper records may be difficult or impossible for a period of time, so teams should prepare alternatives to those types of diligence activities.

Labor & Employment

- When reviewing labor and employment-related diligence in the age of COVID-19, it is essential to understand what steps a target has taken to mitigate against the adverse health effects of the coronavirus on its workforce. As such, in addition to the traditional areas, employment diligence should focus on the following:
  - Has the target taken any steps to ensure worker safety and, if so, what are they? Has the target implemented any policies evidencing the steps it has taken?
  - Have any employees been diagnosed with COVID-19 or been subject to quarantine, and what policies does the employer have in place to address these situations?
  - Has the target implemented any reductions in force, such as layoffs or furloughs, or has the target experienced a WARN event stemming from the economic impact occasioned by COVID-19? Has the target implemented any austerity programs (i.e., across-the-board compensation reductions, suspension of bonuses, suspension of promotions, etc.) as a result of COVID-19? If the target has implemented a compensation reduction program, has it ensured that exempt employees continue to receive salaries at a level sufficient to ensure that the FLSA’s salary basis test is satisfied?
  - Does the target require employees to be physically present at its worksites or are employees able and permitted to work remotely? If employees are permitted to work remotely, what steps has the employer taken to ensure that nonexempt employees that are entitled to overtime pay are accurately recording hours worked in the remote environment?
  - Has the target complied with all applicable COVID-specific employment laws, including those addressing workplace safety and paid leaves of absence?

- **Key Considerations for Representations and Warranties**
  - There have been a number of federal and state statutes that have been implemented to address the economic fallout of COVID-19 and its attendant impact on workforces. Specifically, on April 1, 2020 the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act – which are both part of the Families First Coronavirus Response Act (FFCRA) – were enacted, providing expanded paid leave benefits for U.S. workers. Accordingly, parties should consider adding specific representations and warranties to capture employer obligations under these laws.
  - In addition, to ameliorate the spread of COVID-19 and protect workers as they reenter the workplace, the CDC and various state governments have implemented a series of guidelines addressing workers who have contracted or who may have been exposed to COVID-19. It is therefore important to consider adding representations and warranties that confirm whether a target company has followed federal and state guidance with respect to workforce health and safety.

Employee Benefits

- **Key Considerations for Diligence**
  - If target company has employees who are furloughed or working reduced hours, confirm that any benefits continuation on same terms as active or full-time employees is consistent with plan documents and insurance policies
  - If stock acquisition and target company took advantage of the opportunity to defer the employer-portion of FICA taxes (which runs through the end of 2020 and can be paid 50% each in 2021 and 2022), confirm that those deferred FICA taxes have been reflected as a liability on target company's financial statements
  - If asset acquisition and the target company has deferred the employer-portion of FICA taxes, and buyer wants to use the alternate procedure where they take the seller's tax history so that they do not have to restart FICA taxes:

    - Determine whether seller would be liable for this deferred tax liability
    - Either consider covenant that seller will be responsible or, if buyer will be responsible, confirm that the liability is accrued on financial statements and considered in setting the sale price.
  - If target company suspended company match or profit sharing contributions to a 401(k) plan, confirm that nondiscrimination testing and participant notice obligations were handled appropriately
  - Where target company has cut compensation or suspended company retirement plan contributions, determine normal cost of providing compensation and benefits
  - If the target company has received a loan under the Main Street Lending Program, confirm that executive compensation has been appropriately restricted
  - Numerous COVID-related benefit plan enhancements (e.g., CARES Act distributions, flexible spending account rollovers) require plan amendments that are not due until future years. Determine whether the amendments have been completed.

- **Key Considerations for Representations and Warranties**
  - Buyers should ensure that seller represents that all plans were operated in accordance with their terms to avoid potential out of pocket liability for "active employee" benefits continuation for furloughed or reduced hour employees
  - Confirm that general "compliance with applicable laws" representation sufficiently addresses any potential coverage and discrimination testing issues raised by furloughs and/or suspension of employer contributions
  - Confirm that a representation covers all applicable notice requirements in order to capture potential COBRA notice failures and/ or communications related to suspension of employer contributions.

Material Contracts

- **Key Considerations for Diligence**
  - Given the substantial declines in retail revenue, commercial parties are either unable, or may soon become unable, to comply with material contract terms. As such, close attention should be paid to whether any material contracts have been modified or material terms waived in light of COVID-19 that might affect future enforcement, force majeure and other termination provisions, defenses to contract breach, practical ability to enforce contracts, minimum guaranteed financial commitments, and consequences of breach and termination.
  - Confirm whether any required consents from key counterparties may be difficult to obtain, for example due to interruption of business, lack of availability of key parties or, in the worst case scenario, bankruptcy.
  - Diligence should include a careful review of indemnification provisions in material contracts and insurance coverage for any such claims.

- **Key Considerations for Representations and Warranties**
  - With respect to representations and warranties regarding key contracts, parties should consider whether the effects of COVID-19 provide a basis for nonperformance or termination, or raise the risk of breach or default.

Tax

- **Key Considerations for Diligence**
  - Whether described as quarantine, "shelter in place", "stay at home", workforce reduction, social distancing, shut down, closure, sequester or otherwise, measures to address COVID-19 taken by public and private institutions have impacted business and government operations around the world. The IRS was not immune to these COVID-19 measures. Filings as simple as obtaining a taxpayer identification number, especially for foreign-owned businesses, have not been as routine as before the COVID-19 measures were in place. Obtaining documents from and contacting the IRS are, in many instances, more burdensome than pre-COVID-19.

- COVID-19 measures have forced many employees to work from home. Working from home can have a material impact on companies as it relates to employment-related taxes and withholdings, and also potential tax exposure for conducting business in another jurisdiction. These “other” jurisdictions include both other US states and other nations. Though there is some commonality among the states, domestically, each state has rules regarding employment-related tax obligations and nexus rules creating tax jurisdiction, but there is not a consistent, single rule to apply for all states. Analysis of foreign tax obligations must be confirmed on a country-by-country analysis. Not surprisingly, guidance from taxing jurisdictions on these issues has changed, and is changing, frequently as taxing authorities consider how to apply their respective tax laws to employees temporarily working from home.

- **Key Considerations for Representations and Warranties**
  - The CARES Act and the FFCRA contain numerous special tax elections that taxpayers may make. The representations and warranties in purchase agreements should be reviewed carefully to ensure that sellers have made buyers aware of any such elections that were made.
  - Definitions of “Indebtedness” and “Transaction Expenses” (or similar terms) should include any tax payment or withholding obligations of a target company that have been deferred under legislative reactions to the COVID-19 pandemic. These obligations include the amount of any payroll and other employment taxes that would have been payable but for an election to defer the payment of those taxes.
  - Representations regarding tax return due dates may be impacted by extensions allowed by governmental authorities relating to COVID-19 measures.
  - Post-closing covenants should be reviewed carefully considering, among other relevant consideration, provisions relating to tax returns and payments whose due dates have been suspended due to COVID-19, the significant changes made by the CARES Act relating to net operating loss carryback and carryforward rules, and, if the target received any PPP loans, confirmation that they were eligible to receive such loans and will be eligible to have such loans forgiven.

Data Privacy

- **Key Considerations for Diligence**
  - Given the switch to most employees and contractors working remotely, confirm the processes followed to protect the privacy and security of data during that transition and extending through the duration of the pandemic.
  - For new vendors contracted with during the pandemic, confirm vendor due diligence process to ensure adequate processes were followed.
  - Confirm occurrence of any data events, including ransomware attacks, and processes in place to promptly discover, investigate, and mitigate data events.
  - Diligence should include a careful review of data privacy and security terms in material contracts, as well as indemnification and insurance coverage for any data events resulting from violations of the same.

- **Key Considerations for Representations and Warranties**
  - Buyers should ensure that robust data privacy representations and warranties cover target companies’ data privacy and security practices during the time of the pandemic and be aware of carve-outs or attempts to limit lookback periods.

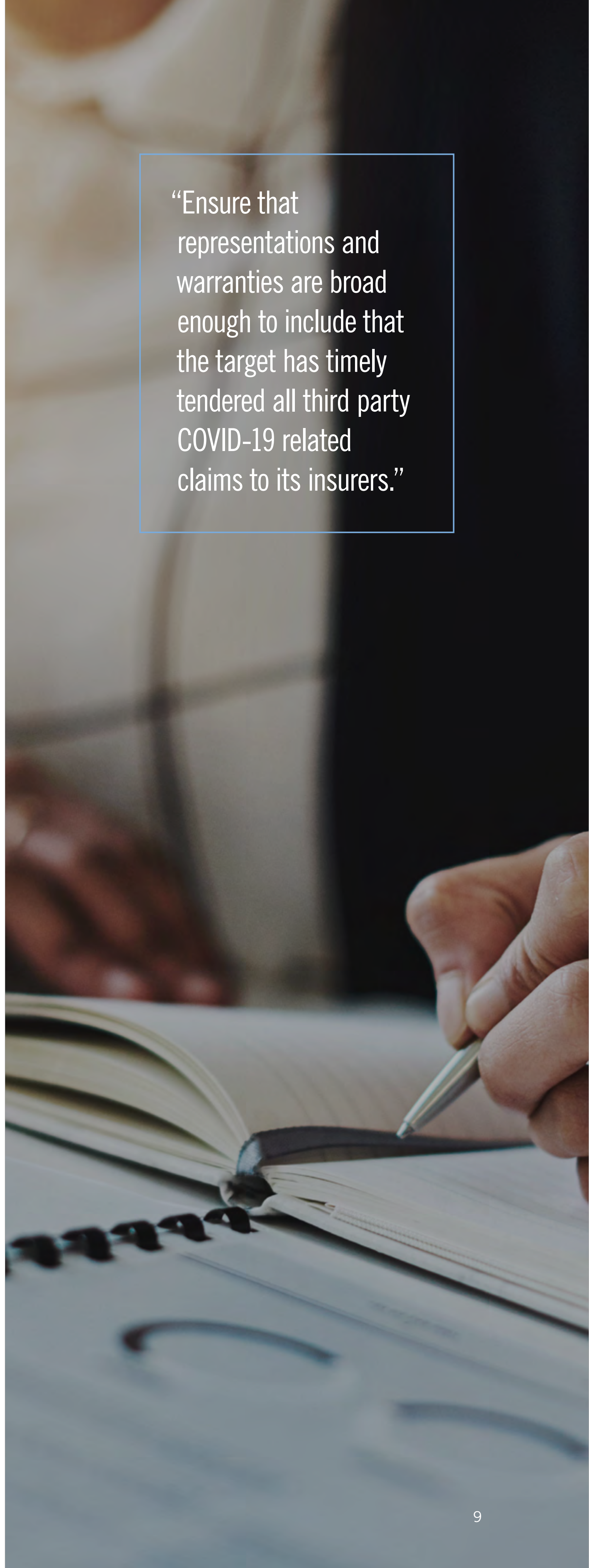
Insurance

- **Key Considerations for Diligence**
  - Confirm whether any COVID-19 related claims have been brought against target by employees or other third parties. If any such claims have been brought, ensure they have been tendered to appropriate liability insurers and obtain copies of all coverage-related correspondence for such claims.
  - Confirm whether the target has made any other COVID-19 related claims under its commercial property or other first party insurance policies. If so, obtain copies of all coverage-related correspondence for such claims.
  - Carefully review all insurance policies (and particularly liability insurance policies) to determine the scope of any pandemic, virus or similar exclusions or limitations on coverage.

- **Key Considerations for Representations and Warranties**
  - Ensure that representations and warranties are broad enough to include that the target has timely tendered all third party COVID-19 related claims to its insurers.

Litigation

- **Key Considerations for Diligence**
  - Clients should be asked whether there are any contracts that have been impacted by COVID-19 – either by the client not being able to fulfill its contractual obligations or the other party failing to perform. These are potential litigation liabilities that may need to be disclosed during diligence depending on how far along the dispute has progressed.
- **Key Considerations for Representations and Warranties**
  - Clients should be careful when making representations and warranties to disclose all potential litigation risks, especially if they have had issues fulfilling their contractual obligations recently.
  - Clients should also consider whether they want to specify the warranties within the contract to account for different financial scenarios, or in the alternative, what warranties are not included.



Financing: Mezzanine and Alternative Financing

Mezzanine Financing

What is Unique About Mezzanine Financing?

Mezzanine financing includes both a debt and an equity component that gives the lender a return on the upside. This type of financing is typically long term, does not require amortization payments, and may allow for part of the interest to be paid in kind, not in cash.

Why is Mezzanine Financing Important?

Borrowers interested in a mezzanine financing should consider the following characteristics:

- It can fund all or part of an acquisition
- It may be cheaper than private equity, though more expensive than senior debt
- It can fill a funding gap between senior debt and equity

Key Takeaways

Mezzanine financing can be used to fund acquisitions by companies with senior debt. Mezzanine investors are nonbank lenders and retain more flexibility to deal with borrowers and financing acquisitions.

Alternative Financing

During an economic downturn, a borrower may want to consider alternative financing options. Two such options include 1) Loan-to-own transactions and 2) DIP financings.

Loan-to-Own Transactions

What is a Loan-to-Own Transaction?

In a loan-to-own transaction (also referred to as distressed-for-control or distressed-to-control transactions), a lender seeks to take control of a distressed company by purchasing debt in the distressed company at a significantly discounted price (e.g. $0.20 on the dollar); this debt is usually secured by the company's assets. Because of the nature of these transactions, lenders will target companies that are distressed but thought to be undervalued.

The strategy of a loan-to-own transaction lies in the ultimate goal of converting the purchased debt into a controlling stake in the distressed company. This conversion usually occurs in one of two ways:

- With the consent and participation of the distressed company and its stakeholders
  - Lenders have ample opportunity to negotiate for favorable terms throughout the process
- Without the consent of the distressed company and its stakeholders
  - Lenders convert debt into equity when the company ultimately goes through bankruptcy and restructuring proceedings

In either situation, because the distressed company has no cash on hand to pay off the debt owed to the investor, the debt will instead be exchanged for equity in the company.

More specifically, a lender may choose to pursue one or a combination of the following techniques:

- Extend or purchase secured debt of the distressed company before bankruptcy proceedings begin
- Offer a DIP financing (see below for more detail on DIP financings) with the following conditions:
  - A sale of the company's assets must occur within a specified period of time, and the lender serves as the "stalking horse" bidder
  - The lender retains the ability to approve any plan so that it can negotiate for one that results in its debt converting to equity in the reorganized company
- Purchase the fulcrum security (otherwise known as fulcrum debt) of the company – the debt most likely to be converted into equity
- Participate in a rights offering to purchase shares of stock in the reorganized company
- Serve as the plan sponsor

"During an economic downturn, a borrower may want to consider alternative financing options."

Generally, a lender ultimately sees returns in one of two ways:

- In scenario one, as the controlling owner of a now debt-free company, the lender (now owner) may choose to sell the company at a total purchase price that is greater than what the lender initially paid to purchase the company's debt, with this delta being the lender's profit.
- In scenario two, the lender (now owner) may opt to use its controlling ownership of the company to nurse the company back to health – recruiting new management, implementing a new business strategy, etc. – to increase the company's value. While this strategy expends more time and effort than immediately selling the company after assuming ownership, the returns are often higher.

DIP Financings

What is DIP Financing?

DIP financing is a loan that is uniquely offered to Chapter 11 debtors to finance their bankruptcy proceedings. Under the Bankruptcy Code, DIP financings can exert superpriority status and have priority over other existing debt, equity, and any other claims against a debtor-company.

In addition to its super-priority status, DIP financing offers the lender other attractive benefits, including greater control over the debtor and its bankruptcy case, high interest rates, and large transaction fees. DIP financings are generally negotiated before the bankruptcy filing, and are approved by the court at the beginning of the case.

A debtor may need DIP financing for the following reasons:

- To maintain liquidity: DIP financing allows a debtor to maintain operations during the reorganization process
- To restore consumer and employee confidence in the debtor
- To attract trade credit and comfort the debtor's vendors
- To allow the debtor to maintain a focus on its reorganization and operating its business

THERE ARE FOUR TYPES OF DIP FINANCING:

Non-Priming DIPs

- **Unsecured financing with superpriority claim:** Lenders have priority over other existing debt, equity, and any other claims against a debtor-company.
- **Financing secured by liens on unencumbered assets:** Lenders are given liens on property that is not already subject to liens.
- **Financing secured by junior liens on encumbered assets:** Lenders are given junior liens on property that is already subject to liens.

Priming DIPs

- **Financing secured by senior or equal liens on assets:** Lenders are given priming liens on property that is already subject to liens. Priming liens are given the same or senior priority to the existing liens. This type of DIP financing is only available when the debtor is unable to obtain any other financing.

Lastly, take-out DIPs are a non-priming DIP used to refinance existing secured loans. Take-out DIPs should be used when a debtor can raise funds to repay its prepetition debt and finance its operations during bankruptcy by obtaining more favorable loan terms.

Who Provides DIP Financing?

Two categories of lenders provide DIP financing:

- Existing Secured Lenders: Existing lenders are motivated to defend and protect their existing loans. These are known as "defensive DIPs."
- New Lenders: New lenders usually have an interest in becoming a creditor to take control of or own the company. They may be banks, venture capitalists, or other institutional investors. Usually new lenders are more difficult to find. These are known as "offensive DIPS" or "new money DIPs."

The benefits to lenders include large transaction fees, high interest rates, quality protection for repayment, greater control, automatic perfection of security interests, and a right to assert a "section 506(c) surcharge" waiver. There are special advantages for existing lenders who provide DIP financing, such as protection of pre-petition collateral, an improved priority position of pre-petition debt, increased collateral securing pre-petition debt, validation of pre-petition liens and releases, avoiding cash collateral litigation, having a cash interest at contracted rates, and having less due diligence.

"DIP financing is a loan that is uniquely offered to Chapter 11 debtors to finance their bankruptcy proceedings."

Applicability of R&W Insurance

The use of representations and warranties insurance (RWI) has become more common as a way to allocate risks related to inaccurate representations and warranties in a definitive transaction agreement. However, one of the significant keys to (and limitations of) RWI is that insurers will only underwrite coverage to the extent they are satisfied that sufficient due diligence was performed, and no significant red flags were discovered. Therefore, if they believe insufficient due diligence was performed in a certain area they view as a material risk (financials, tax, environmental, employee benefits and cyber are often key areas closely looked at by insurers, but these can vary from one transaction to the next), an insurer will almost certainly include exclusions surrounding such risks. This again highlights the need to come up with creative solutions, such as those identified earlier to perform as fulsome of due diligence as possible.

An additional aspect with RWI that has arisen is that many, if not all, insurers are now including COVID-19 exclusions in their policies. These exclusions vary widely from insurer to insurer (there is no standardization of RWI insurance policies), and should be carefully scrutinized and negotiated to keep them as narrow as possible. Most RWI insurers are willing to negotiate specific policy language, but you need to ask, or they will provide you only their “off-the-shelf” policy language, which is typically written much more favorably to the insurer than what can ultimately be negotiated.

Deal Documents

In the interest of promoting a swift acquisition process for the benefit of buyers and target companies (that may be distressed), Foley has developed a package of semi-standard transaction documents which include, without limitation, the following:

I. ASSET PURCHASE

1. Asset Purchase Agreement
2. Bill of Sale
3. Assignment and Assumption Agreement
4. IP Assignment Agreement
5. Purchase Price Allocation
6. Joint Written Consent of Board and Stockholders
7. Closing Certificate and Officer Certificate

II. STOCK PURCHASE

1. Stock Purchase Agreement
2. IP Assignment Agreement
3. Joint Written Consent of Board and Stockholders
4. Closing Certificate and Officer Certificate

M&A Antitrust Considerations

COVID-19 has not changed the obligations on parties to notify reportable acquisitions in those jurisdictions in which the transaction requires antitrust clearance. It remains the case that over 100 countries throughout the world have some form of merger notification and clearance process. In the United States, for example, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, requires parties to make filings with the FTC and DOJ and observe a waiting period prior to closing certain transactions. For a transaction to be HSR reportable, it must satisfy the HSR size-of-transaction test. This test is (currently) **$94 million** and applies to acquisitions of assets, voting securities and/or non-corporate interests. Deals of certain sizes also have to satisfy a size-of-person test in addition to the size-of-transaction test. (These and many other HSR dollar thresholds are adjusted annually based on changes to U.S. gross national product, and accordingly can move downward in an economic downturn). It is important for parties to be very careful in determining if a threshold is met given the process can be very complex, the rules are highly technical, and failure to comply with HSR can result in significant risk, including large civil penalties.

Please note that the FTC and DOJ, as a result of COVID-19, now require that all HSR notifications be filed electronically, and that the merger clearance process, including grants of early termination, may be slower than usual. COVID-19 also has not changed the fact that non-reportable transactions may be investigated and/or challenged under substantive antitrust laws.

The world-wide economic disruption caused by COVID-19 may, however, have created (or impeded) various acquisition opportunities, and the review of transactions by antitrust authorities will necessarily be conducted in the context of current economic conditions. For example, antitrust authorities will often consider the economic viability of a target in their evaluation of the anticipated prospective competitive significance of the target. Federal case law and the FTC's and DOJ's Horizontal Merger Guidelines recognize a "failing firm" defense when certain criteria are met. However, the FTC and DOJ interpret this defense narrowly. The agencies may accept a concentrative acquisition of a failing firm where the acquired firm can establish that it has undertaken an adequate search for an alternative buyer but found no other acquisition interest that would prevent the business from existing the market. Even when the formal defense criteria are not met, the FTC and DOJ can consider the economic viability of the target in their evaluation of the competitive effects of a transaction and whether to initiate a merger challenge. While the agencies prefer that failing or flailing firms be acquired by acquirers that do not raise antitrust concerns, it is also the case that the agencies prefer that capacity not exit a relevant market.

The FTC and DOJ also issued in March 2020 a "Joint Antitrust Statement Regarding COVID-19" clarifying that "there are many ways that firms, including competitors, can engage in procompetitive collaboration that does not violate the antitrust laws." Please note, however, that the world-wide economic disruption caused by COVID-19 has not changed the aggressive enforcement efforts by agencies in the U.S. and abroad with respect to collusion among competitors and other forms of anticompetitive conduct.

The FTC's and DOJ's Joint Antitrust Statement adds that the agencies will work to review requests for guidance and issue expeditious guidance to any coronavirus-related proposed cooperative arrangements. While such reviews usually require "several months" after the agencies receive from the proposed participants all information "necessary" to evaluate the arrangement, the agencies will aim to respond to all coronavirus-related requests "and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information." The agencies also stated that they will try to assist and move quickly with joint venture proposals submitted pursuant to the National Cooperative Research and Production Act, which provides for flexible treatment under the antitrust laws for some standards-setting organizations and joint ventures.

The agencies also have recently issued some new guidance addressing merger reviews that will be relevant to certain transaction both during and after the COVID-19 pandemic. On June 30, the FTC and DOJ released their first jointly issued Vertical Merger Guidelines, replacing DOJ's Non-Horizontal Merger Guidelines from 1984. On September 3, DOJ released a Merger Remedies Manual, updating its 2004 Policy Guide to Merger Remedies. Both sets of new guidance reflect at least incremental changes for parties to consider in the antitrust evaluation of transactions and in drafting contractual antitrust risk allocation provisions in M&A agreements.

Diligence Checklist

- Buyers and target companies should be careful to use, at the onset of the diligence process, a form diligence request list that will have been updated in March 2020 or later to include COVID-related diligence items and questions.
- Understanding, verifying and documenting the implications of, and potential ongoing liabilities associated with, having accepted relief under the Payroll Protection Program, the SBA Economic Injury Disaster Loan Program, and/or the Main Street Lending Program.
- Industry-specific considerations for air carriers and businesses critical to national security.

Investment Banks

- Leading investment banks are emerging from the COVID-19 crisis with a refined business strategy focused on data and digital transformation, enabling organizational flexibility and agility, increasingly digital-first business models and client solutions, streamlined transactions lifecycles and a digitally enabled workforce.
- Foley has the expertise to guide its clients through this "new" investment banking process, from a financial, legal and strategic point of view.

Alternative Sources of Financing

COVID-19-Specific Considerations

- Current economic conditions may signal a particularly active environment for lenders considering alternative financings (and for distressed companies seeking these types of transactions). Historical analyses based on outcomes from the last recession indicate that lenders have unique opportunities in times of economic downturns. Certain industries and sectors heavily impacted by COVID-19 will offer greater opportunities, and lenders should seek guidance to discuss these opportunities in more detail.
- Debtors have found DIP financing more challenging to obtain during this time, even though the number of near-term Chapter 11 debtors calling for DIP financing has increased.

KEY TAKEAWAYS

- Lenders who employ a successful alternative financing strategy can expect to see significant returns. But these transactions are often complex, risky, and time-consuming endeavors that require a thoughtful approach. Distressed companies with limited access to traditional financing during the pandemic should consider alternative financing strategies to weather the storm.
- If you have specific questions for your situation or would like to discuss potential investments, it is advisable that you reach out to a member of the Foley team.

Strategies for Renegotiation of Existing Agreements

The COVID-19 pandemic tested and continues to test us all, but Foley's team of experts know how to help you preserve your key, long-term relationships by ensuring your contracts account for changing times and needs.

Let Foley help you renegotiate your current contracts – and forge new ones as new opportunities arise – including an emphasis on reworking and optimizing core contractual provisions:

- **Economic Terms Generally:**
  - Adjustments to purchase price, service fees, compensation, etc., particularly by implementing language to allow for greater flexibility (or, when needed, narrower specificity and scope), especially when the economics of deals may undergo significant change due to market conditions
  - From the outset of a negotiation or as the next step in a relationship with a client, ensuring that term sheets start with the most favorable, flexible, and protective conditions for our clients
- **Covenants/Representations and Warranties:**
  - Updating provisions that create or impose obligations both to contemplate what COVID-19 has rendered impossible or impracticable and to revise such provisions to ensure both that our clients benefit from the greatest flexibility possible and that their contracts protect them in the event of breaches, fraud, cost-shifting mechanisms, and other issues that may arise given this new era of unpredictability
- **Material Adverse Change/Material Adverse Effect:**
  - Analyzing for our clients whether COVID-19 should expressly be identified as a MAC or MAE and how best to renegotiate contracts where COVID-19 either is or is not included as a MAC or MAE and where such inclusion or exclusion may create practical difficulties for our clients
- **Force Majeure:**
  - Revising or recommending new force majeure clauses, and helping our clients understand whether the specific reference to (or mention of) COVID-19 is advantageous, as well as whether more comprehensive language is needed to contemplate future unforeseen circumstances, like another pandemic and government regulation or shifting of customer sentiment as a result thereof
- **Insurance:**
  - Working with our clients and their business partners to address fundamental aspects of insurance post-COVID-19, including whether changes to baskets, caps, deductibles, and limitations of liability are needed, and carefully considering cost-shifting mechanisms and alternatives
- **Indemnification:**
  - Assessing our client's exposure, including how parties agreed to allocate risk, and identifying protective, but equitable, limitations of liability
- **Key Employee/Key Person:**
  - Strategies for dealing with unforeseen catastrophes in the event of loss of a key employee or key person, and helping implement and execute business continuity plans alongside contracts that more robustly plan for the worst and position our clients for the best possible outcomes
- **Damages:**
  - Rethinking how different theories of loss and recovery factor into agreements, to maximize recovery or limit exposure for our clients, while considering risk of loss in light of unforeseen events
- **Arbitration/Dispute Resolution:**
  - Planning with our clients for how conflicts and disputes – when they arise – will be addressed, including whether mediation, arbitration, and/or mandatory forums or jurisdictions would improve the resolution of any disputes
- **Risk Factors:**
  - Working with our clients to ensure tailored disclaimers, lists, and provisions that offer the "other side" or investors clear, client-specific risks, in an effort to reduce the likelihood of future disputes and liability
- **Latest Trends:**
  - Staying current with macro economic factors, commercial trade regulations, and changes and other developments in law, finance, tax, and other key areas, in order to anticipate and address how they may impact our clients
  - Proactively assisting our clients in limiting risk and avoiding pitfalls and issues associated with how recent, radical changes to our global economy – including due to the COVID-19 pandemic – must be handled in the context of contractual processes, negotiations, financial disclosures, and customer/supplier discussions

Target Board Preparedness

Key considerations for target company board preparedness, and Foley's resources

- **Stakeholder Interests:** The board of an entity considering acquiring a company should carefully consider the implications of potential decisions on relevant stakeholders and stress-test assumptions, projections, and potential ramifications when contemplating the acquisition of a target company that faces a greater level of uncertainty or turmoil.

- **Timing Considerations:** A board should allot adequate time to make an informed decision regarding any course of action, especially with respect to significant transactions.

- **Active Involvement:** A board should stay informed about the day-to-day affairs of the business and understand the company's (and/or the portfolio companies', if any) strategies and corporate plans and the potential impacts of the COVID-19 pandemic on such strategies and plans.

- **Regular Board and Management Meetings:** A board should schedule regular meetings with management to discuss COVID-19-related issues, especially compliance issues involving public health and safety developments, and maintain appropriate meeting minutes to document these oversight activities.

- **Expert Involvement:** A board may need to retain or otherwise consult with appropriate experts and advisors (e.g., legal counsel) regarding specific COVID-19-related issues.

- **Financial Diligence:** A board should ensure that, in completing financial and legal due diligence, appropriate consideration is given to COVID-19-related issues, including the impact and/or potential impact of the COVID-19 pandemic on financial projections, current and future operations, solvency, product demand, supply chain, etc.

- **Paycheck Protection Program ("PPP"):** The CARES Act has provided a number of potential financing routes for companies impacted by the COVID-19 pandemic, including the PPP. The board of a company that is considering acquiring a target company that has received PPP funds under the CARES Act should ensure that its management team and advisors have carefully reviewed any and all PPP-related documents of the target company (including applications and loan documents) and considered all potential tax and other impacts of acquiring such a target company.

- **Material Adverse Effect (MAE) Clause:** For deals still in negotiation and to be negotiated, boards should carefully consider the implications of carve-outs to MAE definitions and clauses. Boards of buyer entities should consider requiring additional representations regarding the impacts of the COVID-19 pandemic on the target company and its business. For signed deals that have yet to close, boards should consider whether to invoke a material adverse effect provision (or otherwise propose modifications to the transaction) if the prospects of the counterparty have been negatively affected by the COVID-19 pandemic.

- **Closing Considerations:** A board should be aware that, in the current environment, there may be potential delays to closing (including delays in receiving regulatory approvals, given that staff of certain governmental agencies may be working remotely) and ensure that financing commitments remain in place for a sufficient period of time to reach closing.

- **Director Liability:** Members of a board of a company in the zone of insolvency should seek out advice of counsel to clearly understand their obligations and fiduciary duties to stockholders and creditors, especially where the consummation of a transaction would render the company insolvent.

Matchmaking

- Foley's Private Equity Matchmaker 2.0 enhances our attorneys' ability to refer business opportunities to clients like you.
- Foley's Private Equity Matchmaker 2.0 connects clients seeking capital or investment opportunities by customizable terms, including deal size, development stage, region and industry.
- We provide added value to you by fostering collaboration and deal flow.
- Our Private Equity Matchmaker 2.0 allows us to present you with real-time deal options quickly and efficiently.

Alternative Fee Arrangements

When developing fee structures, Foley's goal is to partner with our clients to create an arrangement that provides transparency, cost certainty and efficiency. Depending on the task, budget, goal and strategy, and realizing that hourly rates may not always be the best solution, Foley offers the following alternative fee arrangements:

- Discount with success premium
- Discount with bonus at client's option
- Volume discount
- Blended hourly rates
- Fixed fee
- Capped fee
- Monthly retaining

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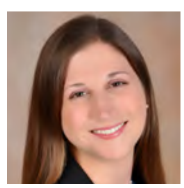

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ABOUT FOLEY & LARDNER LLP

Foley & Lardner LLP looks beyond the law to focus on the constantly evolving demands facing our clients and their industries. With over 1,100 lawyers in 24 offices across the United States, Mexico, Europe, and Asia, Foley approaches client service by first understanding our clients' priorities, objectives, and challenges. We work hard to understand our clients' issues and forge long-term relationships with them to help achieve successful outcomes and solve their legal issues through practical business advice and cutting-edge legal insight. Our clients view us as trusted business advisors because we understand that great legal service is only valuable if it is relevant, practical, and beneficial to their businesses. Learn more at Foley.com.

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