



Jul 01, 2020

Categories:

[Blogs](#)

[Coronavirus Response](#)

[Team](#)

[Private Equity Industry](#)

[Blog](#)

Authors:

[Jason D. Tonne](#)

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

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 had and may continue to have on a target company’s business. Some key issues and concerns that buyers should consider incorporating into their due diligence investigation include:

- **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?
- **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?

- **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.
- **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?
- **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.
- **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. 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.

- **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.
- **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.

For more information, contact [Jason Tonne](#), [Molly McCartney](#), or any attorney with Frost Brown Todd's [Private Equity](#) Industry Team.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.