2020 Mid-Year Middle Market M&A Update

How much longer 'til we get there?

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Post-COVID Market Update

M&A Market Update

It's a crazy world out there, but the M&A market is starting to look more normal than you might think

- M&A deal volume dropped off considerably in March through May as uncertainty remained high
- Recently, market sources indicate an upward trend in deal volume, although attractive assets remain scarce
- Leverage levels, valuations, and buyer interest in an opportunity have diverged considerably depending on COVID's impact on the business

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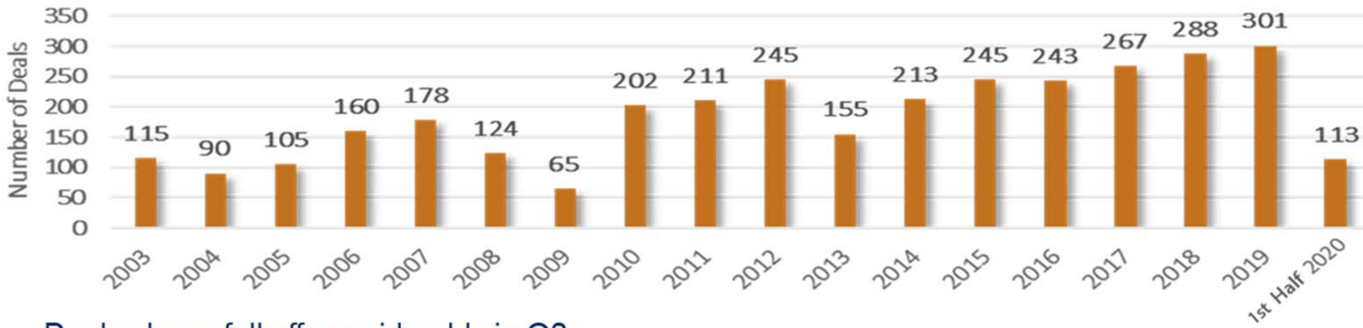
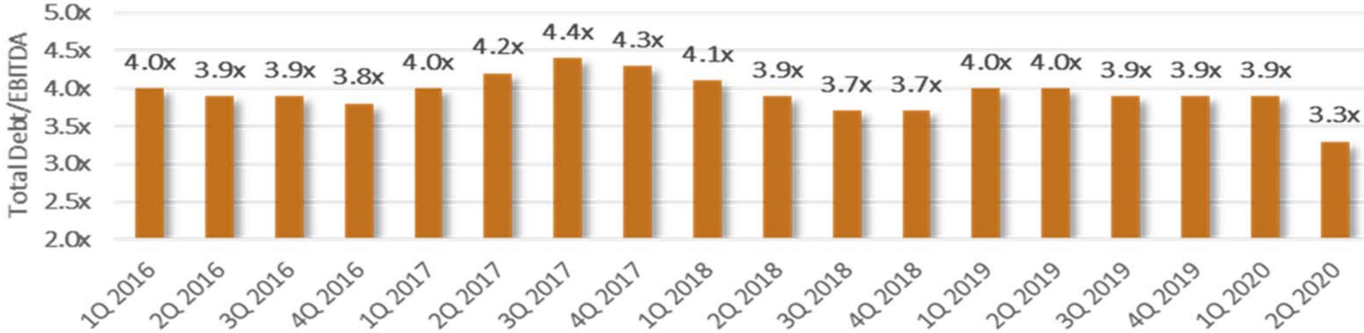
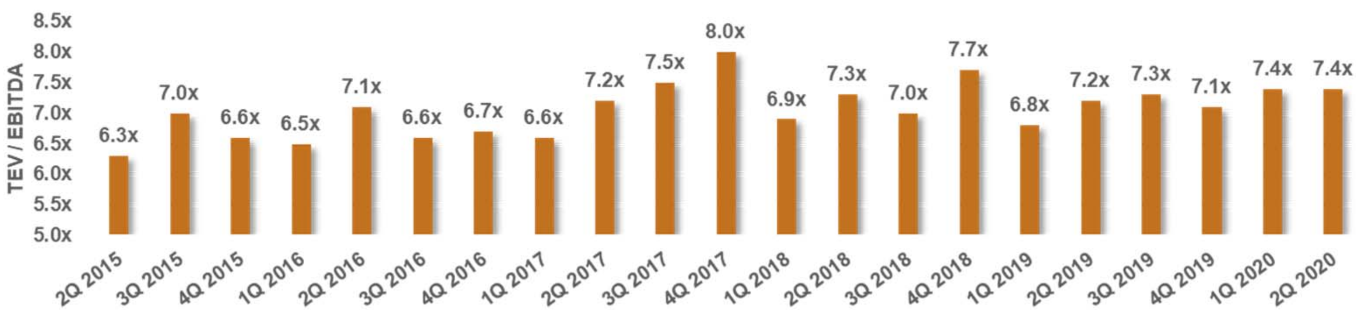


Deal volume fell off considerably in Q2



…as did leverage levels…



…but valuations remained level

Key Market Metrics Source: GF Data August 2020 M&A and Leverage Reports

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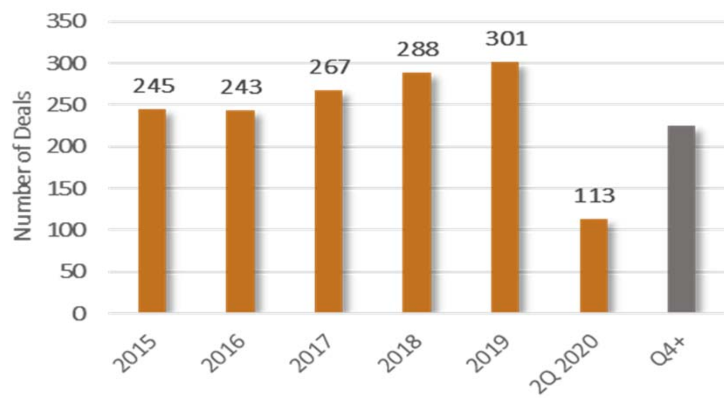
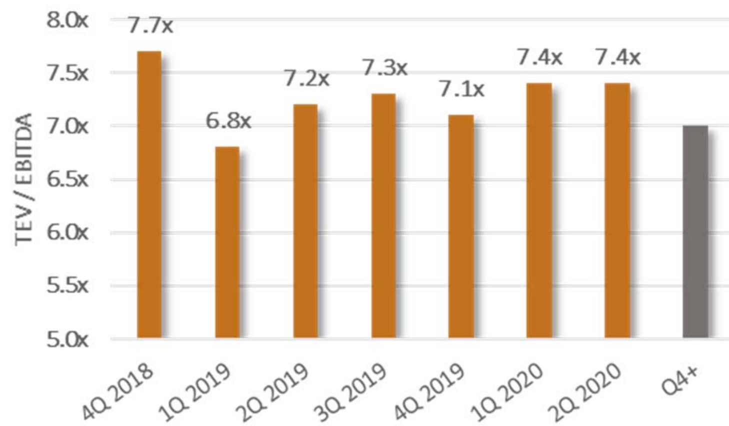
Q4 and Beyond?

This year has been nothing if not unpredictable, buy hey, let's give it a shot

- By most accounts, M&A activity and deals in the market have been increasing throughout the summer
- While challenges remain, buyers and sellers generally feel less uncertain about the future
- We would anticipate deal volume to continue to increase in Q4 2020 and early 2021 as processes that were put on hold come back to the market
- Buyers' ability to effectively price COVID's impact is improving, so successful transactions will not be limited only to the least-impacted assets (as was the case for many first half deals)
  - While this will increase the volume of completed transactions, it will likely also drive average valuations down, as deals trading with a "COVID discount" are factored into the average
- Leverage levels are likely to remain depressed compared to their pre-COVID highs



We anticipate deal volume to increase as greater certainty allows COVID-impacted or distressed assets to transact



Greater volume will likely reduce average valuations since less-than-perfect assets that could not transact in Q1-Q3 may be able to close with priced-in risk

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COVID's Impact on Deals

General Overview

COVID-19 has impacted our world in many ways and M&A transactions are no exception

- Leverage is lower
- Lenders are more risk averse
- Quality assets are scarce
- Certain sectors are (nearly) untouchable
- Other sectors are seeing added interest
- Buyers are still out there
- Different assets are impacted differently
- PPP loans, lockdowns, and other government programs raise new questions

Some Deals Take a Hit

- The seller's performance declines significantly
- There is substantial long-term sector risk
- The transaction relied on heavy leverage
- The buyer's business suffers

Case Study: Project Gold Coast

- *Gold Coast, a manufacturer of construction equipment, was weeks away from close in mid-March*
- *The buyer and lenders were based in NYC, and paused the deal when COVID began dominating the news cycle*
- *During the pause, Gold Coast's performance fell off substantially (YoY Q2 revenue was down nearly 70% compared to 2019) which made reviving the deal anywhere near its previous valuation impossible*

Some Deals Benefit

- Businesses that grew or remained on plan in 2020 are in high demand
- Buyers remain active and deals are even more scarce
- They will pay up for stable assets

Case Study: Project Galaxy

- *Galaxy is a remanufacturer/ maintenance business serving the wind power space*
- *Since it is essential infrastructure, this sector was minimally impacted by COVID or lockdowns*
- *Galaxy remained on plan while it was in the market during the height of COVID mania (late March thru mid-May)*
- *Buyer demand was extremely high, and Galaxy received 20+ IOIs at higher-than-expected valuations*

Some Deals Just Keep Chugging

Some deals simply must get done, and in most cases, any risk can be effectively priced

- As discussed, buyers are still very active
- Even severely impacted businesses in risky sectors can transact, but they will be discounted compared to pre-COVID value

Case Study: Project Bravo

- *Bravo is a manufacturer of licensed sports glassware sold to consumers through retail channels*
- *In a world with no sports and limited retail, Bravo's prospects weren't great*
- *Despite the bleak performance and industry outlook, we were able to find a buyer for the business at a price that the sellers found acceptable and close the transaction*

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COVID's Impact Varies by Industry

Industry Performance by Early 2022 Real GDP by Industry ($ billions)	Level (Q4-2019)	Share	Recovery Ratio (%)	TKO Miller Grade
Food and beverage stores	129.3	0.67%	115	A
Information and cultural industries	1,228.5	6.39%	115	A
Health care and social assistance	1,462.3	7.61%	115	A
Warehousing and storage	76.9	0.40%	110	A
Wholesale trade	1,136.1	5.91%	105	A
Professional, scientific & tech. services	1,543.1	8.03%	105	A
Truck transportation	135.7	0.71%	100	B
Other transportation	143.4	0.75%	100	B
Agriculture, forestry, fishing & hunting	244.9	1.27%	100	B
Utilities	297.8	1.55%	100	B
Other services (ex. public admin.)	368.7	1.92%	100	B
Mgmt. of companies & enterprises	442.8	2.30%	100	B
Administrative & support, waste mgmt. & remediation services	585.7	3.05%	100	B
Construction	653.8	3.40%	100	B
Nondurable manufacturing	943.0	4.91%	100	B
Educational services	1,022.1	5.32%	100	B
Finance and insurance	1,208.4	6.29%	100	B
Public administration	1,425.6	7.42%	100	B
Pipelines	37.3	0.19%	95	C
Transit and other ground	43.3	0.23%	95	C
General merchandise stores	152.6	0.79%	95	C
Motor vehicle and parts dealers	260.6	1.36%	95	C
Other retailers	615.6	3.20%	95	C
Durable manufacturing	1,241.5	6.46%	95	C
Real estate and rental and leasing	2,420.0	12.59%	95	C
Mining and quarrying	45.2	0.24%	90	C
Oil and gas extraction	501.3	2.61%	85	C
Air transportation	124.6	0.65%	70	D
Accommodation	145.7	0.76%	70	D
Arts, entertainment and recreation	198.9	1.04%	70	D
Food services	379.7	1.98%	70	D
Total	$ 19,214.4	100.00%		

Source: BMO Economics, Haver Analytics

Positive Anticipated Impact on M&A Valuations and Activity	Little-to-No Anticipated Impact on M&A Valuations and Activity	Medium Anticipated Impact on M&A Valuations and Activity	Large Anticipated Impact on M&A Valuations and Activity
Grade – A	Grade – B	Grade – C	Grade – D

▪ Food and beverage stores
▪ Wholesale trade
▪ E-commerce
▪ Healthcare technology and pharma
▪ Telecom
	▪ Companies with little-to-no change in sales and profitability
	▪ Companies with high revenue per employee / low number of employees
	▪ Examples:
	  ▪ Industrial services
	  ▪ Nondurable manufacturing
		▪ Companies that are expected to rebound and get back to similar operations once the economy opens up
		▪ Examples:
		  ▪ Discretionary consumer goods
			▪ Companies that will see large, long-term changes and shifts in consumer behavior
			▪ Examples:
			  ▪ Movie theaters
			  ▪ Restaurants

Commentary

- Businesses have had to absorb the shocks of softening demand for goods and services while also having to make operational changes to account for risks to the employee base
- The stock market decline and the capital markets and banks tightening their standards to mitigate the increased risk and uncertainty will have a significant impact on the M&A market for the foreseeable future, however, there are pockets of hope
- Companies in sturdy market segments who have performed strongly over the past several months may see increased interest from buyers during a transaction process; scarcity among healthy businesses may also result in some positive impacts on valuation and ultimately purchase price

Handling PPP Loans

- PPP loans have introduced new layers of questions and complexity to middle market M&A transactions in 2020
- There are several ways to handle a PPP loan in a transaction:
  - Close with the PPP loan on the balance sheet and hold the amount of the new loan in escrow until forgiveness amount is solidified
  - Wait to close until the forgiveness amount is solidified
- It's important to recognize non-recurring cost increases/ reductions
  - Cost increases might include fees/ professional expenses, lost time, or facility alterations
  - Cost reductions might include temporary furloughs, deferred rent, or salary reductions

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Market & Commercial Banking President

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MASSIVE GLOBAL STIMULUS: U.S. 44% OF GDP, GLOBAL 28%.

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*** U.S.: Fed's $6.2 tln injection Incl the $2.5 tln announced on Apr 9, and the $3.7 facility.

On $3.3 tln on the fiscal side, includes the $454 billion appropriated to the ESF.

** "BOJ Vows to Buy as Many Bonds as Needed in Stimulus Move." (BBG, 4/27)

Global Monetary And Fiscal Stimulus To Fight COVID-19 Impact
2020 Feb to June (CSM)

	Potential Central Bank Liquidity Injection		Potential Fiscal Stimulus		Central Bank Liquidity Injection and Fiscal Stimulus	
	$ Tln	% GDP	$ Tln	% GDP	$ Tln	% GDP
U.S.***	$6.21	29.0%	$3.30	15.4%	$9.51	44.4%
Eurozone	$1.78	13.3%	$4.02	30.2%	$5.80	43.6%
Japan**	$1.03	20.0%	$2.08	40.3%	$3.11	60.3%
U.K.	$0.37	13.6%	$0.23	8.3%	$0.60	21.8%
China****	$1.33	9.3%	$1.22	8.4%	$2.54	17.7%
Others*	$0.68		$2.61		$3.29	
Global	**$11.39**	**13.2%**	**$13.46**	**15.5%**	**$24.85**	**28.7%**

*incl RoW and ADB, IMF, WB ****China CB stimulus incl liq injections and other activities, e.g. re-lending, RRR, direct small biz lending, etc

^French stimulus & EU's latest proposal would raise the size of the bloc's fiscal stimulus to 30.2% of GDP, bringing the total response (incl the ECB) to 43.6% (vs 29.6% a month ago).

** Japan's ¥117.1 t supplementary budget includes: fiscal measures, an investment loan program, and private sector loans (i.e. guarantees).

"The total size of measures to fight the coronavirus crisis will reach ¥230 trillion [40% of GDP]" (Jiji, May 27)

With BoJ's 20% potential liquidity injection, Japan's total stimulus may be 60% of GDP.

Aided by monetary stimulus, credit spreads narrowed significantly in Q2. HY spreads hit historically wide levels not seen in 11 years on 23-Mar but, by the end of June, spreads had dropped in half. Spreads have come in ~250 bp and stand approximately at just over 150 bps relative to Treasuries.

Best & Worst Placed Sectors – Post COVID-19 World

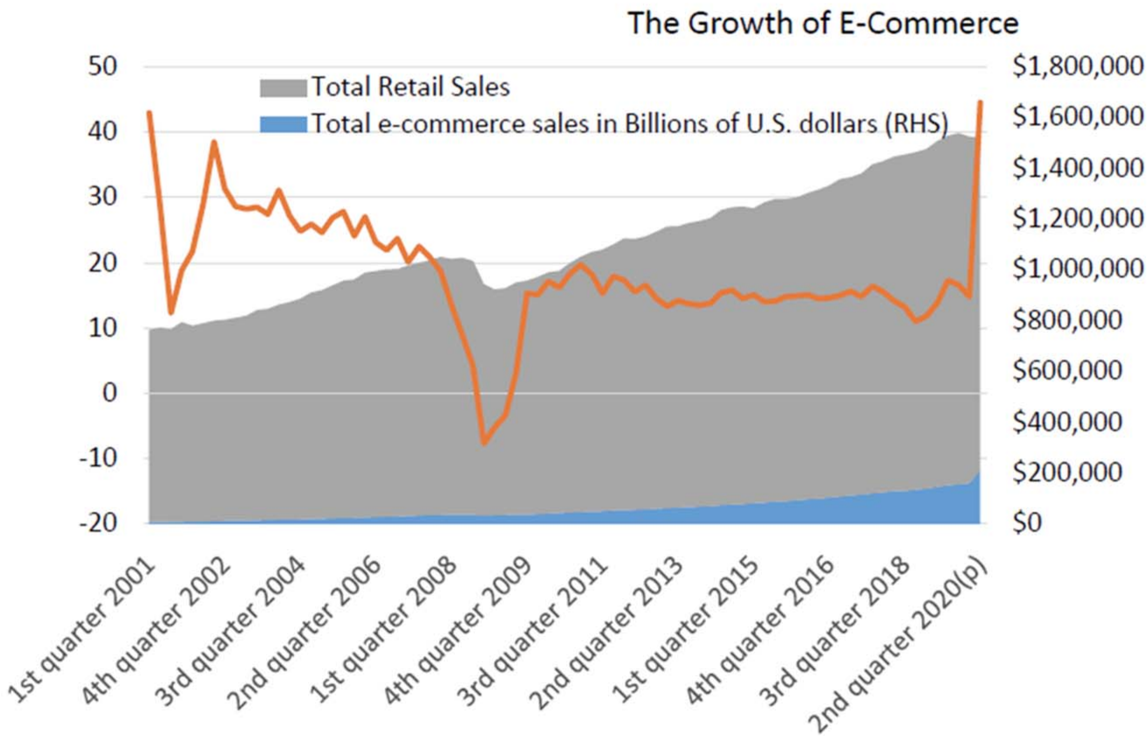
Secular Beneficiaries
Grocery Chains
Healthcare Device
Digital Consumer Products
Manufacturer of Staple Products
Industrial Real Estate
Digital Technology Suppliers

Challenged Sectors
Fossil Energy
Retail-Oriented Commercial Real Estate
Auto Sector Suppliers
Legacy Consumer
Sharing/Gig Economy

Senior Debt Availability is Sector/ Industry Specific

- **Commercial loans outstanding are soft.** Line usage is significantly down likely due to the Payroll Protection Plan
- **We are preparing for more credit risk in certain sectors.** Obvious areas for concern include office, restaurants, and other entertainment. We are concerned with senior living and retail real estate. Locally, we are concerned with student housing due to uncertainty with fall plans and international students
- **Industrial, storage, rental: long-term beneficiaries but near term headwinds**
- ***Industrial:*** Easy to adapt. Higher demand long-term from an increase in e-commerce adoption, higher inventories and re-shoring manufacturing to the U.S.
- ***Storage:*** Already adapting to social distancing + boost in demand from COVID-19 with longer-term benefits from aging Millennials renting Single-Family (SF) homes & Work-From-Home (WFH) increasing
- ***Single Family Rentals:*** Single Family Rentals (SFR) have been increasing over the past 5 years in the US & COVID-19 will accelerate this trend. Aging Millennials now facing their 2nd recession will choose to rent

2020 Middle Market M&A Appetite in the Midwest



- Internet sales accelerated 31.8% q/q and 44.5% y/y during the second quarter.
- Total retail spending for Q2 fell 3.9% to $1.3 trillion while internet sales increased from $160 billion to $212 billion.

Main Street Lending Program

- On April 9, the Federal Reserve announced a $600 billion Main Street Lending Program.
  - Structured to keep credit flowing and provide low-cost loans to small and mid-size businesses that were in good financial standing before the onset of the COVID-19 crisis
  - Great alternative to the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) Program
  - Open to businesses and non-profits

Doug Patch

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Employment Tax Provisions in CARES Act

- ***Employee Retention Credit*** – Employers get credit against future employment tax for certain wages paid during 2020. Qualify if either suspend (or partially suspend) operations because of government orders related to COVID or have a significant decline in gross revenues. Wages paid by large employers (over 100 employees) only qualify if employee is not providing services due to above-referenced COVID circumstances.
- ***Delay of Payment of Employer Payroll Taxes*** – Deposits of the employer's share of OASDI taxes that are required to be made during the period starting with the enactment of the CARES Act and ending on Dec. 31, 2020 (the payroll tax deferral period) will be treated as timely made if half of such deposits are made by Dec. 31, 2021, and the remainder by Dec. 31, 2022.

Use of PPP Loans and Employment Tax Provisions

- ***No double-dipping for Employee Retention Credit:***
  - 2301(j) – "if an eligible employer receives [a PPP loan], such employer shall not be eligible for the credit under this section"
  - 2301(d) – For purposes of determining an employer's eligibility for and the amount of the Employee Retention Credit, all entities that are treated as a single employer under section 52(a) or (b) of the Internal Revenue Code (the "Code") or section 414(m) or (o) of the Code are considered one employer.
- ***No double-dipping for purposes of delay of payment of employer payroll taxes:***
  - 2302(a)(3) – No deferral if taxpayer has had a PPP loan forgiven

Tax Treatment of Forgiveness of PPP Loans

- CARES Act provides that the forgiveness of a PPP loan “shall be excluded from gross income.”
- Notice 2020-32 provides that borrowers cannot deduct otherwise deductible expenses that they paid using funds from a PPP loan that was subsequently forgiven.
- Suggested representation: “Neither the Buyer nor the Target will be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of forgiveness of any Paycheck Protection Program loan under Section 1102 of the CARES Act.”

Revised Net Operating Loss Rules

- Pursuant to the TCJA, NOLs could not be carried back for tax years beginning in 2018. CARES Act allows NOLs generated in 2018, 2019 or 2020 to be carried back 5 years
- TCJA limited NOL usage to 80 percent of taxable income. The CARES Act temporarily removes the 80 percent limitation, reinstating it for tax years beginning after 2020. This change permits NOLs carried back to prior years to offset up to 100 percent of taxable income in those years.
- NOLs are frequently generated in M&A transactions as a result of the target company paying substantial transaction bonuses, option cash-out payments, and investment banking and legal fees that generate tax deductions in excess of the target company's operating income for the year of the transaction.

Potential Tax Changes Applicable to Individuals

Donald Trump

- **Top rate**: Permanently extend current law of 37% (scheduled to increase to 39.6% on January 1, 2026)
- **Capital gains/dividends**: 20% rate for all taxpayers, although some references to potentially lowering rate
- **Estate tax**: Permanently extend current law exemption ($11.58M per individual in 2020 but the Applicable Exclusion Amount will automatically decrease to approximately $6.5 million on January 1, 2026, after considering adjustments for inflation.)
- **Payroll taxes**: On August 8, 2020, President Trump issued a directive deferring the deadline to pay worker's portions of Social Security taxes from Sept. 1 through the end of 2020

Joe Biden

- **Top rate**: Increase from 37% to 39.6% immediately
- **Capital gains/dividends**: 20% rate for taxpayers making less than $1M; tax capital gain at ordinary income rates (proposed to be 39.6%) for those earning over $1M
- **Itemized deductions**: Itemized deductions could not be used to offset more than 28% of income (e.g., a taxpayer in a 39.6% bracket would receive deduction of 28% even though income is taxed at 39.6%).
- **Estate tax**: Apply $3.5M threshold and repeal stepped-up basis
- **Payroll taxes**: Apply the 12.4% Social Security payroll tax to apply to wages over $400,000 in addition to wages under threshold ($137,700 in 2020)

Potential Tax Changes Applicable to Business Entities

Donald Trump

- Generally maintain current law, although discussion of reducing corporate rate from 21% to 20%

Joe Biden

- **Corporate rate**: Biden would increase the tax rate on corporate income from its current 21% to 28%. In 2017, the Tax Cuts and Jobs Act reduced the rate from 35% to 21%.
- **GILTI Tax**. Global Intangible Low-Taxed Income (GILTI) tax requires multinational companies to pay a tax of at least 10.5 percent on foreign income generated from relatively mobile and intangible assets held abroad such as patents, trademarks, and copyrights. Biden would double the GILTI tax from 10.5 to 21%.
- **Expensing**: Disallow accelerated depreciation deductions
- **§199A**: Section 199A provides a 20% deduction for qualifying business income in flow-through entities, effectively reducing the tax rate from 37% to 29.6%. Phase out deduction for filers with income over $400,000.
- **Book income**: Impose 15% minimum tax on book income of companies that report US net income of over $100M but owe no US income tax.

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Transaction Documents – What Are We Seeing?

- Current Trends in Representation & Warranties Insurance
- COVID-related Provisions in Purchase Agreements
- Bridging the Valuation Gap with Earnouts, Rollovers and Seller Notes

Current Trends in Representation & Warranties Insurance

- No Deal too Small?
- Pricing Stability, but Changes Coming
- No Indemnity Deals, For a Price
- Distressed Deals
- Heightened Due Diligence
  - More sophisticated process
  - Increased reliance on 3rd party diligence reports

Current Trends in Representation & Warranties Insurance (cont.)

- New Exclusions
  - Matters identified in diligence reports
  - PPP loans
  - COVID-related exclusions:
    - From: any loss of or reduction of business with [CUSTOMER X], including any modification to pricing and/or payment terms, as a result of COVID-19,
    - To: any business interruption or other downturn to the extent such interruption or downturn arises out of the presence, transmission, threat or spread of the SARS-CoV-2 virus (and resulting COVID-19 illness) or any evolution thereof, any mandatory or advisory restriction issued, or action ordered or threatened, by any applicable government authority in connection therewith, and failure to comply with laws in connection therewith
- Read-Outs of Specific Representations & Warranties
  - Accounts receivable collection
  - Inventory salability
  - Older financial information
  - Debt and seller expenses
  - Non-infringement of IP
  - Customer and supplier relationships

COVID-Related Provisions in Purchase Agreements

- Definition of Material Adverse Effect
  - New exclusion: the effect of any outbreak, epidemic, pandemic, health crisis or public health event (including with respect to coronavirus (a/k/a COVID-19) or any variation, adaption or mutation thereof), and any worsening thereof on or after the date of the agreement
- Materiality and Disclosure
  - Financial Statements
  - Customer & Vendor Relationships
  - Compliance with State and Local Orders
  - Changes since Balance Sheet Date
- PPP Loans and Forgiveness
  - Asset acquisitions – bank consent, getting clean title and changing the seller's name
  - Stock acquisitions – bank consent, release of liens, the forgiveness process and escrows
- Payroll Tax Deferral Treated as Debt

Bridging the Valuation Gap

- Earn-Outs
- Equity Rollovers
- Seller Notes

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Topics I Will Address Today

- What is the COVID-19 “market” on indemnification?
- Increased areas of focus in due diligence
- Early insights from COVID-19 deals on “certainty to close” issues
- What the Magic 8 ball is predicting on legal issues ahead

What's "Market" for Indemnification Terms?

- For targets having the strength to close exits in Q2 and Q3, not much has changed:
  - Generally seller favorable terms
  - Continued increase in use of RWI:
    - Legal negotiation between buyer and seller focused on items carved-out from coverage or that could exceed policy limits, such as disclosed/known risks, other exclusions and treatment of fundamental representations
  - Non-RWI transactions: Focus on indemnification limitations (cap, basket, and survival period)

What's "Market" for Indemnification Terms?

- Indemnification terms for 1H2020 transactions as compared to 2019:
  - Cap:
    - 2019 ABA/SRS (approx.): With RWI 1%; without RWI 14.3%
    - 2020 First Half without RWI (GF Data): 8.2% (Q2 6.7%)
  - Basket:
    - 2019 ABA/SRS (approx.): With RWI .51%; without RWI .59%
    - 2020 First Half total (GF Data): 1%
  - Survival:
    - 2019 ABA/SRS (approx.): 15 months
    - 2020 First Half total (GF Data): 20.8 months
  - Escrow:
    - 2019 ABA/SRS (approx.): With RWI .8%; without RWI 12.5%
    - 2020 First Half total (GF Data): 14.8 months / 2.1% of EV (RWI) / 6.8 % of EV (without RWI)

Due Diligence in 2020

- Target compliance with employment laws during COVID-19 (wage and hour; WARN Act; compliance with new COVID-19 laws; etc.)
- Examination of relationship, contracts and solvency issues with customers and suppliers
- Looking behind COVID-19 numbers to understand what target behaviors (good and bad) have driven them
- IT and data security issues with increasingly remote workforce

Lessons from Busted Deals – Closing Conditions

- Through September 9, US companies cancelled 82 deals totaling $111.2B
  - Same period last year: 58 transactions withdrawn totaling $50.4B
- Several have wound up in DE Chancery Court
  - Most recently Tiffany / LVMH transaction ($16B)

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Lessons from Busted Deals – Closing Conditions

- How true must representations be at signing and closing?
  - “In all material respects”? (2019 SRS – approx. 51%)
    - In Delaware, disclosure-based standard of materiality (significantly altering the “total mix” of information in the eyes of a reasonable investor)
  - “MAE” (2019 SRS – approx. 46%)
    - While MAE is still more prevalent in highly competitive deals, thus pushing risk to buyers, buyers now may insist on certain inclusions
    - Increased attention to carve-outs and “no disproportionate effect” qualifications

Lessons from Busted Deals – Closing Conditions

- Increased focus on interim operating covenants:
  - Operate between signing and closing in the ordinary course of business
  - Commercially reasonable efforts to preserve business
- Ordinary course of business
  - Inclusion of “in accordance with past practice” in 85% of deals
    - What does this mean when the seller takes unprecedented action?
  - Inclusion of efforts qualifiers rare (19% of deals)
    - May become more common
  - Potential increased inclusion of consent rights for buyer

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Lessons from Busted Deals – Closing Conditions

- Be careful with fundamental representations / capitalization carve-out from MAE
  - Typically must be true in all respects
  - Sellers should limit detail in those representations to eliminate risk of "foot fault", particularly in foreign jurisdictions
    - E.g., seller owns 100% of subsidiary, but number of outstanding shares listed incorrectly
  - Consider bifurcating "fundamental" treatment for closing conditions vs. indemnification recovery

Possible Future Market Trends?

Possible Future Market Trends?

- Use of RWI in distressed deals outside of bankruptcy or receivership processes (but we are not seeing them yet)
- Increase in average time between LOI and definitive agreement due to increased due diligence
- Wider deviation from mean deal terms in transactions depending on impact of COVID-19 on target and its industry (arguing "market" less helpful outside of COVID winners)
- Buyer's insistence on ADR to avoid bogged down court system (only 18.1% of deals in 2019)
- Increased complexity in determining NWC targets and addressing COVID-19 related changes as of Closing
- Increased virtualization of M&A process (e.g., dogs barking and babies crying during management presentations)

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Will Parties Fight More Post-Closing?

- Some of the same issues will be litigated, but perhaps with greater risk
  - No undisclosed liabilities
  - Employee-related claims
  - Financial statements
  - Data security
  - Operation in ordinary course

Be Careful with Earnouts

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Be Careful with Earnouts

- SRS Acquiom: 31% of earnouts in life sciences industry are disputed
- Many potential issues:
  - Treatment as a security
  - Implied obligations of buyer to try to maximize earnout or to act in good faith
  - Sellers unduly influencing earnout calculation if employed post-Closing
  - Possible fiduciary duty claims by rollover sellers

Thank You

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