



In Crisis Lies Opportunity: Growth Through M&A During COVID-19

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Your business may grow through mergers and acquisitions (M&A) despite challenges posed by the COVID-19 pandemic.

COVID-19 has clearly dampened appetites for transactions. Statistics from Dealogic show that the value of M&A activity during Q1 2020 plunged 35% globally and 39% in the United States from the prior quarter. While we are seeing improvements, full recovery seems far off.

That said, times of crisis create M&A opportunities for those with the vision and resources to take advantage of them. Many private equity groups are sitting on cash that will come back into play as a new normal emerges, and well-positioned strategic buyers are looking to diversify or grow revenue through M&A or to acquire distressed competitors, suppliers, and customers at bargain prices.

While opportunity still abounds, your transaction will need to overcome additional challenges during the pandemic. Success requires an understanding of these unique risks, excellent planning, and experienced counsel who know how to get your deal done in these turbulent times.

Key M&A Issues to Consider During COVID-19

The Deal Process. Most business's productivity remains disrupted as the COVID-19 pandemic drags on. We have seen this disruption slow down and complicate the deal process. Clients struggle to access information and personnel during transactions. Negotiations have slowed and LOI extensions are commonplace. Even seemingly simple actions such as gathering signatures have suddenly become more challenging. Proactive counsel will help you plan for these inefficiencies and close your deal on time.

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Due Diligence. The due diligence process helps to identify risks and liabilities, confirm earnings and other financial representations, and otherwise ensure that the buyer is getting what it pays for. The COVID-19 pandemic has increased the severity of most targets' risk profile, and so has made due diligence more important while also making it more challenging. Sellers need to prepare for due diligence well in advance, including by identifying and digitizing hard copy records and populating a well-organized virtual data room that allows for comprehensive remote diligence. Buyers need to be thorough in their virtual diligence requests and review, and plan well to minimize in person meetings and inspections.

Risk Mitigation. COVID-19 risks have unnecessarily stalled many deals. Most deals can still move forward through thorough diligence, good deal structuring, and fair risk allocation strategies. Buyers more than ever should consider asset deal structures that are designed to reduce successor liability risks, particularly for distressed targets. Parties should consider more liberal use of "earn out" structures and customized escrow arrangements to plan for and allocate COVID-19 risks. And counsel must focus closely on risk allocation provisions in the transaction documents, including reps and warranties, indemnification "caps" and "baskets," and owner liability and guarantees. Parties must be more flexible, creative, and willing to compromise outside of the pre-COVID-19 norms.

Valuation. The uncertainty in your industry and the economy at large is pressuring valuations. It's harder to forecast earnings, value assets, and predict whether synergies will materialize when we do not know what the future holds. Waiting for valuation stability risks losing a buyer's opportunity for a bargain and a seller's opportunity to sell and, for some, avoid bankruptcy. Earn-outs and escrows can help bridge valuation gaps, as can working capital and other post-closing adjustments. Experienced counsel can help you apply these tools to turn a valuation gap from a deal killer into a closing.

Payroll Protection Program. The Small Business Association (SBA) recently issued a notice that clarifies how a transaction affects a target's Paycheck Protection Program (PPP) loan. Affected businesses are required to obtain lender consent, and possibly SBA consent depending on how the transaction is structured. Both the seller and the buyer need to work with counsel to avoid PPP-related surprises.

Post-Deal Integration. It's hard to integrate two businesses and their unique systems, operations, and cultures, even during the best of times. First time acquirers often find themselves surprised by the challenge, which can lose customers and hit post-deal revenue hard. Today's remote-working environment makes integration even more difficult. Good counsel will help you plan early for what comes after closing.

The COVID-19 pandemic may have slowed M&A activity, but it has created opportunity for those wise enough to see it. Your deal can close with a little extra planning and creativity, as well as excellent execution. Whether you are a buyer or a seller, Foster Swift can help you navigate these challenges and realize the opportunities in today's market.

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