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Tariffs in flux: M&A deals at risk in 2025

Amid tariff uncertainty and market chaos, thoughtless 'copy and paste' M&A approaches will prove problematic as standard contract terms take on non-ordinary meanings.

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Tariffs, tariffs and... more tariffs. On, off, up, down, or maybe just suspended - for the moment. Uncertainty abounds. But not just with tariffs. Regulatory uncertainty has increased significantly. Federal government funding and support, whether through subsidies, loans or grants, now seems of questionable reliability. Commitments to U.S.-based semiconductor manufacturers under the CHIPS Act, for example, could be terminated, even after companies have made significant capital investment decisions assuming the federal government would honor its pledges. Tax credits for advanced manufacturing under the Inflation Reduction Act could disappear, disrupting long-term manufacturing strategies and corporate budgets. The result - corporate strategies upended, corporate financial performance uncertain, daily stock market volatility and opaque macroeconomic conditions. The effect - M&A principals, practitioners, and bankers need to carefully consider the implications of chaos for pricing, execution and post-closing commitments, including those regarding future contingent payments.

A myriad of customary concepts, terms of art, commonly used phrases and standard provisions permeate acquisition agreements. Pricing, for example, may pivot off the acquiror's stock price. That pricing could be locked into a fixed exchange ratio with the buyer or may vary based on some trailing average of stock market trading prices. Assuming the introduction of 50% tariffs on a company's imports and a resulting drop in that company's stock price of 20% or more right after that introduction, how would a buyer and seller calculate a "fair" and reasonable exchange ratio? While perhaps extreme, the possibility of those kinds of market shifting changes, and their effect on matters beyond just deal-pricing mechanics, are not entirely unforeseeable or unexpected today. And, if not unforeseeable or unexpected, they must be considered thoughtfully in the planning stages of a transaction and addressed proactively through the execution phase. The alternative - to leave those issues to the vicissitudes of a third party decision maker, whether a judge, arbitrator or accountant, should they become problematic or disputed later - is inadvisable.

Quite often it's the simple, overused concepts like "ordinary course of business," "consistent with past practices," and "commercially reasonable efforts" that are overlooked by dealmakers in chaotic markets. Yet these simple concepts and often used phrases demand closer examination when conditions are quickly changing. Thoughtless reuse and repurposing of corporate precedent and commonly applied terms of art will lead to inefficient execution and potentially longer-term litigation risk. The "copy and paste" assembly line approach to M&A will prove problematic. How will a 30% tariff affect the cost structure of a

target company, its financial projections and its operating margins? Is it impossible to foresee or address that possibility if one listens to the daily news? Can material tariff changes like the ones under consideration by the current administration have a "durationally significant" effect on the target? If so, are the legal implications of that possibility well understood by both buyer and seller? (see, *Akorn, Inc. v. Fresenius Kabi AG*, in which the Delaware Supreme Court opined that a "material adverse change" requires an adverse event that affects the target in a "durationally significant manner"). Is it impossible to allocate the risk of "tariff spikes" heading into a transaction, even if it forces an uncomfortable conversation, rather than allocating that risk post-closing through potential indemnification demands if things go awry or only after a seller has experienced the loss of a formerly achievable earnout payment? While it's not possible to enumerate all issues that should be reassessed or reconsidered in light of tariff, regulatory, market and general economic uncertainties, this article simply seeks to note that those issues exist in spades today. This discussion also aims to raise concerns about standard practices that may not work so well in chaotic conditions and to recommend more active consideration of formerly unexpected events that may not be so unforeseeable with a little forethought applied.

Toward that end, a buyer will generally seek to understand an acquired company's "normalized" operations to value the purchase and to assess likely future performance. In addressing those concerns, the buyer may request representations and warranties from a seller that link or tie the seller's pre-closing conduct and activities to concepts of "ordinary course," "past practices," and "commercially reasonable efforts." The following example reflects a fairly standard seller representation: "Except as expressly permitted by this Agreement, since the date of the most recent balance sheet, [target] has conducted its operations *in the ordinary and usual course of business consistent with past practice*, and [target] has used its commercially reasonable efforts to preserve intact its business, to keep available the services of its current officers and employees and to preserve the goodwill of and maintain satisfactory relationships with those persons having business relationships with Target." (emphasis added). Consistency of performance and conduct is essential to effective assessment of M&A risk and to a credible valuation exercise. What is the *"ordinary course"*? What is *"commercially reasonable"* when tariffs are on again and off again? Many of these concepts were the subject of litigation during the Covid pandemic, as businesses tried to adjust to unforeseen and unexpected circumstances. (see *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, in which the Delaware Supreme Court affirmed that a seller had breached an ordinary course covenant when it made significant changes to its business during the COVID-19 pandemic without the buyer's consent). It is not inconceivable that abrupt tariff, regulatory, and other market changes may cause similar litigation or disruption. But in this instance, the relevant questions are whether they are entirely unforeseeable or unexpected and whether they can, and should, be dealt with directly within the acquisition documentation?

M&A agreements also seek, through the use of interim operating covenants, to limit a seller's conduct between the signing and closing of a deal - again, to maintain some form of operational consistency and to level set a buyer's post-closing expectations. A standard interim operating covenant follows: "During the period from the [date of the Agreement] and continuing until the earlier of the termination of this Agreement or the Closing Date, except with the prior written consent of Buyer (which shall not be unreasonably delayed or withheld), [target] shall, and shall cause each of its subsidiaries to: (a) conduct its business in the *usual, regular and ordinary course* in a manner substantially *consistent with past practice* and in accordance with the provisions of this Agreement and in compliance with all Applicable Laws" (emphasis added). The phrases and concepts are similar to those discussed above, but used in a different context. Will they have atypical meanings when tariffs, markets and economic conditions change daily? Other covenants in an M&A agreement may obligate the target to exercise "*commercially reasonable efforts*" to close a transaction: "Each of the parties hereto shall use *commercially reasonable efforts* to take, or cause to be taken, all action, or to do, or cause to be done, all things necessary, proper or advisable to complete and make effective the transactions contemplated by this Agreement." (emphasis added). Same concerns, again, with the application of many of these commonly used terms.

If an acquisition includes some form of earnout, or contingent payments, tied to the post-closing performance of the acquired company, the buyer may be obligated to manage the business in a manner that doesn't prevent the sellers from realizing the opportunity to achieve the earnout. For example, "[Buyer] has the right to operate, fund and manage the business of [target] in any way that [buyer] deems *commercially reasonable* ... provided, however, that [buyer] shall ... not take any intentional action *without reasonable basis* which is intended to, or the primary effect of which is to, delay or prevent any Earnout Payments from being achieved." (emphasis added). Throughout these common M&A provisions, "ordinary course," "past practices," "commercially reasonable," among others, become critical to risk allocation, to closing and to deal success. In all of these cases, "ordinary" concepts may take on non-ordinary meaning when conditions and markets exhibit consistent "inconsistency," uncertainty, change and chaos.

What does the "ordinary course of business" mean when expectations and operations may not be so ordinary? What does it mean to operate "consistent with past practices" when chaos and uncertainty abound and operational decisions may be materially affected by that chaos or uncertainty? Can any target operate "in the ordinary course" between the signing and closing of a deal if external events force material, though not unreasonable, changes in a company's business operations? Can material changes in tariffs - 20%, 40% or 50% - permit a buyer to walk away from a deal without penalty? What tariff is material - is it 20%, 40% or 90%? Are those changes in tariffs entirely unforeseeable today? If a buyer has promised to make future contingent payments through an earnout, should significant post-closing changes to the buyer's business practices and operations, even if not undertaken for the "primary purpose" or with a "specific intent" to reduce or avoid the earnout, be proscribed or limited in some manner to protect the seller's opportunity to realize those earnout payments? Does post-closing "chaos" absolve the buyer in that situation or permit it greater latitude with post-closing operations? Or is there sufficient knowledge today about the possibility of future disruptive events that both buyer and seller should be responsible for expressly and specifically addressing those concerns in a definitive agreement?

All of the preceding questions, and similar questions, must be considered prior to, and during, the negotiation and execution of any deal. Tariff, regulatory and market uncertainties, and gyrations require intelligent forethought. Careful planning, careful drafting, and deliberate execution are essential for avoiding post-closing buyer and seller remorse and disputes. Despite expectations that M&A activity would quickly accelerate in 2025, the pace of transactions has clearly suffered through the first several months of the year, and deal risks, known and unknown, have risen. The extent of those risks, and the scope of some of those "unknowns," can be effectively ringfenced through proper deal structuring, deal drafting and deal execution. It may just take a little more effort and attention to achieve those objectives with tariffs and other economic conditions changing by the day.

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