In a little over a couple of months, the COVID-19 outbreak has dramatically altered the landscape of business. Companies are struggling to cope with massive uncertainty and an array of unforeseen challenges, including everything from supply chain and revenue disruptions caused by reduced consumer demand, to staffing shortages, travel restrictions, business closures, and other such issues. At the same time, these companies are bound by obligations in a variety of transactional instruments and regulatory requirements developed in normal times—like purchase and sale agreements, agreed consent orders or decrees, and operating permits. Those transactional instruments presume continued performance in all but the most unusual of circumstances. Similarly, regulatory requirements at law demand strict compliance. In the wake of novel COVID-19, parties are increasingly pressed to find creative ways to address their inability to meet such requirements. While this is far from a “one-size-fits-all” exercise, three areas of potentially available flexibility are considered below.

“Material Adverse Effect” Provisions
Acquisition agreements, loan documents, and other M&A or transactional agreements commonly contain “material adverse effect” or “material adverse change” provisions (“MAE”), which qualify the representations and warranties, covenants and/or closing conditions to the agreement. These provisions typically provide that if an event results in a materially adverse effect to the business’s financial condition or stability (and is not otherwise excluded), then a party may not be obligated to close on the transaction and can walk away from the deal.

Material Adverse Effect provisions will greatly depend upon the specific language in the agreement, but generally will include broad language defining the MAE as an event or circumstance beyond a party’s control that results in an effect or change materially adverse to the business, assets, financial condition and/or operations of the business.

The MAE will include specific exceptions to narrow the definition and exclude more generalized risks not specific to the business. Common exceptions include effects to the general economic or political conditions; financial market fluctuations; geopolitical conditions, such as acts of war, sabotage, terrorism, and natural disasters, such as hurricane, tornado, flood, or earthquake. Some agreements may specify epidemics and/or pandemics as exclusions. Consequently, if an event falls within one of these categories, the impacts to the business will not be considered a MAE. However, a MAE also commonly qualifies that if the effect impacts the business disproportionately, then it is a MAE even if the event falls within one or more of those categorical exclusions.

Whether COVID-19 will be considered a MAE depends greatly on the specific language to the agreement and the effects incurred by the party. MAE provisions are generally interpreted narrowly by courts and there are few published examples of courts finding a MAE to exist. Nonetheless, circumstances under COVID-19 are unprecedented and the impacts to companies are likely more easily demonstrated to be extreme and unforeseen, supporting a party’s claim to MAE.

“Force Majeure” Clauses

A similar concept is that of the “force majeure” clause. Here, businesses subject to consent orders and a wide array of other agreements and instruments (and sometimes even regulatory permits), may be excused from noncompliance due to unforeseeable forces beyond their control that impede their ability to meet applicable requirements. Qualifying events often include acts of God, war, fire, national emergencies, natural disasters, labor strikes, diseases, pandemics, epidemics, and governmental acts.

As with MAEs, force majeure provisions look beyond generalized economic impacts or losses of profitability, and instead look for events that prevents a party to perform. Obviously, if the force majeure clause expressly lists epidemic, pandemic, or similar health-related crises, then the clause should likely apply to COVID-19 based upon the plain language of the clause. Where it does not so explicitly reference such events, it is less clear and applicability will be determined by the specific language of the clause in conjunction with the governing state contract law.

In general, to assert a force majeure defense, a party will need to demonstrate a
causal link between the event and its failure to perform. Certain procedural requirements are also common, including the need to provide notice to the other party or governmental entity within a prescribed time period and in a particular manner. Consequently, it is essential that parties seeking to rely upon force majeure document how such procedural requirements were met, demonstrate that the event causing the inability to perform was beyond the party’s control, and show that there were no reasonable steps that could have been taken to avoid or mitigate the event.

**Regulatory Flexibility**

Although parties remain strictly liable for compliance with most regulatory obligations, agencies appear increasingly willing to acknowledge the unique circumstances created by the COVID-19 outbreak by exercising agency discretion and allowing some limited flexibility with regard to compliance matters. For example, on March 26, US EPA issued guidance regarding its “temporary” policy to address noncompliance as a result of the COVID-19 outbreak. The guidance provides that EPA will exercise its enforcement discretion as to noncompliance with reporting obligations, applicable limitations on air and water discharges, and other applicable requirements. Exercise of such discretion is contingent upon regulated entities making efforts to meet their compliance obligations, as well as employing measures to track, minimize, and end noncompliance as soon as possible. We previously analyzed that guidance in more detail in a prior post located here.

While the above guidance does not apply to RCRA or CERCLA matters, on April 10, US EPA followed-up with separate interim guidance (discussed here) to specifically address disruption of cleanup fieldwork under RCRA, CERCLA and other federal programs. The guidance provides for delay of ongoing remediation activities as long as public health remains protected. The guidance instructs that:

> Parties who believe that COVID-19 restrictions may delay their performance of obligations should consult the applicable enforcement instrument, including provisions allowing for adjustments to schedules to be made at the discretion of EPA’s project manager and/or force majeure provisions, for directions on providing the requisite notice and other information described in the provisions. Modifications to a party’s performance obligations will be made on a case-by case basis in accordance with the terms of the applicable enforcement instrument. The formal determination as to whether a particular situation constitutes force majeure or requires additional response depends on the site-specific circumstances, particularly the type of work that is affected by COVID-19. EPA expects to be able to make these determinations promptly …

While the agency guidance is characteristically vague as to whether COVID-19 will qualify as a force majeure event, the guidance does suggest that the agency intends to exercise a degree of flexibility at least to procedural requirements: “To the extent available under the instrument, EPA intends to be flexible regarding the timing of the notices.”

Similarly, states have also issued guidance for regulated entities impacted by COVID-19 and have provided mechanisms for requesting regulatory flexibility. For instance, the Texas Commission on Environmental Quality has given notice that it
intends to exercise its discretion and extend reporting deadlines under several programs, such as air emissions inventory reporting, stormwater general permit reporting, Texas Pollution Discharge Elimination System permit reporting, and other requirements. Other state agencies, such as Ohio EPA, the Michigan Department of Environment, Great Lakes and Energy, and the Pennsylvania Department of Environmental Protection have provided procedures for requesting waivers and regulatory flexibility for unavoidable noncompliance, such as extending reporting deadlines, consideration of waiving late fees and exercising enforcement discretion. The Minnesota Pollution Control Agency, which similarly accepts requests for regulatory flexibility, reports as of April 14 that of the 429 requests received, 393 were approved and only 2 rejected (with another 27 still under review and 7 withdrawn)—illustrating the high degree of flexibility the agency appears willing to extend. Given the unprecedented circumstances created by COVID-19, it appears that many state regulators will exercise discretion in enforcing existing requirements if sufficiently justified.

Accordingly, companies impacted by COVID-19 should be reviewing existing agreements and other instruments to determine what flexibilities may be available under applicable terms. Legal counsel can assist with analyzing whether use of MAE or force majeure language can be justified under the circumstances and how best to assert such provisions strategically (particularly as there may be counter-parties that oppose exercise of such provisions). Similarly, regulated operations should identify whether COVID-19 is or has the potential to affect its compliance with existing requirements and if so determine whether regulatory flexibility has been made available for affected operations or cleanup activities.

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