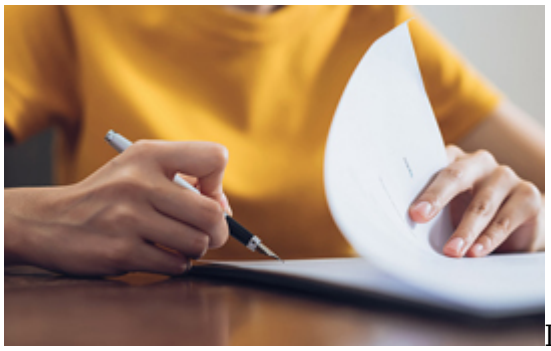
Hedging COVID-19 Pandemic Risks in M&A: PPP Loans

During the COVID-19 pandemic, M&A counsel and their respective life science clients have attempted to navigate the new normal of an unprecedented situation.[1] In addition to impacts on due diligence, material adverse effects clauses, termination provisions, contingent payment mechanics and representations, warranties and covenants, potential acquirers have also had to hedge specialized risk associated with target companies engaged in the Paycheck Protection Program ("PPP").

Financially healthy life science companies have often been cautious of being associated with PPP loans during the COVID-19 pandemic, especially with the increased scrutiny surrounding the "necessity" analysis by the U.S. Small Business Administration ("SBA") and, in the case of public companies, the disclosure requirements to shareholders. Consequently, target companies with outstanding PPP loans have been required to address potential risks. Prominent means to hedge such risks include the use of escrow funds and covenants obligating target companies to seek forgiveness of some or all of a PPP loan. In fast-paced transactions, targets may not be able to apply and receive forgiveness prior to the transaction's closing and thus, forgiveness as a closing condition is improbable. In such situations parties may opt to set-up an escrow account in an amount equal to the PPP loan forgiveness amount and, if negotiated, the out-of-pocket costs borne by the sellers related to the forgiveness application. Relatedly, among other things, sellers may also be required to indemnify acquirer(s) indemnitees from any losses arising from a target company's obligation to repay any portion of the PPP loan that is outstanding as of the transaction's closing, to the extent it is not forgiven. The combination of a separate and dedicated escrow account, along with a covenant to eliminate PPP loans and indemnification for related losses, can provide acquirers of life sciences companies (which are typically bigger and often do not meet the requirements for PPP loans) with some level of comfort with respect to the potential effects of PPP loans on their other operations.

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[1] For an overview of the impact of COVID-19 on M&A see **client alert**