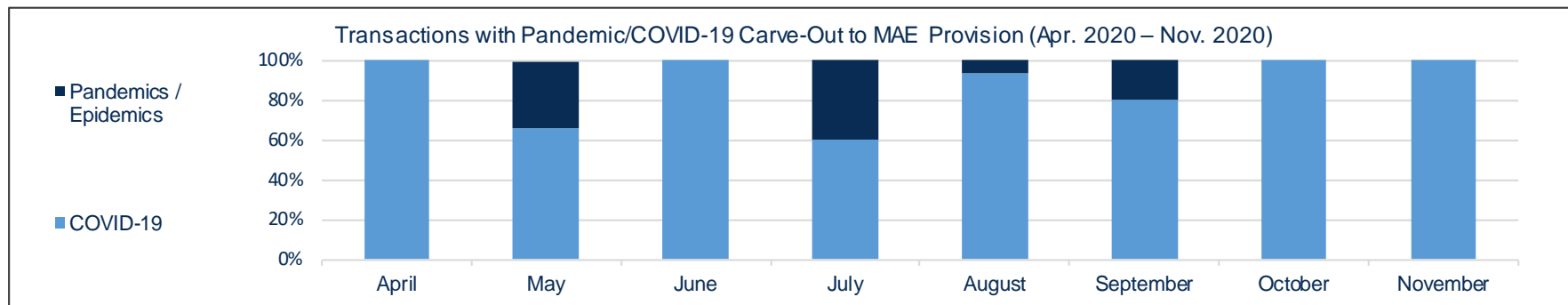

CRAVATH, SWAINE & MOORE LLP

COVID-19 Update: Impact on MAE Clauses

DECEMBER 2020

MAE Carve-Outs

- **Since April 1, 2020, 100% of public target M&A deals over \$100 million* included an explicit carve-out for pandemics, epidemics or similar health emergencies**
 - Nearly all merger agreements included a specific reference to COVID-19 in the MAE carve-outs, and many defined COVID-19 to include evolutions or mutations of the COVID-19 virus/disease and subsequent or second waves
- **In addition to a carve-out for COVID-19 itself, a number of merger agreements also included carve-outs for COVID-19-related measures**
 - Example: “COVID-19 Measures” shall mean any quarantine, “shelter in place,” “stay at home,” workforce reduction, social distancing, shut down, closure, sequester, safety or similar Law, directive or guidelines promulgated by any Governmental Authority, including the CDC and the WHO, in each case, in connection with or in response to COVID-19, including the CARES Act and the Families First Coronavirus Response Act (Momenta Pharmaceuticals / Johnson & Johnson (Aug. 19))
- **In most merger agreements (approx. 80%), the carve-outs related to COVID-19 were subject to a disproportionate impact exception**
 - However, over the last three months there was a noticeable increase in the number of blanket carve-outs for COVID-19 and/or COVID-19 measures



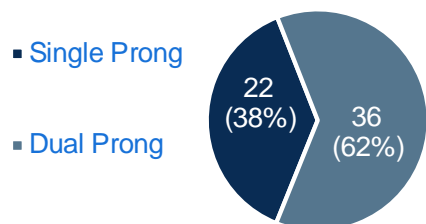
Source: DealPoint Data (data includes 58 transactions from April 1, 2020 through November 25, 2020 with equity value greater than \$100M where the target was a public company and the transaction agreement was publicly available). Does not include Brookfield Asset Management's acquisition of a 19.9% stake in American Equity.

“Prong One” / “Prong Two” Structure

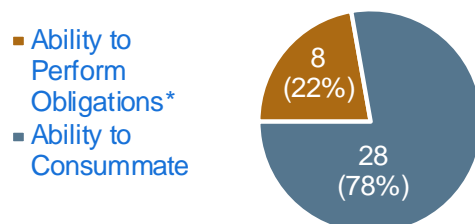
- **Since the onset of COVID-19, some buyers attempted to rely on dual-prong MAE definitions to bring claims asserting that the inability of the target to perform its obligations under the transaction agreement constitutes an MAE and excuses the buyer from closing**
 - Claims were possible where the MAE definition contains two prongs:
 - “**prong one**”: capturing material adverse effect on the target’s business and
 - “**prong two**”: capturing material adverse effect on the ability of the target to consummate the transaction / perform its obligations under the agreement

- **Despite this, many merger agreements signed since April 2020 (approx. 60%) still contain two-pronged MAE definitions**
 - However, in most post-COVID merger agreements with “prong one” / “prong two” bifurcation, prong two is limited to the ability of the target company to consummate the transaction (approx. 80%), and does not cover the ability of the target to perform its obligations under the merger agreement
 - This trend has been even more pronounced in the last three months, when only three MAE definitions which contained “prong two” included the ability of the target to perform its obligations under the merger agreement
 - The carve-outs which traditionally qualify “prong one” (including the COVID-19 carve-outs discussed above) applied to “prong two” in a not insignificant number of merger agreements (but still in the minority of cases)

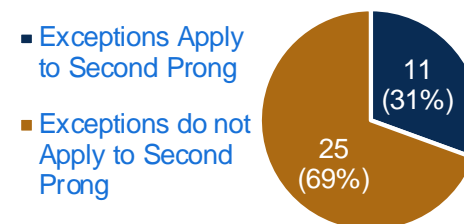
Single-Prong vs. Dual-Prong
(Apr. – Nov. 2020)



Scope of Dual-Prong Language
(Apr. – Nov. 2020)



Application of MAE Carve-Outs
(Apr. – Nov. 2020)



Source: DealPoint Data (data includes 58 transactions from April 1, 2020 through November 25, 2020 with equity value greater than \$100M where the target was a public company and the transaction agreement was publicly available). Does not include Brookfield Asset Management’s acquisition of a 19.9% stake in American Equity. *Includes deals with language that addressed ability to perform obligations and consummate transactions.

“Disproportionate Impact” Comparison Group

- **When seeking to establish disproportionate impact (in order to overcome an MAE carve-out which has a disproportionate impact exception), the relevant peer comparison group matters**
- **Pre-COVID, as well as post-COVID through the summer, most deals referred to the target’s industry in a general way for purposes of the disproportionate impact exception (e.g., measuring disproportionate impact relative to other participants in the industries in which the target operates)**
 - Such general definitions could give rise to disputes as to the appropriate industry / comparable companies
 - As a result, we suggested that parties should consider whether a more tailored definition of the comparison group is appropriate
- **A notable trend over the last three months is that only a minority of merger agreements (less than 40% of mergers signed since September 2020) referred to the target’s industry in a general way in the disproportionate impact exception**
- **Every other merger agreement included some level of additional specificity with respect to the appropriate comparison group for purposes of measuring disproportionate impact**

Source: DealPoint Data (data includes 58 transactions from April 1, 2020 through November 25, 2020 with equity value greater than \$100M where the target was a public company and the transaction agreement was publicly available). Does not include Brookfield Asset Management’s acquisition of a 19.9% stake in American Equity.

“Disproportionate Impact” Comparison Group

▪ Examples include:

- Industry parameters described with specificity
 - “as compared to other similarly situated industry participants (it being understood and agreed that, for the purposes of determining whether a Party has been disproportionately adversely affected compared to other similarly situated industry participants, the Company shall be compared to independent exploration and production companies primarily focused in the Permian Basin and Parent shall be compared to independent diversified exploration and production companies)”
- Industry referenced more generically
 - “as compared to similar companies in the banking industry”
- Geographic specificity added
 - “compared to other companies that operate in the industry and geographic markets in which the Company ... operate[s] (it being understood and agreed that, for purposes of determining whether there is a materially disproportionate impact on the Company ... compared to other companies that operate in the industry and geographic markets in which the Company ... operate[s], the Company ... shall be compared to other companies that have comparable presences in the geographic markets in which the Company ... operate[s]).”
 - “as compared to companies that conduct business in the countries and regions in the world and in the industries in which the Company and its Subsidiaries conduct business”
- Industries in which the target company “materially engages” / “primarily conducts business”
- Comparison to “other similarly-situated companies” in the industry in which the target company operates
- Comparison to other companies “of similar size” in the industry in which the target company operates
- Combination of the above
 - “relative to other similarly situated Persons in the oil and gas exploration, development and production industry in the geographic areas in which such Person and any of its Subsidiaries operate”
 - “as compared to comparable U.S. banking organizations”