COVID-19 and Environmental Matters – Key Transactional and Compliance Impacts

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The novel coronavirus (COVID-19) pandemic has had, and will continue to have, a significant impact on the global economy, businesses and individuals. This memorandum summarizes the ways in which we have seen COVID-19 impact the environmental, health and safety ("EHS") aspects of transactions, including with respect to due diligence, financing transactions, representations and warranties insurance for M&A deals, as well as EHS compliance obligations. Please reach out to any of the lawyers listed in the sidebar or your regular Davis Polk contact with any questions.

EHS Diligence and Transaction Implications

Even during the COVID-19 pandemic, planning and execution of M&A, finance and capital markets transactions continue. This means that appropriate EHS diligence still needs to be performed. Due to the compliance difficulties discussed below, however, parties conducting due diligence should keep in mind that there may be a period of incomplete EHS reporting, and that traditional EHS diligence sources such as databases or regulatory websites may not provide as full a picture of a company's EHS compliance as in the past if these sources or websites are not being updated due to COVID-19-related disruptions. Governmental responses to Freedom of Information Act and similar document requests may also be delayed.

The cornerstone of EHS diligence in M&A transactions is often the so-called Phase I site assessment, which relies on recent visits to target sites and interviews with site personnel. In addition, some lenders require Phase I assessments as a condition to extending credit. We have seen COVID-19 impact the ability of consultants to perform such visits or interviews on a timely basis, for reasons such as travel restrictions or bans, quarantine orders, consultant or target employee illness or unavailability, or the temporary closure of business locations. Until the health impacts of COVID-19 abate, we expect this disruption to continue, during which time these roadblocks to EHS diligence will impact the ability of parties conducting due diligence to get a full picture of a company's EHS liabilities. Buyers or borrowers that need to conduct EHS diligence during this time should continue to seek alternatives such as use of Google Earth or other commercially available maps, video or audio calls for interviews, and reliance on preexisting Phase Is or, in the alternative, consider contractual protections.

For M&A transactions for which representations and warranties insurance is contemplated, we have seen that insurers are continuing to condition EHS coverage on new Phase I environmental assessments where the environmental risk warrants them. If the delays described above impact the ability to conduct Phase Is, parties should consider modifying the representations and warranties policy language to allow for Phase Is to be obtained after signing or closing. The policy language should also allow that if Phase Is are completed, the insurer will agree to remove or scale back environmental policy exclusions.

EHS Compliance Obligations

Restrictions on businesses and individuals related to COVID-19 may make it more difficult for facilities to staff their ongoing EHS compliance functions or otherwise have sufficient personnel to operate required pollution

control equipment or remediation systems. Companies in this unfortunate situation should engage with relevant state, local, federal and other EHS regulators to understand what relief, if any, may be available to them related to EHS compliance obligations and what sort of recordkeeping and notice is required to obtain that relief.

For example:

- On March 26, 2020, the U.S. Environmental Protection Agency (EPA) issued **temporary guidance** regarding the implications of COVID-19 for compliance. This guidance, which lasts until EPA determines modification or termination is appropriate, uses traditional *force majeure* principles to provide that while businesses should continue to make best efforts to comply with EHS obligations, EPA generally will not seek penalties for violations of certain routine compliance obligations (e.g., emissions reporting) resulting from COVID-19 impacts for the duration of the temporary guidance. The guidance requires regulated entities to make best efforts to minimize noncompliance, document how COVID-19 impacted their compliance efforts and communicate that information to EPA. The guidance provides procedures for addressing and notifying EPA of noncompliance issues that may create an imminent threat to human health or the environment for which EPA will take more of a case-by-case approach in exercising enforcement discretion.
- The guidance also provides relief for various obligations under EPA administrative settlement agreements and notes that EPA will work with the Department of Justice to exercise enforcement discretion under consent decrees. EPA counsels parties to follow the *force majeure* terms in those agreements, which generally provide relief from obligations if a party can demonstrate that compliance was rendered impossible due to circumstances beyond its control.
- The guidance will not apply to compliance programs administered by state agencies, which have varied approaches to COVID-19. Some U.S. states have released guidance similar to EPA's. For example, on March 18, 2020, the Texas Commission on Environmental Quality issued guidance for submitting enforcement discretion requests in the event reduced staffing results in a facility being unable to meet certain EHS compliance obligations, and some U.S. states have agreed that they will not issue penalties to water and wastewater utilities that fail to meet Clean Water Act permit requirements for COVID-19-related reasons if these failures are justified and documented. However, other states, such as California and Maryland, have signaled a case-by-case approach.
- The guidance does not apply to corrective actions under two major U.S. federal laws related to the cleanup, management and disposal of hazardous materials and wastes (the Comprehensive Environmental Response, Compensation and Liability Act, otherwise known as CERCLA or "Superfund," and the Resource Conservation and Recovery Act, or RCRA). These will be the subject of a subsequent guidance from EPA.

Relatedly, businesses that are operating or constructing remedial systems at sites that are closed pursuant to COVID-19 quarantine orders should confer with their EHS personnel and relevant regulators to understand whether the remedial system at such site is an "essential service" that can nonetheless continue operating, and should also prepare for the possibility that supply chain disruptions could lead to the inability to complete such systems in time for deadlines in any governing consent decrees. In the event of such a delay, the EPA guidance described above may provide relief for businesses that miss such deadlines.