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Corporate Insights

Understanding Efforts Clauses in Mergers and Acquisitions (M&A) Purchase Agreements

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In M&A, "efforts" clauses in purchase agreements define the level of commitment a party must undertake to fulfill specific obligations, such as obtaining regulatory approvals, securing financing or satisfying closing conditions.

Efforts clauses commonly fall into three categories: "commercially reasonable efforts," "reasonable efforts," and "best efforts." Such clauses provide a framework for the parties' rights, remedies and obligations, and may affect the likelihood of successfully closing a deal. Below, we explore these standards, their requirements, and their impact in an M&A context.

1. Commercially Reasonable Efforts

Definition and requirements – Typically considered to be the least burdensome standard, "commercially reasonable efforts" clauses require a party to take good faith actions consistent with what a prudent businessperson would undertake in similar circumstances, considering industry norms and economic rationality. (*See Holland Loader Co., v. FLSmidth A/S*, 313 F.Supp.3d 447, 473 (S.D.N.Y. 2018).) Under this standard, courts may consider the economic feasibility of an action and the promising party's business practices and sophistication, which may impose additional diligence such as engaging expert advisors or making limited concessions to regulators. That said, "commercially reasonable efforts" generally stop short of requiring actions that would jeopardize the party's financial or strategic interests.

Deal implications – This standard ties obligations to commercial pragmatism, offering a balanced approach to closing transactions. A breach of contract may occur if a party deviates from relevant industry practices, potentially triggering remedies like specific performance or paying monetary damages. For buyers, a "commercially reasonable efforts" clause may limit their ability to walk away from a deal without demonstrating significant impracticality. For sellers, the clause ensures that buyers will actively try to satisfy the other party's closing conditions, increasing deal certainty. However, ambiguity in what constitutes "commercially reasonable efforts" may lead to disputes, impacting deal timelines or outcomes.

2. Reasonable Efforts

Definition and requirements – A "reasonable efforts" clause requires a party to take actions that are sensible and practical under the circumstances, without requiring extraordinary measures or undue burden. (*See Akorn v. Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347 at *87 (Del. Ch. Oct. 1, 2018).) This clause implies a good faith effort, but permits parties to consider their own interests and exercise business judgment, giving the parties flexibility to balance costs, risks and feasibility. For example, in a situation where a party is required to use reasonable efforts to obtain regulatory approvals as a condition to closing, such party would need to submit required regulatory filings promptly and respond to standard inquiries, but would not be obligated to make significant concessions or incur excessive costs.

Deal implications – "Reasonable efforts" clauses allow a party to fulfill its obligations without exhaustive measures. If a party fails to meet this standard, it may breach the agreement, potentially entitling the other party to remedies like damages or termination, depending on the terms of the agreement. However, proving a breach of this standard can be challenging; courts often interpret "reasonable efforts" as requiring only ordinary diligence. (*See Soroof Trading Dev. Co. v. GE Fuel Cell Sys.*, 842 F.Supp.2d 502, 511 (S.D.N.Y. 2012) (finding contractual obligation to use "reasonable efforts" required company to work in good faith and to the extent of its capabilities).) As a result, this standard may reduce the likelihood of closing if a party prioritizes cost-savings over preemptive measures, particularly for complex conditions like antitrust approvals.

3. Best Efforts

Definition and requirements – "Best efforts" clauses impose the most stringent standard, requiring a party to exert substantial effort to achieve the objective or satisfy the condition, even if it involves significant cost or risk, short of causing insolvency or irreparable harm. (*See In re Chateaugay Corp.*, 198 B.R. 848, 854 (S.D.N.Y. 1996).) In practice, this might mean aggressively pursuing regulatory approvals, including offering divestitures, litigating against regulatory challenges or securing financing under adverse market conditions.

Deal implications – "Best efforts" clauses impose onerous obligations, which significantly limit a party's discretion to abandon or deprioritize tasks. Failure to meet the "best efforts" standard is more likely to constitute a breach of contract, thereby exposing the breaching party to substantial liability, ranging from money damages or injunctive relief to specific performance. For buyers, this clause can increase pressure to close, even in unfavorable conditions, while sellers benefit from heightened assurance that the buyer will exhaust all reasonable avenues to complete the transaction. This high burden, however, may deter parties from agreeing to such a standard, and can certainly lead to contentious negotiations over its scope.

Practical Implications for Deal Closing

The parties' choice of efforts clause directly influences the likelihood and timing of a deal closure. "Commercially reasonable efforts" foster cooperation between the parties, while preserving economic sensibility, making them common in M&A agreements. "Reasonable efforts" may suffice for straightforward transactions with minimal hurdles, but could stall deals requiring significant coordination or concessions. "Best efforts" are rare due to their intensity but may be used in high stakes deals where closing is critical, such as distressed asset sales or deals with significant regulatory scrutiny.

One additional efforts standard not detailed above, while uncommon, is worthy of mention: the "hell-or-high-water" (HOHW) clause. True to its name, this provision places the highest level of obligation on a party, typically the buyer, to ensure a transaction's completion, regardless of obstacles. Under HOHW, the buyer must overcome any challenges, come hell or high water, including regulatory hurdles, financing issues or third-party consent requirements without exiting the deal. Sellers increasingly demand HOHW clauses for antitrust approvals, which may compel buyers to divest assets or businesses, pursue litigation to secure regulatory clearance or pay substantial fees to obtain consents. By limiting a party's ability to terminate a contract, HOHW clauses significantly restrict the buyer's ability to abandon the transaction. The inclusion of such a clause in an M&A agreement enhances closing certainty and signals a strong commitment to the market that the parties are able and willing to close, regardless of risk or expense.

Efforts clauses also shape litigation risks. Ambiguity in these provisions can lead to disputes over whether a party has fulfilled its obligations, particularly if a deal fails to close. Courts typically examine the specific language, industry context and the parties' conduct when interpreting these clauses, which makes precise drafting essential. Efforts clauses also interact with other provisions in the agreement, such as termination rights, material adverse effect clauses or financing covenants, which can amplify or mitigate their impact on potential remedies. Finally, the specific obligations that efforts clauses impose are dependent on the contract's governing law due to some variance in judicial interpretation of the definitions and obligations that accompany each type of efforts clause. Thus, the parties must be cognizant of jurisdictional practice to ensure the agreement's provisions reflect the desired obligations of the parties.

Conclusion

Efforts clauses are pivotal in M&A purchase agreements, defining the scope of a party's commitment to close a deal. Each standard carries distinct requirements and implications for rights, remedies and obligations, thereby influencing deal dynamics and outcomes. To maximize the likelihood of a successful closing, parties should negotiate terms and precisely draft efforts clauses to align with their strategic goals, risk tolerance and expectations for deal certainty.

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