Bloomberg's Nabila Ahmed reports on the "Weinstein Clause" being worked in to potential mergers.

On Wall Street, it's known as “the Weinstein clause.”

Advisers are adding guarantees to certain merger agreements in light of the sexual misconduct scandals that have enveloped the producer Harvey Weinstein and other high-profile businessmen -- ones that legally vouch for the behavior of a company's leadership.

The development is a concrete example of how business is trying to adapt to the #MeToo era, at least in terms of legal liability. The move is particularly noteworthy given its source: the male-dominated world of M&A advisory where the terms of an offer can make or break a bid.
In some cases, buyers have even negotiated the right to claw back some of the money they paid if subsequent revelations of inappropriate behavior damage the business.

“Social due diligence is becoming more and more important and, particularly for founder-centric businesses, money is being put aside to address #MeToo issues,” Gregory Bedrosian, chief executive officer of boutique investment bank Drake Star Partners, said in an interview.

In several deals he’s worked on -- the firm mostly advises on technology and media deals of about $1 billion or less -- sellers have even put money in escrow that buyers can claim if any social issues arise. That can sometimes be as much as 10 percent of the total value of a transaction, Bedrosian said. These provisos are being called “the Weinstein clause”.

CBS, Athenahealth

It’s more relevant than ever at a time when companies involved in deals have been among those caught up in misconduct allegations.

At Athenahealth Inc., Chief Executive Officer Jonathan Bush’s decision to step down in June after a series of misconduct allegations helped clear the way for a potential sale of the $6.1 billion health-technology company.

A possible tie-up of media companies CBS Corp. and Viacom Inc. may be easier for controlling shareholder Shari Redstone to pull off if allegations against CBS Chairman and CEO Leslie Moonves lead to him stepping down, Cowen & Co. analyst Doug Creutz wrote in a note to clients Friday. Moonves has acknowledged that some of his behavior in the past may have made some women uncomfortable, but said he never used his position to harm anyone’s career.

#MeToo Reps
Drake Star’s Bedrosian, who’s been advising on acquisitions for 25 years, said that it’s only over the past six months or so that sellers have been asked to make legal representations about the behavior of their management teams. In deal rooms, these clauses are being referred to as “the #MeToo rep,” he said.

In a typical representation, the target attests that nobody has accused certain managers or directors, as well as certain executives who manage a large number of employees, of sexual harassment.

At least seven deals announced this year involving public companies include such representations, according to data compiled by Bloomberg, across industries as diverse as entertainment, real estate and hospitality.

Brookfield Asset Management’s agreement to acquire Forest City Realty Trust Inc., announced Tuesday, is the latest example, stating that no allegations of sexual harassment have been made against any employees at senior vice president level or above in the last five years.

When tapas chain Barteca Restaurant Group sold itself to Del Frisco’s Restaurant Group Inc. in June, the language was even more specific, citing a date -- January 1, 2015 -- since which there haven’t been any allegations against managers or executives.

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To the Knowledge of the Company, (i) no allegations of sexual harassment have been made against (A) any officer or director of the Acquired Companies or (B) any employee of the Acquired Companies who, directly or indirectly, supervises at least eight (8) other employees of the Acquired Companies, and (ii) the Acquired Companies have not entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by an employee, contractor, director, officer or other Representative.
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An example of the type of boilerplate language that can be used in merger agreements

**Tough Questions**

The changes are happening in deals involving private equity firms as well as corporates, with firms starting to pay greater attention to culture and labor issues at companies they own.

Some of the scrutiny is being forced by their largest investors, who are demanding greater diversity and asking tough questions about gender mix, sexual harassment claims and preventative measures.

Private equity firms started broadening their examination of potential takeover targets beyond financial diligence over the past year or two, according to Townsend Belisle, whose firm, Haystack Needle, helps firms dig into a company’s social media presence and online reputation.

“We do market research, search engine and social media assessments to evaluate the reputation of any brand,” Belisle said in an interview. “Doing that helps us to uncover risks and figure out where the opportunities might be for a company.” Gaining that perspective on a brand can give private equity firms an advantage when considering where to invest -- and an edge over their peers in a bidding process.

Companies are working faster to act on allegations of bad behavior and weed out the perpetrators, and it’s right that buyers -- who are used to spending weeks and months on financial due diligence -- are paying more attention to human resource and labor issues, John Waldron, the co-head of investment banking at Goldman Sachs Group Inc., said at the Milken Institute Global Conference in California in May.

At least 475 high-profile executives and employees have been accused of harassment or other wrongdoing during the last 18 months, according to a tally from crisis-consultant Temin & Co., which is updated daily. Companies have slashed the time between the first public report of alleged misdeeds and a subsequent dismissal to just over two weeks on average this year, compared with six weeks last year.
“More of the right questions are being asked around culture and behavior,” Waldron said at the conference, adding that buyers are focusing more on patterns of behavior and whether a company can be integrated “based on nothing to do with math or multiples or any of that.”

“That’s a fundamental shift,” he said.

For more on the #MeToo movement, check out the Decrypted podcast:

— With assistance by Jeff Green, Sabrina Willmer, and Ed Hammond

In this article

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