

## Cultural Due Diligence and M&A in the Wake of a Pandemic

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### I. INTRODUCTION

What insights does the Covid-19 pandemic provide regarding how to refocus cultural due diligence to ensure successful firm integration in mergers and acquisitions (“M&A”) transactions? The question seems particularly pressing considering a number of prominent planned acquisitions have been canceled since the advent of the pandemic.<sup>1</sup> Perhaps most notably, on March 31, 2020, Xerox Holdings Corporation terminated its proposed \$32.85 billion hostile acquisition of HP Inc.<sup>2</sup> A few months earlier, friendly merger

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<sup>1</sup> Greg Roumeliotis, *Xerox Abandons \$35 Billion Hostile Bid For HP*, REUTERS (Mar. 31, 2020), <https://www.reuters.com/article/us-hp-m-a-xerox-hlngs/xerox-abandons-35-billion-hostile-bid-for-hp-sources-idUSKBN2113C0> (“The market rout triggered by the global coronavirus outbreak has led many companies to hit the pause button on mergers and acquisitions, sabotaging the hopes of corporate advisers who expected a dealmaking bonanza this year.”); See Yalena Dunaevsky, *Mostly Dead but Slightly Alive: M&A Deals of 2020*, A.B.A (May 19, 2020), available at <https://businesslawtoday.org/2020/05/mostly-dead-slightly-alive-ma-deals-2020/>.

<sup>2</sup> See Cara Lombardo, *Xerox is Ending Hostile Takeover Bid for HP*, WALL ST. J. (Apr. 1, 2020), <https://www.wsj.com/articles/xerox-to-end-hostile-takeover-bid-for-hp-11585684800>.

negotiations between the two companies stalled because the companies could not agree on terms for the exchange of confidential information necessary to assess the terms of any deal.<sup>3</sup> Although a number of business experts suggested Xerox and HP were too culturally different to secure a successful fit,<sup>4</sup> Xerox nonetheless anticipated \$2 billion in gains based in part on the synergistic integration of the combined companies' different approaches to sales operations.<sup>5</sup> After initially moving ahead with a hostile takeover, however, Xerox ultimately announced that logistical concerns related to the pandemic made fully assessing the combination impossible.<sup>6</sup> Ensuring proper deal pricing, structure, and anticipated post-merger value remains inextricably linked to the ability to conduct robust due diligence related to firm integration. The inability of Xerox to move forward in its acquisition of HP, however, reveals that the pandemic makes essential due diligence tasks extraordinarily difficult.

This short article attempts to identify the new challenges facing effective cultural due diligence in the wake of the Covid-19 pandemic and to suggest key due diligence strategies to make post-merger integration more successful. Part I briefly identifies the problems the pandemic creates for conducting cultural due diligence in M&A transactions. In light of those logistical hurdles, Part II suggests some new strategies to ensure a sufficiently robust cultural due diligence process necessary for post-merger success. Part III discusses some important implications of embracing those strategies, including cost, changes to deal structure, and post-merger planning. The article concludes that although the pandemic should not prevent effective cultural due diligence in M&A transactions, the pandemic might change the very notion of what corporate culture entails going forward.

## II. COVID-19 AND CULTURAL DUE DILIGENCE CHALLENGES

The multifarious challenges created by the Covid-19 pandemic have significantly altered the climate for acquisition transactions.<sup>7</sup> Many transactions

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3 See Roumeliotis, *supra* note 1.

4 See Kyle Alspach, *10 Big Things HP Just Said About Xerox*, CRN (Feb. 25, 2020), <https://www.crn.com/news/components-peripherals/10-big-things-hp-just-said-about-xerox>.

5 See James Brumley, *Why Xerox (Still) Isn't Convincing HP Shareholders*, THE MOTLEY FOOL (March 12, 2020), <https://www.fool.com/investing/2020/03/12/why-xerox-still-isnt-convincing-hp-shareholders.aspx>; Xerox, *Xerox + HP: A Value Creating Combination*, at 5 (Nov. 5, 2019), [https://www.news.xerox.com/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/84/files/201911/XXHP-A-Value-Creating-Combination.pdf](https://www.news.xerox.com/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/84/files/201911/XXHP-A-Value-Creating-Combination.pdf).

6 See Roumeliotis, *supra* note 1.

7 See Richard D. Harroch et al., *The Impact of the Coronavirus Crisis on Mergers and Acquisitions*, FORBES (Apr. 17, 2020), <https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/#78a7f0a3200a>.

remain stalled and the overall volume of M&A transactions plummeted in the first quarter of 2020.<sup>8</sup> Whether the market for M&A rebounds remains uncertain.<sup>9</sup> Without doubt, however, the hurdles in assessing whether business combinations might prove successful over time have become increasingly difficult to surmount. This section lays out some of the general challenges involved in assessing merger integration risk and highlights some additional problems regarding assessment of firm cultural compatibility.

### *A. The Existing Landscape of Integration Failures*

Getting a deal to close does not guarantee long-term success of any business combination. According to a 2019 study by Deloitte, business executives increasingly cite successful post-merger integration “as the single most important factor that leads to a successful transaction (23 percent this year, up from 21 percent last year).”<sup>10</sup> Despite that acknowledged need to focus early on firm integration to realize the predicted value of any merger, many recent studies suggest the failure rate of mergers and acquisitions lies somewhere between 70% and 90%.<sup>11</sup> But why do integration efforts fail so often? And what can be done to increase chances of success on the ground, both before and after closing?

Although experts cite a host of reasons for flawed integration,<sup>12</sup> inaccurate data, insufficient attitudinal assessment, and lack of leadership messaging deserve special note. First, without adequate and accurate data, coherently assessing integration risks becomes all but impossible.<sup>13</sup> Despite that rather obvious connection between robust data and predictive capability, many

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<sup>8</sup> See *id.*

<sup>9</sup> See Jens Giersberg et al., *The Power of Through-Cycle M&A: How Companies Can use Deal Making to Accelerate Strategic Shifts During the COVID-19 Crisis*, MCKINSEY & CO. (Apr. 30, 2020), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-power-of-through-cycle-m-and-a>.

<sup>10</sup> Russell Thomson et al., *The State of the Deal: M&A Trends 2019*, DELOITTE (2018), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-mergers-acquisitions-trends-2019-report.pdf>.

<sup>11</sup> Clayton M. Christensen et al., *The Big Idea: The New M&A Playbook*, HARV. BUS. REV. (Mar. 2011), <https://hbr.org/2011/03/the-big-idea-the-new-ma-playbook>.

<sup>12</sup> See Johannes Gerds et al., *Post Merger Integration: Hard Data, Hard Truths*, DELOITTE INSIGHTS (Jan. 2, 2010), <https://www2.deloitte.com/us/en/insights/deloitte-review/issue-6/post-merger-integration-hard-data-hard-truths.html>; Kison Patel, *Top 5 Reasons of M&A Integration Failures & How to Prevent Them*, DEALROOM (Sept. 18, 2020), <https://dealroom.net/blog/why-m-a-integrations-fail#:~:text=3,-,Poor%20Execution%20Of%20The%20Integration,not%20remove%20the%20value%20entirely>.

<sup>13</sup> See Ali Korotana et al., *M&A Success, Powered By Advanced Analytics*, MCKINSEY & CO. (Aug. 1, 2019), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/m-and-a-success-powered-by-advanced-analytics>.

business combinations proceed without sufficient due diligence.<sup>14</sup> Absent a dedicated collection of hard and soft experiential data regarding the various potential pitfalls for integration failure as well as paths for synergistic gains, successful integration becomes aspirational rather than a concrete expectation.

Second, a failure to measure and account for the attitudinal commitments of various firm constituencies can significantly reduce the likelihood of successful integration.<sup>15</sup> The collective values of line employees, sales teams, managers, mid-level executives, and a host of other players within the corporate structure define the very identity of the firm. Imposing without adequate consideration a new value structure or mode of corporate thinking on an acquired entity risks not just temporary disruption but intractable internal conflict.<sup>16</sup> Adequately identifying and navigating the nuances of attitudes within any firm remains essential to enhancing the likelihood of a successful melding of potentially disparate corporate cultures.<sup>17</sup>

Third, poor leadership messaging regarding prospective firm identity can cause fragmentation and disorder within a newly combined entity.<sup>18</sup> By their very nature, business combinations involve evolution and some inevitable disruption. Without leadership effectively communicating how the new entity will forge the path ahead, institutional confusion may result that causes various components of the corporate enterprise to work at cross purposes.<sup>19</sup> Although a newly combined company might inevitably face some institutional growing pains, an effective steward who communicates a shared vision for growth remains essential to build a solid foundation for future success.

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14 See David Heathcoate et al., *Data & Analytics in M&A*, KPMG (May 2018), <https://assets.kpmg/content/dam/kpmg/au/pdf/2018/data-analytics-in-mergers-acquisitions.pdf>.

15 See Peter Lee, *Innovation and the Firm: A New Synthesis*, 70 STAN. L. REV. 1431, 1494 (2018); Kison, *supra* note 12.

16 See generally J. ROBERT CARLETON & CLAUDE S. LINEBERRY, *ACHIEVING POST-MERGER SUCCESS: A STAKEHOLDER'S GUIDE TO CULTURAL DUE DILIGENCE, ASSESSMENT, AND INTEGRATION* (2004) (attributing the failure of most mergers and acquisitions to a lack of proper consideration in integrating acquired entities' cultures in a systemic, systematic, and efficient manner).

17 See Oliver Engert et al., *Organizational Culture in Mergers: Addressing the Unseen Forces*, MCKINSEY & CO. (March 26, 2019), <https://www.mckinsey.com/business-functions/organization/our-insights/organizational-culture-in-mergers-addressing-the-unseen-forces>.

18 See Thomas Diefenbach, *The Managerialistic Ideology of Organisational Change Management*, 20 J. ORG. CHANGE MGMT. 126, 131–132 (2007); Kison, *supra* note 12.

19 See Oliver Engert et al., *Communications in Mergers: The Glue That Holds Everything Together*, MCKINSEY & CO. (Jan. 30, 2019), <https://www.mckinsey.com/business-functions/organization/our-insights/communications-in-mergers-the-glue-that-holds-everything-together>.

### B. Cultural Integration and the Challenges of Covid-19

Perhaps the most challenging and important component of successful post-merger integration involves ensuring a sufficiently compatible cultural fit between the combined companies.<sup>20</sup> According to McKinsey, “[s]ome 95 percent of executives describe cultural fit as critical to the success of integration. Yet 25 percent cite a lack of cultural cohesion and alignment as the primary reason integration efforts fail.”<sup>21</sup> Thus, identifying potential cultural rifts between combining corporations and implementing sufficient organizational bridges remains essential to reaping planned merger value. Even with an understanding of potential cultural pitfalls, “the task of integrating two companies with different cultures and operations is fraught with difficulty.”<sup>22</sup>

Assessing cultural compatibility, however, is no easy task and it is made substantially more difficult given the logistical hurdles imposed by the advent of the Covid-19 pandemic.<sup>23</sup> At the outset, “corporate culture” remains a somewhat vague and protean concept. As a result, simply defining what “corporate culture” entails might seem like a daunting task. For the purposes of ensuring expected post-merger value, a broad, holistic definition might best capture the many facets of culture potentially affecting financial success. Taking that expansive perspective, culture might be seen “as the outcome of the vision or mission that drives a company, the values that guide the behavior of its people, and the management practices, working norms, and mind-sets that characterize how work actually gets done.”<sup>24</sup> But casting such a broad definitional net requires a searching approach to cultural due diligence.<sup>25</sup> Given the focus on nuances in organizational behavior, working norms, interfirm values, and a host of other thorny issues, conducting cultural due diligence to

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20 See May Hu & Pei Ni Huynh, *How Do Cross-Border Mergers and Acquisitions Affect Firms' Management & Stakeholders?*, 20 CORP. FIN. REV. 21, 23 (2015); Oliver Engert et al., *Assessing Cultural Compatibility: A McKinsey Perspective on Getting Practical about culture in M&A*, MCKINSEY & CO. (June 2010), <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Merger%20Manager%20Compendium/A%20McKinsey%20perspective%20on%20getting%20practical%20about%20culture%20in%20M%20and%20A.ashx>; Michele Gelfand et al., *One Reason Mergers Fail: The Two Cultures Aren't Compatible*, HARV. BUS. REV. (Oct. 2, 2018), <https://hbr.org/2018/10/one-reason-mergers-fail-the-two-cultures-arent-compatible>.

21 Engert et al., *supra* note 17.

22 Lee, *supra* note 15, at 1490.

23 See Michael Thompson & Alexandra Melia, *Cross-Border M&A Challenges During COVID-19: An Overview For Buyers and Sellers*, STEPTOE (June 1, 2020), <https://www.steptoelaw.com/en/news-publications/cross-border-mergers-and-acquisitions-during-covid-19-an-overview-for-buyers-and-sellers.html>.

24 Engert et al., *supra* note 17.

25 See Thomas W. Christopher et al., *COVID-19: Due Diligence Considerations for M&A Transactions*, LATHAM & WATKINS (May 13, 2020), <https://www.lw.com/thoughtLeadership/covid-19-due-diligence-considerations-for-mergers-and-acquisitions-transactions>.

devise an effective integration plan was already incredibly complex prior to the pandemic.<sup>26</sup> Within the “new normal” created by Covid-19, some unique obstacles exist to identifying interfirm cultural chasms that might damn the deal.

In the midst of the Covid-19 pandemic, most if not all, cultural due diligence will be conducted virtually or remotely. As a result, acquisition teams will experience difficulty in understanding the inner-workings of an organization without the typical person-to-person interactions, without walking the floors and without the ability to read a “vibe” from the hallways. In fact, even if site visits are possible, many key employees may be working remotely.<sup>27</sup> This lack of cultural data, especially the “gut feel” data, could hinder effective deal valuation and structuring.<sup>28</sup> And more profoundly, many cultural and compatibility risks may be hidden or festering (e.g., temporary and/or reoccurring layoffs, remote working arrangements, health-related absences). As a result, uncovering those pandemic inflicted risks may require conducting due diligence with a much sharper lens.<sup>29</sup>

Moreover, heavy restrictions on travel make assessment of working environments logistically difficult if not impossible.<sup>30</sup> The focus here remains the physical spaces within which corporations operate and the working environments employees and managers inhabit.<sup>31</sup> Those physical spaces necessarily affect cultural development and working norms. As Covid encourages remote work disconnected from traditional physical workplaces, cultural assessment becomes even more problematic, especially if the duration of those new working conditions remains uncertain.

Finally, the abrupt absence of communal interaction outside formal work assignments hinders robust assessment of intangibles associated with workplace

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26 See Reinhard Guggenberger, *How HR Can Contribute In Mergers and Acquisitions*, FORBES (Oct. 24, 2019), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2019/10/24/how-hr-can-contribute-in-mergers-and-acquisitions/#37784b2e61e6>.

27 See Erik Brynjolfsson et al., *COVID-19 and Remote Work: An Early Look at US Data*, NAT'L BUREAU OF ECON. RES. (June 2020), <https://www.nber.org/papers/w27344.pdf> (discussing that about half of all workers surveyed during the pandemic are working remote and a higher share of employment in information work including management, professional and related occupations were more likely to shift toward working from home).

28 See *People Risks in M&A Transactions*, MERCER, <https://www.mercer.com/our-thinking/people-risk.html> (reporting that the highest people risks includes failure to consider culture fit).

29 See Matt Brubaker, *Why Rigorous Human Capital Analysis are Crucial for Pandemic Era Valuations*, MERGERS & ACQUISITIONS (July 20, 2020), <https://www.themiddlemarket.com/opinion/why-rigorous-human-capital-analyses-are-crucial-for-pandemic-era-valuations>.

30 See Harroch et al., *supra* note 7; Thompson & Melia, *supra* note 23.

31 See, e.g., Dan Denison & Ia Ko, *Cultural Due Diligence in Mergers and Acquisitions*, 15 ADVANCES IN MERGERS & ACQUISITIONS 53, 60 (2016).

satisfaction.<sup>32</sup> Studies routinely demonstrate a link between worker productivity and job satisfaction.<sup>33</sup> Elements affecting job satisfaction often include certain fringe and non-monetary benefits including collegiality, a sense that voices are respected, respect for diversity, accessible child day care, and onsite recreation facilities, among others.<sup>34</sup> As corporate actors take a (temporary) hiatus from the traditional workplace and its daily routines, it becomes incredibly difficult to assess the importance of intangible elements of corporate culture that may in the end have a significant effect on profitability.

### III. CULTURAL DUE DILIGENCE STRATEGIES IN THE PANDEMIC

How then can acquisition teams adequately assess the risk of culture incompatibility and post-merger integration viability of two distinct cultural entities in the wake of the pandemic? In addressing this pandemic “new normal,” acquisition teams should consider development of advanced technologies and new forensic strategies to identify potential risks. By applying somewhat unconventional tools, such as internal and external cultural surveys, internal dialogue venues to understand and stem cultural rifts, and predictive analytics to identify new avenues for cultural cohesion, integration teams can gain a much more robust understanding of cultural risks and potential rewards that could materially affect deal price, the structure of the transaction, and the likelihood of long-term post-merger success.<sup>35</sup>

#### A. Utilize Artificial Intelligence

Even before the Covid-19 crisis, new technologies, such as Artificial Intelligence (“AI”), were rapidly changing the process of M&A due diligence.<sup>36</sup> Advanced data capture and predictive analytics have enabled transaction teams to shift from a reliance on data spreadsheets to managing massive quantities of data in ways that promote smarter and faster decisions throughout the M&A lifecycle.<sup>37</sup> AI has also enabled more accurate data collection, processing, and

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<sup>32</sup> See Chris Cancialosi, *Why Company Culture Is Critical To M&A Success*, FORBES (July 11, 2017), <https://www.forbes.com/sites/chriscancialosi/2017/07/11/why-company-culture-is-critical-to-ma-success/#8239e4d4168b>.

<sup>33</sup> See Samuel Edwards et al., *Examining the Relationship Between Workplace Satisfaction and Productivity*, INC. (Oct. 29, 2015), <https://www.inc.com/samuel-edwards/examining-the-relationship-between-workplace-satisfaction-and-productivity.html>.

<sup>34</sup> See *id.*

<sup>35</sup> See Martin Hirt et al., *Bubbles Pop, Downturns Stop*, MCKINSEY Q. (May 21, 2019), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/bubbles-pop-downturns-stop> (discussing resilience and impact to organizational change).

<sup>36</sup> See Michael R. Siebecker, *Making Corporations More Humane Through Artificial Intelligence*, 45 J. CORP. LAW 101–13 (2019).

<sup>37</sup> See *id.*

synthesis in pre-merger contract review and compliance risk assessments.<sup>38</sup> Moreover, AI tools can apply rules to data, learn over time with the acquisition of new data, and adapt to unforeseen changes.<sup>39</sup> These capabilities have reliably produced huge productivity gains and cost savings for dealmakers.<sup>40</sup>

Now, the pandemic “new normal” necessitates prioritizing innovation to unlock post-crisis growth by expanding AI to enable remote cultural due diligence data capture and analysis.<sup>41</sup> Both the cultural due diligence and negotiation phases can gain insight into what cultural incompatibility risks the deal will likely encounter by collecting data that transaction teams have been historically unable to collect, clean and analyze.<sup>42</sup> Acquisition teams can now direct AI and machine learning technologies to sift through and interpret large amounts of corporate culture data points gathered from internal servers and external websites.<sup>43</sup> Analytics can establish how internal and external messages and cultural themes connect in order to build a more accurate picture of the how a target company might adapt, pivot, and address challenges brought on by the pandemic (or any other matter).<sup>44</sup> Moreover, through monitoring of a target company’s key messages internally, externally, or through corporate driven communications, cultural due diligence becomes enriched by identification of changes in tone of communications over time.<sup>45</sup> These cultural themes may indicate a resistance to change, expose critical culture issues, or trigger a need to address negative perceptions.<sup>46</sup> AI tools can also be used to summarize themes from conversations that occur through email, public forum postings, and

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38 See William Choe et al., *Powering Opportunity: How dealmakers are harnessing AI*, WHITE & CASE (August 7, 2018), <https://www.lexology.com/library/detail.aspx?g=c2bae896-d804-4f0c-a406-859469755bd4>.

39 See Ana Isabel Canhoto et al., *Artificial Intelligence and Machine Learning as Business Tools: A Framework for Diagnosing Value Destruction Potential*, 63 BUS. HORIZONS 183–93 (2020).

40 See *Not using analytics in M&A? You may be falling behind*, DELOITTE, <https://www2.deloitte.com/ca/en/pages/finance/articles/analytics-m-and-a-ia.html>.

41 See Jordan Bar Am et al., *Innovation in a crisis: Why it is more critical than ever*, MCKINSEY & CO. (June 17, 2020), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/innovation-in-a-crisis-why-it-is-more-critical-than-ever>.

42 See *Using Advanced Analytics to acquire and retain the best talent during M&A*, MCKINSEY & CO., <https://www.mckinsey.com/business-functions/organization/our-insights/the-organization-blog/using-advanced-analytics-to-acquire-and-retain-the-best-talent-during-m-and-a>.

43 See ROSARIO GIRASA, *ARTIFICIAL INTELLIGENCE AS A DISRUPTIVE TECHNOLOGY* 46 (Palgrave Macmillan) (2020).

44 See Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence: What It Can – and Cannot – Do for Your Organization*, HARV. BUS. REV. (Aug. 7, 2017), <https://hbr.org/cover-story/2017/07/the-business-of-artificial-intelligence>.

45 See Girasa, *supra* note 43, at 47–51 (discussing the various ways AI is used in marketing, advertising, entertainment and consumers).

46 See *id.*



social media in such a sophisticated manner that shared moods and attitudes of conversation participants can be identified and tracked.<sup>47</sup>

AI tools can also assist in compiling more granular cultural data that would traditionally take untold hours for acquisition teams to formulate manually. For example, acquisition teams can identify a target company's public partner relationships, summarize customer feedback, synthesize employee reviews, or integrate survey data from external sources.<sup>48</sup> Furthermore, with the use of AI tools, more channels for data mining become available for cross reference and validation.<sup>49</sup> For example, once a cultural issue is identified through one mode of data, the potential issue can be benchmarked against behavior metrics or against external business news to signal alarms regarding employee, market, or customer sentiment.<sup>50</sup>

Finally, the adoption of AI tools in cultural due diligence analysis requires care and expertise. Acquisition teams should have a solid understanding of how AI will be used in the transaction and what data is available regarding the target company.<sup>51</sup> Without proper analysis and guidance from the acquisition team, AI tools may review and compile data that is opinion-driven, unverified, incomplete, or misleading.<sup>52</sup> Like all data systems, AI tools are only as good as the data input into the system. Acquisition teams need to be well versed in understanding and managing AI data to avoid bias and gain reliable direction.<sup>53</sup>

### *B. Conduct Surveys to Evaluate Cultural Risks*

In addition to AI tools and new due diligence technologies assisting acquisition teams in identifying underlying culture risks, informal and formal surveys may help to substantiate or evaluate cultural risks presented by the pandemic.<sup>54</sup> Given the limitations and ongoing restrictions related to Covid-19,

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47 See Sterling Miller et al., *Benefits of Artificial Intelligence: What Have You Done for me Lately*, THOMSON REUTERS, [https://static.legalsolutions.thomsonreuters.com/static/pdf/S045388\\_3\\_Final.pdf](https://static.legalsolutions.thomsonreuters.com/static/pdf/S045388_3_Final.pdf).

48 See Siebecker, *supra* note 36, at 110–13, 128–37.

49 See Presanna Tambe et al., *Artificial Intelligence in Human Resources Management: Challenges and a Path Forward*, CAL. MGMT. REV., 61(4) 19-21 (2019) (discussing AI applications in the Human Resources data generation stage.)

50 See Michael McDonald, *The Multiple Benefits of Artificial Intelligence*, CORPORATE COMPLIANCE INSIGHTS, <https://www.corporatecomplianceinsights.com/the-multiple-benefits-of-artificial-intelligence/> (discussing the use of natural language processing, transcription, translation and voice and text analysis algorithms to determine unusual employee behavior and flag issues for management attention).

51 See Siebecker, *supra* note 34, at 110-13, 128-37.

52 See *id.*

53 See *id.*

54 See Tiffany Yates et al., *M&A: Assessment Key To Avoiding a Culture Clash*, GRANT THORNTON (Oct. 29, 2018), <https://www.grantthornton.com/library/articles/advisory/2018/M-and-A-assessment-key-avoiding-culture-clash.aspx>.

gathering sufficient attitudinal data may require unconventional methods. Remotely hosting interviews and focus groups may be an acquisition team's only choice in getting a sense of the attitudes, cultural preferences, and decision-making styles within an organization.

Informal interviews and focus groups can provide acquirers the opportunity to vet out important similarities and differences that affect post-merger compatibility.<sup>55</sup> Those informal interviews or internal climate surveys can be carried out virtually by top executives, the target company's deal team, mid-management, or key employees.<sup>56</sup> As an example, when Johnson Wax was negotiating to buy DiverseyLever for approximately \$1.6 billion, CEO Greg Lawton spent more than 100 hours talking informally with executives to generate a comprehensive pre-merger communications program regarding all stakeholders.<sup>57</sup> In the pandemic, acquisition teams can build a fuller picture of employee attitudes by informally exploring key cultural drivers derived from informal interactions in both companies. Those key cultural drivers include employee beliefs about the target company, general assumptions about firm values, and expected behaviors associated with those values.<sup>58</sup> Only by identifying latent issues relating to all three attitudinal factors can value generating integration solutions be developed.<sup>59</sup>

In addition, informal climate surveys provide an incredibly useful tool to ferret out potential legal, regulatory, employee, or integration issues.<sup>60</sup> For example, an internal climate survey designed to investigate whether the target company established emotional and workforce stability can determine whether the company is following government regulatory mandates, especially related to Covid-19.<sup>61</sup> Informal surveys can also lead to uncovering information regarding how business leaders execute decisions in terms of speed, influence, and effectiveness. Each element could have serious consequences to the deal price, structure, or probability of successful integration.<sup>62</sup>

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55 See NUNO FERNANDES, *THE VALUE KILLERS: HOW MERGERS AND ACQUISITIONS COST COMPANIES BILLIONS—And How to Prevent It*, 41–45 (Palgrave Macmillan) (2019).

56 See David Harding & Ted Rouse, *Human Due Diligence*, HARV. BUS. REV. (April 2007).

57 See *id.*

58 See Fernandes, *supra* note 57 at 42–43.

59 See *id.*

60 See Harding, *supra* note 58, at 128.

61 See Jonathan Emmett et al., *COVID-19 and the Employee Experience: How Leaders Can Seize the Moment*, MCKINSEY & COMPANY, <https://www.mckinsey.com/business-functions/organization/our-insights/covid-19-and-the-employee-experience-how-leaders-can-seize-the-moment> (discussing how organizations that stepped up in addressing the crises had a tangible impact on their employees).

62 See *id.*

Cultural data can be further substantiated through a more formal process of internal data analysis and formal employee surveys.<sup>63</sup> Data companies like IDC offer employee surveys and internal assessments that analyze employee sentiment to uncertainty, diversity, and inclusion criteria. These formal surveys can assess in a more detailed manner cultural attitudes regarding financial security; health coverage; opportunities for advancement; antidiscrimination policies; and representation of women and minorities in management positions. These surveys can be used not only to identify areas of potential cultural incompatibility but to shed light on potential cultural synergies critical to sustained post-merger health.<sup>64</sup>

### *C. Embrace Cultural Definition Opportunities*

For culture issues that can be mitigated and managed, acquisition teams should turn them into an advantage by implementing cultural definition opportunities and integration interventions.<sup>65</sup> Using the newly available cultural data, teams should also formulate business strategies and messages which mitigate cultural roadblocks and lead to acceptance of the change.<sup>66</sup> The strategies and messages should prioritize the vision of an evolving organization that addresses the pandemic, as well as market challenges or opportunities faced by both organizations. Furthermore, the unification of the combined company's goals and objectives in addressing the special challenges presented by the Covid-19 pandemic might be useful in overcoming any employee or stakeholder resistance to the deal.<sup>67</sup>

Communication of those strategies and key messages is a critical aspect of cultural due diligence that also must be implemented.<sup>68</sup> In conventional acquisitions, teams often fail to establish communications that address the concerns of employees and other corporate stakeholders.<sup>69</sup> A particular concern in the Covid-19 environment is overcoming the view of the acquiring company being opportunistic in its acquisition of an organization struggling through the

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63 See Oliver Engert et al., *supra* note 20.

64 See Tim Galpin, *Avoid M&A Assimilation heartburn: an actionable model for culture due diligence and integration*, STRATEGY & LEADERSHIP, 47(4) at 20-25 (2019) (discussing a methodology for comparing organizational cultures of combining firms).

65 See Engert et al., *supra* note 20.

66 See Elizabeth Long Lingo & Kathleen L. McGinn, *A New Prescription for Power*, HARV. BUS. REV., July–Aug. 2020, <https://hbr.org/2020/07/a-new-prescription-for-power> (discussing generally the ability of leaders to enable change management).

67 See Jeremy Hof & John Luce, *Culture Shock: Anticipate the Risks When Companies Merge*, KPMG (2019), <https://advisory.kpmg.us/articles/2019/anticipate-risks-when-non-tech-tech-companies-merge.html> (discussing overcoming a culture gaffe by focusing on winning together).

68 See David Baral et al., *M&A Communications: Communicating to engage and motivate people throughout the deal*, PwC (June 2017), <https://www.pwc.com/us/en/services/deals/pdf/pwc-ma-integration-communications.pdf>.

69 See *id.*

effects of the pandemic.<sup>70</sup> The acquiring company can face substantial resistance from the target company workforce when the value of the deal is viewed as beneficial to just the acquirer. The target company workforce is therefore less willing to rally behind the deal viewing integration as nothing more than the acquirer digesting the target.<sup>71</sup> The impacts of the Covid-19 pandemic, however, present a platform for objective and critical transformation that both acquirer and target workforces can rally behind in a unified post-crisis strategy. The traditional market and business challenges are no longer the primary threat. The “new normal” presents a message of companies consolidating to protect against future “black swan” destructive and disruptive events. Transformation “is never stronger than when adapting to a crisis.”<sup>72</sup> Acquirers should articulate how the acquisition will benefit both sides given the new financial reality and stabilize the entire system allowing the combined companies to manage the Covid-19 crisis.<sup>73</sup>

While culture due diligence will be conducted in new and creative means, harnessing emerging AI due diligence technology and considering unconventional ways of collecting data can help to complete an internal and outside-in culture compatibility assessment. These assessments will enable better price and deal structure and better prepare the organization for successful post-merger integration.

#### IV. IMPLICATIONS

Attending to the new normal in M&A regarding cultural due diligence and integration planning will likely have a number of important implications. First, the cost of conducting an acquisition transaction will most certainly be affected. To the extent AI and other new information generating strategies will need to be relied on more heavily, a shift in cost allocation to those modalities—and to consultants with expertise in their use—should be anticipated. At least with respect to AI, a move to technology assisted transactions was well underway prior to Covid.<sup>74</sup> Moreover, experts predict a more accurate and cost-effective due diligence process through AI.<sup>75</sup> Still, to the extent that technological move has been gradual prior to Covid, the pandemic provides a strong impetus for

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<sup>70</sup> See Torrey McClary et al., *INSIGHT: Health-Care M&A Post-Pandemic-Opportunities, Not Opportunism*, BLOOMBERG L. (June 11, 2020, 2:00 AM), <https://news.bloomberglaw.com/health-law-and-business/insight-health-care-m-a-post-pandemic-opportunities-not-opportunism> (discussing perceptions in healthcare mergers in the time of the pandemic crisis).

<sup>71</sup> See *id.*

<sup>72</sup> See Steve Krousos, *How Do You Find Clarity In the Midst of a Crisis?*, GLOBAL CAP. CONFIDENCE BAROMETER (Mar. 2020), [https://www.ey.com/en\\_gl/ccb/how-do-you-find-clarity-in-the-midst-of-covid-19-crisis](https://www.ey.com/en_gl/ccb/how-do-you-find-clarity-in-the-midst-of-covid-19-crisis).

<sup>73</sup> See Torrey McClary et al., *supra* note 70.

<sup>74</sup> See Siebecker, *supra* note 36, at 105–113.

<sup>75</sup> See *id.*

speedier adoption. With regard to other cultural information gathering techniques needed to overcome the barriers Covid presents, the initial adoption costs may be significant. To the extent those methods prove effective outside pandemic conditions, the change simply represents an operational investment that could be effectively amortized over the long term.

Second, deal structures will likely change given the increased uncertainty associated with Covid hampered due diligence. Market experts suggest there will be changes in “material adverse effect” provisions, increased information demands, greater specificity in Covid related representations and warranties, and post-closing price adjustments, among others.<sup>76</sup> Discussing the details of precisely how those deal structures would change in response to Covid lies far outside the scope of this short article. Nonetheless, effective due diligence plays an incredibly important role in shaping the price and terms of any acquisition transaction. To the extent new cultural due diligence strategies in the wake of the pandemic shed light on opportunities to gather cultural information or conversely reveal the inability to gain comfort regarding post-merger cultural compatibility, the mechanisms for securing expected deal value will necessarily evolve.

Third, flexibility and an appreciation for uncertainty will need to occupy more prominent roles in any integration plan. In many respects, the path of the pandemic has already sufficiently established that in many areas, we simply “don’t know what we don’t know.” That persistent uncertainty counsels adopting a lithe and malleable approach to integration—an approach that attempts to gain comfort in advance with uncertainty itself.<sup>77</sup> The lesson is not that M&A strategies should forgo new strategies for fact finding and simply rely on sophisticated deal structures to recoup anticipated deal value when integration efforts falter. Instead, the implication for cultural due diligence in the wake of Covid is that the very notion of what constitutes corporate culture going forward may be fundamentally changed. Attending to that definitional evolution and how firm culture gets embraced or eschewed represents an essential focus of proper acquisition planning.

## V. CONCLUSION

The advent of the Covid-19 pandemic has created substantial hurdles for negotiating, pricing, and effecting successful M&A transactions. Although acquisition activity has certainly declined in the pandemic’s wake, an increased reliance on new and emerging strategies for conducting effective cultural due diligence could help the market in M&A rebound. Those new strategies might likely affect the cost of conducting M&A transactions, the deal structures employed, and the need to embrace uncertainty in planning for successful

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<sup>76</sup> See Harroch et al., *supra* note 7.

<sup>77</sup> See Mark Herndon & John Bender, *What M&A Looks Like During the Pandemic*, HARV. BUS. REV. 3–5 (June 10, 2020).

integration of firm cultures. In the end, although the pandemic should not prevent effective cultural due diligence in M&A transactions, the pandemic might change the very notion of what corporate culture entails going forward.