

The background features a dynamic, abstract design with numerous thin, parallel lines in shades of red and blue, creating a sense of motion and depth. The lines are most concentrated in the upper right quadrant and fan out towards the bottom left.

**Morgan Lewis**

**M&A ACADEMY:**  
**Private Equity Deals in a Changing  
Environment**

**December 8, 2020**

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# PRESENTERS



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Partner  
Morgan Lewis



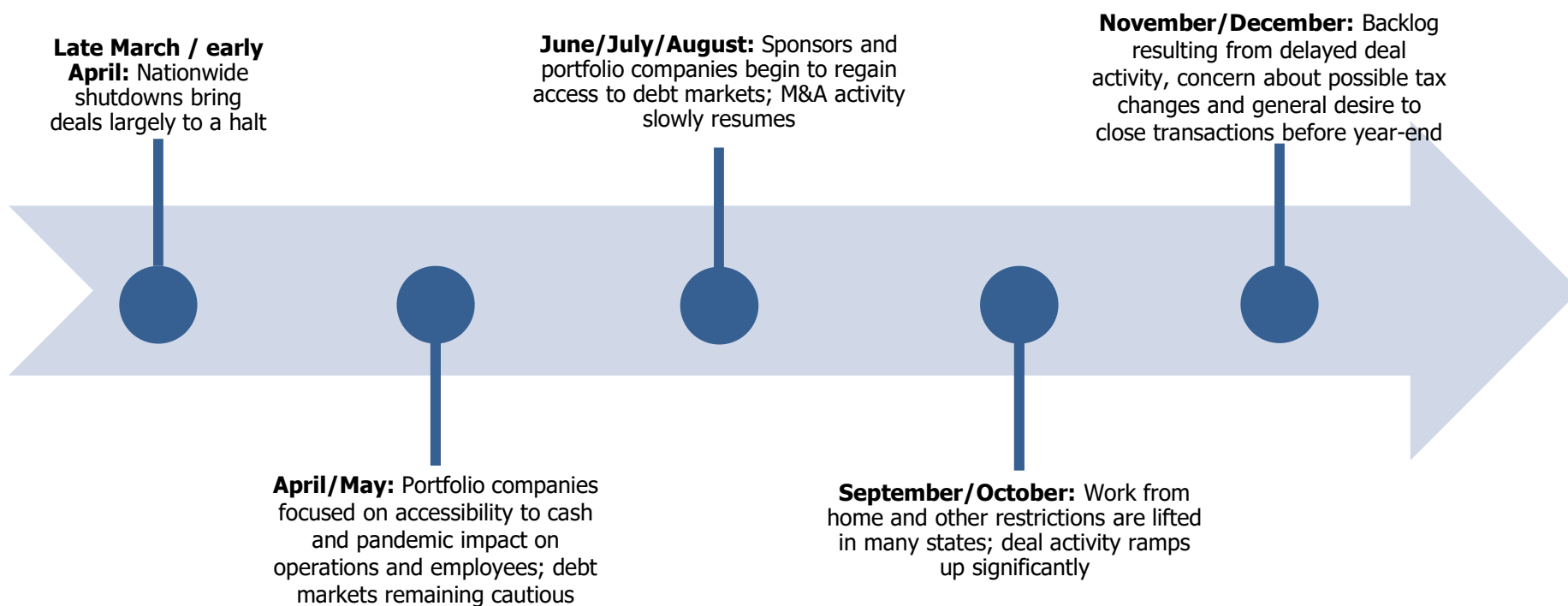
**Adam Prince**  
Associate  
Morgan Lewis

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# **COVID-19 IMPACT ON THE PRIVATE EQUITY LANDSCAPE:**

**HOW IT STARTED,  
WHERE WE ARE TODAY, AND  
WHAT'S NEXT**

# COVID-19 Impact on Deal Flow: A Timeline



The background features a dynamic, abstract composition of light trails. On the left, there are numerous thin, parallel lines in shades of red and orange, creating a sense of motion and energy. These lines transition into a darker blue on the right, where they become more blurred and integrated into a larger, flowing shape. The overall effect is one of speed and modernity, typical of a corporate or financial presentation.

# **COVID-19 IMPACT ON THE PRIVATE EQUITY LANDSCAPE:**

## **HOW IT STARTED**

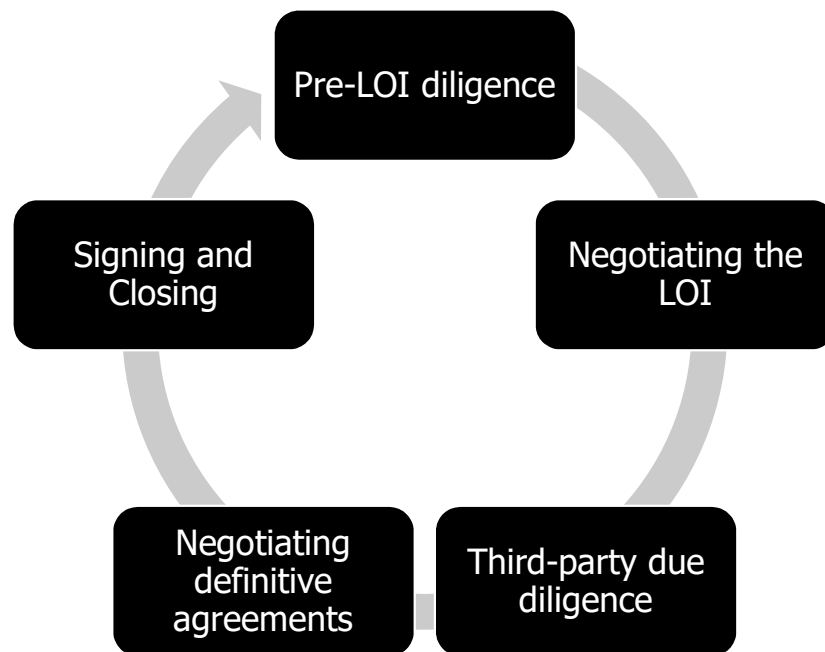
## How It Started (The Early Months of COVID-19)

- **March 13-20:** COVID-19 declared a National Emergency; states begin to implement shutdowns and other mitigation measures that restrict large gatherings and many in-person work settings
- **March 27:** The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law, introducing the Paycheck Protection Program (the "PPP"), which funded an initial \$349 billion and subsequent \$310 billion on April 24
- **April 3:** PPP loan applications first become available; with much of the economy shut down, portfolio companies worked quickly to determine eligibility and apply for the loans made available under the PPP
- Deal flow largely on hold with companies focused on accessing cash (either through PPP loans, current credit facilities or sponsor support) and managing disruption in portfolio company revenues and workforce

## How It Started (The Early Months of COVID-19)

- Deal activity slowly resumes, starting with:
  - Smaller add-ons with strong strategic fits not requiring large cash outlays
  - Transactions in industries less impacted by COVID-19 (healthcare, software, technology, telecom, pharma)
  - Distressed businesses creating opportunity for “bargains”
- Much more limited deal activity with:
  - Platform acquisitions or other transactions requiring new third party debt
  - Transactions in industries more heavily impacted by COVID-19 outside of distressed sales

## How It Started: Initial Impact on the Life Cycle of a Deal





## Initial Impact on the Life Cycle of a Deal: Letter of Intent

- **Pre-LOI diligence:**
  - With many work environments remaining virtual and challenges with travel, the industry saw a major shift away from in-person meetings and site visits
- **Negotiating the LOI:**
  - Buyers requested longer exclusivity periods to account for the challenges in completing business and legal due diligence
  - Sellers remained focused on deal certainty
    - Many leveraged the fact that their industry was less impacted and/or business improved during pandemic
    - Some buyers considered full equity funding to bridge credit market challenges

## Initial Impact on the Life Cycle of a Deal: Third Party Due Diligence

- Diligence focused on certain pandemic operational issues
  - Has the target been in compliance with state and local stay-at-home and related orders?
  - If the target was allowed to remain open, what policies and procedures did it put in place to ensure the safety of employees and others?
  - If the target had to shut down, how did the shutdown impact the business?
  - Remote working
  - IT infrastructure
  - Impact on short-term and expected long-term revenue/financials
  - Expense management

## Initial Impact on the Life Cycle of a Deal: Negotiating Definitive Agreements; Signing and Closing

- **Transaction Structure:**
  - Buyers looked to earn-outs, seller rollover and other forms of deferred purchase price to bridge financing and manage potential increases or decreases in revenue
  - Consideration of broader termination rights for COVID-19-related shutdowns and impacts
- **Representations and Warranties; Insurance:**
  - New representations and warranties emerged, including with respect to PPP loans, workforce impact, and stronger representations regarding impact to material customers and suppliers
  - Rep and Warranty Insurance industry initially created broad and comprehensive COVID-19-related exclusions which have since largely been tailored or eliminated
- **Treatment of PPP Loans:** Tension between Sellers looking for benefit of forgiveness and Buyers looking to avoid risk

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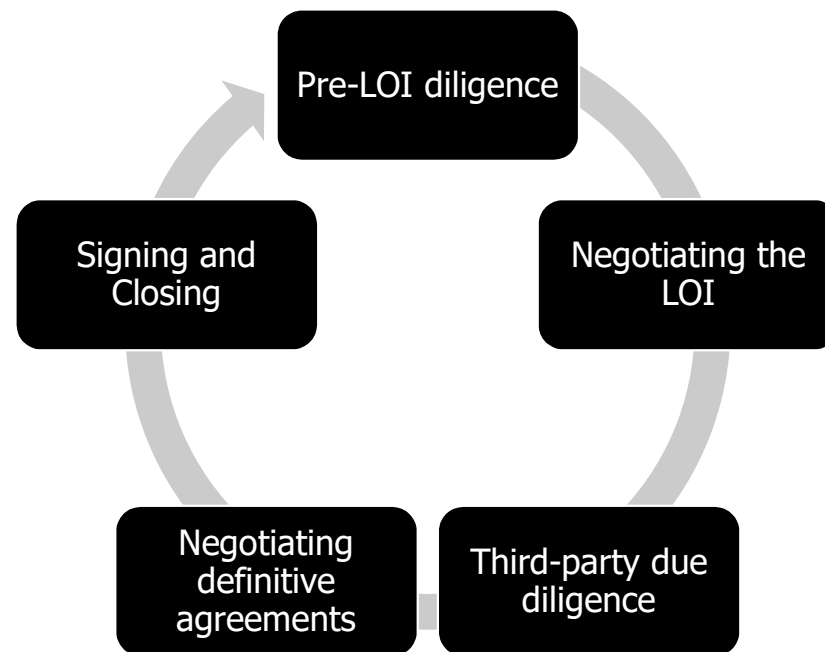
**COVID-19 IMPACT ON THE  
PRIVATE EQUITY LANDSCAPE:**

**WHERE WE ARE TODAY**

## Where We Are Today: The Market Adjusts

- As companies began to adjust to the new norms of COVID-19, private equity deals did as well.
- Stay at home and other state and local orders become lifted or limited in many states, with companies allowed to resume operations on a normal or modified basis.
- Companies implemented more organized policies regarding safety, work-from-home operations, travel and back to office protocols.
- Buyers able to diligence some financial performance during COVID-19.
- **October 2:** SBA issued guidance on the treatment of PPP loans in M&A transactions, allowing parties who received these loans a path forward to closing without forgoing the benefits of the PPP loans and obtaining SBA consent.

## Where We Are Today: Current Impact on the Life Cycle of a Deal



## Current Impact on the Life Cycle of a Deal: Letter of Intent

- **Pre-LOI diligence:**
  - Even as travel restrictions have been largely diminished, meetings and site visits remain heavily skewed toward video-conference as parties continue to be concerned about travel in particular during fall spikes
  - Parties balancing benefits of in-person meetings and site visits with being mindful of safety concerns have engaged in creative diligence strategies
- **Negotiating the LOI:**
  - Exclusivity periods remain longer than they were pre-COVID-19
  - Seller favorable market remains largely intact

## Current Impact on the Life Cycle of a Deal: Third Party Due Diligence

- Buyers focusing more on due diligence, including:
  - Pro forma financial information taking into account COVID-19 impact, impact on workforce and business, cost savings/increased expenses, revenue impact
  - Compliance with state and local measures
  - Impact of any shutdown and/or remote working
  - IT infrastructure
  - Ability of the target to maintain the status quo
  - PPP loans: Target eligibility, impact on transaction, audit risk



## **Current Impact on the Life Cycle of a Deal: Negotiating Definitive Agreements; Signing and Closing**

- **Transaction Structure:**
  - Asset purchase transactions; increased earn-outs, seller notes and seller rollover.
- **Definitions**
  - MAE definition: Impact of COVID-19.
  - Ordinary Course: Sellers are specifying that actions taken in the “ordinary course” include actions in response to COVID-19.
- **Representations and Warranties; Insurance**
- **Treatment of PPP Loans**

# Four Options for Accommodating PPP Forgiveness

## Option 1

Wait to execute on the transaction until the loan is forgiven

## Option 2

Loan forgiveness a condition to closing in a non-simultaneous sign and close transaction

## Option 3

Keep the PPP loan in place post-closing in order to accommodate a future forgiveness determination; escrow the PPP loan amount

## Option 4

Repay the PPP loan at or prior to closing; parties to agree on who will bear the risk of cost of repayment

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# **COVID-19 IMPACT ON THE PRIVATE EQUITY LANDSCAPE:**

## **WHAT'S NEXT**

## What's Next and When

- While the market has started to adjust to the new norms of a COVID-19 world, questions remain:
  - When will companies go back to pre-COVID normal, including more stability, return to office, increased travel?
  - How will COVID-19 change the way we do business and impact on M&A market?
  - How will these changes impact the life cycle of a private equity deal?

The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel lines in shades of red and orange streak across the frame, creating a sense of rapid movement. These lines transition into a more structured, grid-like pattern of blue and white lines on the right, suggesting a digital or technological environment. The overall effect is one of speed and modernity.

# Key Takeaways

## Key Takeaways

- Since the start of the COVID-19 pandemic, private equity firms and their portfolio companies have shown tremendous resilience
- Deal activity is very high, and portfolio companies have adjusted to operating in this changed environment
- Certain positive and negative longer-term impacts remain, including (i) challenges with diligence resulting from limited travel and in-person meetings, (ii) navigating through unknown 2021, including ability to maintain consistency in customer and vendor relationships, and (iii) establishing and maintaining longer-term policies and procedures, including considering permanent changes to businesses which will reduce expenses over a longer period
- Private equity firms and their portfolio companies will continue to be creative and adaptive in their response to COVID-19, adjusting transaction timelines, structure, financing, diligence, representations and warranties and conditions to closing

**Q&A**

The background of the slide is an abstract composition of light trails. The top half is dominated by numerous thin, parallel lines in various shades of red and orange, creating a sense of motion and energy. These lines appear to originate from the right side and fan out towards the left. Below the red lines, there are several distinct, parallel streaks of bright blue and white light, also originating from the right and moving towards the left. The overall effect is that of a high-speed, futuristic environment or a data visualization. The colors transition from dark red on the left to a deep blue on the right, with the light trails providing a dynamic contrast.

# Biography



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As deputy practice area leader of the firm's private equity practice, Barbara J. Shander advises private equity funds and their portfolio companies on structuring and negotiating complex business deals. These transactions include mergers and acquisitions, dispositions, equity financings, joint ventures, commercial agreements, incentive equity and other compensation plans, leveraged dividends, corporate governance, and general corporate matters. Barb represents buyers and sellers in transactions involving privately held businesses, and subsidiaries and divisions of public companies, and has experience in roll-up, corporate carve-out and distressed transactions. She represents numerous private equity funds, ranging from lower middle-market funds to multibillion dollar funds.

In addition to advising institutional investors on portfolio investments and buy-out transactions, she serves as outside general counsel to numerous companies, and advises them on a variety of legal matters. Barb has experience in the use of representations and warranties insurance, and regularly uses this product in transactions representing both buyers and sellers. She has led numerous transactions of varying sizes in several sectors including healthcare, financial services, energy, utilities, retail, technology, telecommunications, and manufacturing. Barb is a prior board member of the Philadelphia chapter of the Association for Corporate Growth (ACG) and remains an active member of the chapter.



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Adam D. Prince advises clients on diverse business transactions, focusing on mergers and acquisitions and advising private equity funds and their portfolio companies. Adam also advises clients on venture capital and emerging growth company investments and transactional matters; finance and restructuring; and general corporate governance. Adam's clients represent diverse sectors including healthcare, media, technology, pharmaceuticals, retail, manufacturing, utilities, financial institutions, and energy. In law school, Adam served as an editor for the University of Pennsylvania Law Review. He holds a B.A. in philosophy, politics, and economics.

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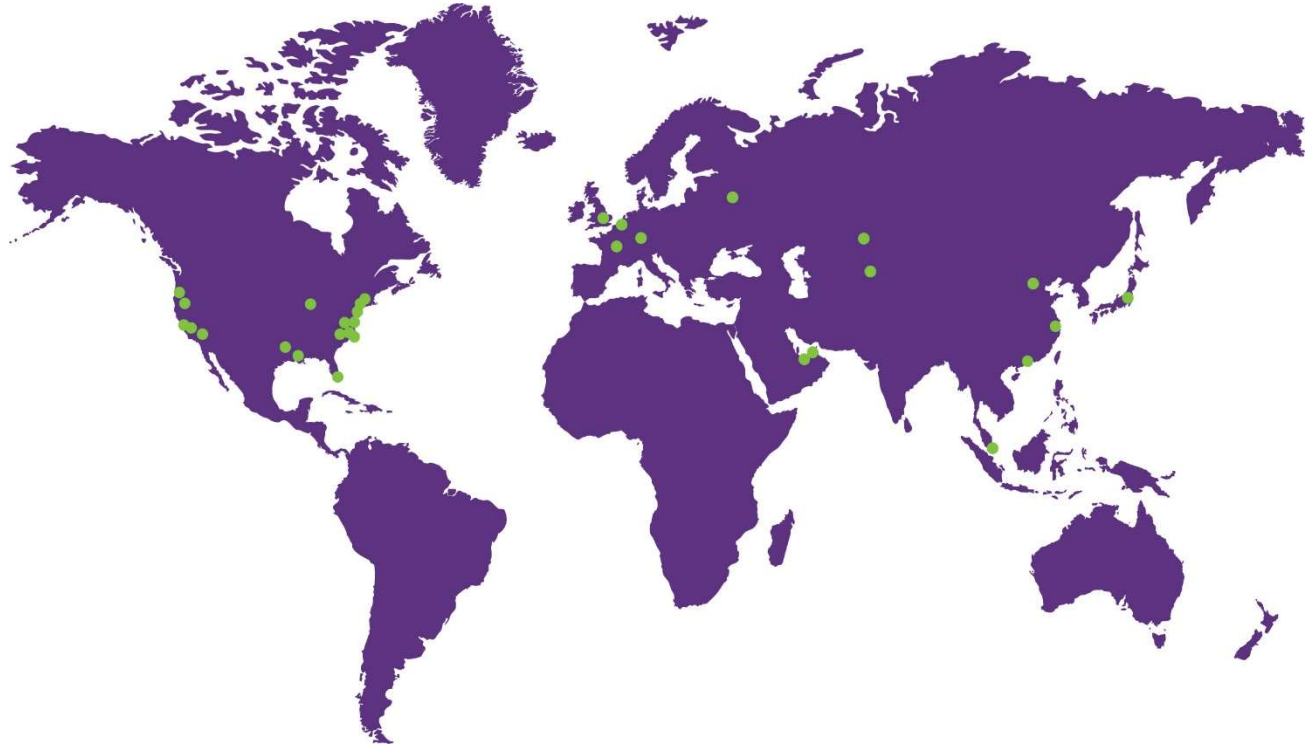
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