

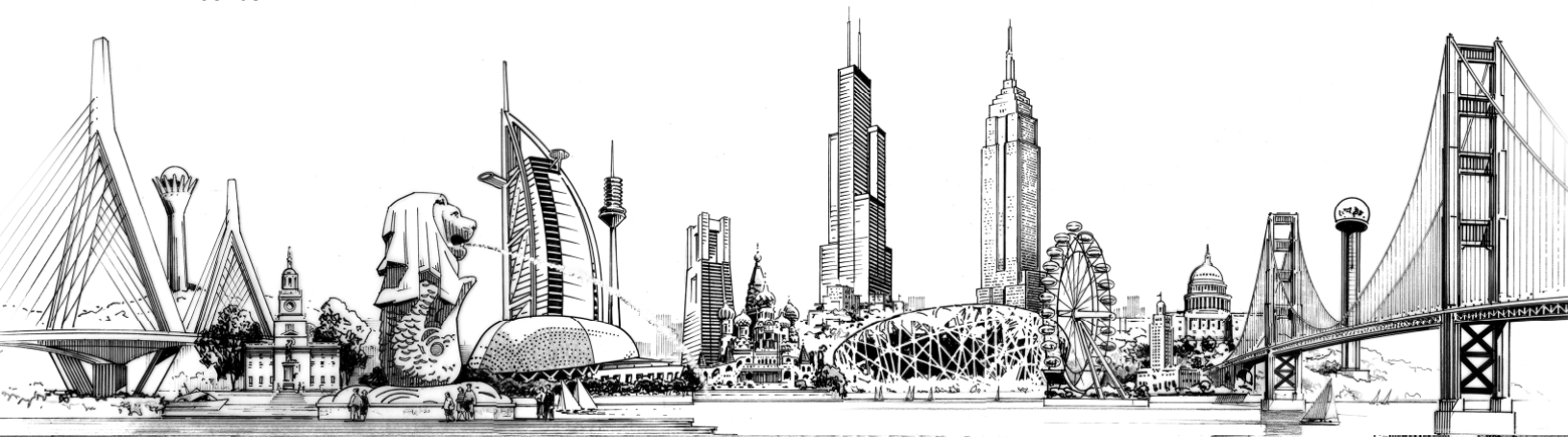
# Morgan Lewis

## 2015 – 2016 MORGAN LEWIS M&A ACADEMY

**REPRESENTATIONS AND WARRANTIES IN NOVEMBER  
10, 2015]**

Presenters: Gitte Blanchet and Erin Morley

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## Representations and Warranties [November 10, 2015]

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**Q: Will you speak to representations that covenants will be performed on/before Closing? Any special significance/treatment?**

**A:** Typically we do not see representations and warranties that discuss covenants but rather the covenants section of the agreement outlines actions to be taken on or prior to Closing.

**Q: You began the seminar with an explanation of how a "Material Adverse Effect" was extremely difficult to show/prove/win on. Why, then, is much of the drafting pinned to that standard? Aren't you better off not references a MAE?**

**A:** You're right that as a buyer it is often difficult to prove that an MAE has occurred and buyer's often resist inclusion of an MAE standard in representations and warranties. However, sellers typically want to include MAE qualifiers in order to limit the scope of the representations and warranties and the related scheduling burden in the disclosure schedules.

In response to the inclusion of an MAE, a buyer will likely try to negotiate for a "materiality scrape (or strip)." This means that for indemnification purposes, the concept of materiality (including MAE) is read out of the representations and warranties (other than the representation stating that no MAE has occurred) in the agreement (although the materiality/MAE qualifiers still apply for disclosure purposes). This concept will be discussed in greater detail at the Indemnifications session next week on November 17th. We hope you can attend that session, but please let us know if you have additional questions.

We hope that you find the foregoing Q&A to be helpful. If you have any other questions on representations and warranties please contact:

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