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The #MeToo Movement Migrates to M&A Boilerplate

ABSTRACT. In the #MeToo era, companies pay for unchecked sexual harassment with plummeting stock prices. Corporate lawyers have addressed this liability by developing the #MeToo clause in mergers and acquisitions (M&A) agreements. The #MeToo clause generally represents that, to a target company's knowledge, senior employees have not been subject to allegations of sexual harassment. This Note explains the clause's creation and evaluates its significance based on an original analysis of public filings and interviews with practitioners. It argues that the clause is a form of reactive M&A growth uniquely rooted in a movement driven by women of color rather than a temporary response to a one-off event. As a result, the clause is likely a permanent addition to M&A boilerplate. Moreover, this Note argues that the clause should not be viewed as an intentional effort by the M&A industry to curb sexual harassment, but rather as a tool to protect shareholder wealth and decrease shareholder risk. Nonetheless, it has the potential to improve antiharassment mechanisms in the workplace. Finally, this Note provides recommendations for shifting the clause's focus from cataloguing incidences of sexual harassment to improving reporting channels and policies. Implementing these recommendations would ensure that the clause serves not only corporate interests, but also the #MeToo movement's ideals.

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INTRODUCTION

The #MeToo movement has left its mark on corporate lawyering, but not through a slew of high-profile firings. Rather, the risk-averse field of corporate law has integrated #MeToo into one of its most significant tools: the mergers and acquisitions (M&A) agreement. Dubbed the “Weinstein clause” on Wall Street, this new provision began appearing in M&A contracts in early 2018, a few months after sexual-assault allegations against film producer Harvey Weinstein surfaced in the popular media. The clause exists in various forms, but generally represents that, to a target company’s knowledge, senior employees have not been subject to allegations of sexual harassment within a particular time span.

Reporters and pundits expressed surprise that a clause reflecting awareness of workplace sexual harassment would surface in the “male-dominated world of M&A advisory,”¹ the “male-dominated world of finance,”² or the “testosterone-infused Wall Street mergers and acquisitions market.”³ Such surprise, this Note argues, is misplaced. The clause does not stem from a desire for progressive reform, but is rather best understood as a tactical industry response to reduced tolerance for misconduct.

The Weinstein Company’s demise illustrates the economic power of such reduced tolerance. Before the *New York Times* first reported on allegations against Weinstein in October of 2017,⁴ the Weinstein Company’s board estimated that its television entity alone was worth around \$650 million.⁵ A few weeks after Weinstein’s infractions became public, an expert predicted massive discounts for interested private equity firms, perhaps up to forty percent.⁶ As

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1. Nabila Ahmed, *Wall Street Is Adding a New “Weinstein Clause” Before Making Deals*, BLOOMBERG (Aug. 1, 2018), <https://www.bloomberg.com/news/articles/2018-08-01/-weinstein-clause-creeps-into-deals-as-wary-buyers-look-for-cover> [https://perma.cc/2TFD-QL83].
 2. Emma Clarke, *How #MeToo and the “Weinstein Clause” Impact M&A*, *Crisis Comms*, VESTED (Oct. 17, 2018), <https://fullyvested.com/how-metoo-and-the-weinstein-clause-impact-ma-crisis-comms> [https://perma.cc/5B8W-LPQN].
 3. Erik Sherman, *Why You Might Start Seeing a ‘Weinstein Clause’ in Your Business Deals*, INC. (Aug. 2, 2018), <https://www.inc.com/erik-sherman/why-you-might-start-seeing-a-weinstein-clause-in-your-business-deals.html> [https://perma.cc/F684-6VXZ].
 4. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [https://perma.cc/RS25-ULTC].
 5. Ben Fritz et al., *Weinstein Co. Negotiating Possible Sale*, WALL ST. J. (Oct. 16, 2017), <https://www.wsj.com/articles/weinstein-co-negotiating-possible-sale-1508162396> [https://perma.cc/ZZU5-RZMV].
 6. *Id.*

nearly ninety women came forward to express that they had endured unwanted sexual contact from the Hollywood producer,⁷ the company's value plummeted. An investor group finally offered to pay about \$275 million for the entire company and to assume \$225 million in debt. After New York's attorney general filed a lawsuit against the company for its handling of the allegations, however, the deal fell through.⁸ A month later, the company filed for bankruptcy.⁹

Activist Tarana Burke, the woman who coined the term "Me Too" over a decade ago, has said that her work is "about survivors talking to each other."¹⁰ That's a far cry from corporate lawyers engaging in transactional negotiations. But even though an M&A provision addressing sexual harassment does not reflect industry concern for anything beyond risk mitigation, it certainly pressures companies to carry meaningful conversations about harassment into the deal room. Involving a wider range of actors in such discussions helps carry an onus that has traditionally fallen on victims of sexual harassment alone — "[t]he onus," in Burke's words, "to tell [their] stories, to elevate the conversation, . . . to keep the conversation going."¹¹

The Weinstein scandal may have been egregious enough to set off these conversations in deal rooms. But sustained interest in sexual harassment, this Note argues, was a product of the #MeToo movement's lasting economic impact on a range of industries. After Weinstein, the movement to expose miscreant executives spread quickly to other companies. Reputation and management consultancy firm Temin & Company compiled a database of high-profile individuals accused of sexual harassment between December 2015 and October 2018: a total of 810, from Bill Cosby to Brett Kavanaugh.¹² The firm identified a

7. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM EST), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001> [<https://perma.cc/4WXR-7TGV>].

8. Brooks Barnes, *How a Deal to Sell the Weinstein Company Fell Apart*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/business/media/weinstein-company-bankruptcy.html> [<https://perma.cc/TE2H-U6SP>].

9. Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html> [<https://perma.cc/Y32Z-3Z5K>].

10. Nikki Ogunnaik, *Tarana Burke Started the #MeToo Movement 10 Years Ago*, ELLE (Oct. 19, 2017), <https://www.elle.com/culture/a13046829/tarana-burke-me-too-movement-10-years-ago> [<https://perma.cc/CV4X-KJ55>].

11. *Id.*

12. Press Release, Temin & Co., *Between Cosby and Kavanaugh — 810 High-Profile Public Figures Accused of Sexual Harassment* (Oct. 3, 2018), <http://www.teminandcompany.com/in-the-news/2600-between-cosby-and-kavanaugh-810-high-profile-public-figures-accused-of>

“steep explosion” in public accusations after the Weinstein revelations.¹³ By October 2018, fifty-six CEOs were the subject of accusations.¹⁴ “[O]rganizations are paying attention to and acting on complaints more quickly,” Temin found, as “#MeToo begins to be seen as a real reputational risk.”¹⁵ The firm concluded that “leaders—CEOs and board directors—are looking for insight on why, why now, and how we can address the reputational risk of toxic workplace cultures.”¹⁶

The Weinstein scandal’s aftermath also showed that reputational costs arise even absent legal liability. Hours after Kate Upton accused Guess cofounder Paul Marciano of harassment on Twitter, the company’s shares dropped by almost eighteen percent—a loss of \$250 million in market value.¹⁷ The company’s public denial of Upton’s claims did not stop its shares from tumbling. Within three days of the *Wall Street Journal*’s publication of a story detailing allegations of assault against casino mogul Steve Wynn,¹⁸ who also denied the allegations, his company lost about \$3.5 billion in value.¹⁹ “Call it the cost of sexual harassment allegations in the age of the Me Too movement,” a *Fortune* reporter wryly noted.²⁰

Enter the Weinstein clause in March of 2018. The term “Weinstein clause” itself signals the clause’s focus—no business wants to be the next Weinstein Company, and no investor wants to accidentally acquire one. Despite its noble-sounding origins, the Weinstein clause merits close scrutiny. It was developed to maximize profits rather than social good, and even its incidental social impacts are not universally positive. By focusing on allegations of misconduct, the clause risks stigmatizing reports of sexual harassment—already a notoriously underreported phenomenon.

-sexual-harassment [https://perma.cc/TE9E-CPWJ]. To qualify for inclusion in the database, an incident must have received at least seven mentions by the popular media. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Samantha Cooney, *Companies Are Losing Millions After #MeToo Allegations Like Kate Upton’s Claim Against Guess’ Paul Marciano*, TIME (Feb. 2, 2018), <https://time.com/5130340/kate-upton-guess-stock-price> [https://perma.cc/DY23-DVNH].

18. Alexandra Berzon et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018), <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953> [https://perma.cc/29R7-Z5JA].

19. Lucinda Shen, *Wynn Resorts Loses \$3.5 Billion After Sexual Harassment Allegations Surface About Steve Wynn*, FORTUNE (Jan. 29, 2018), <http://fortune.com/2018/01/29/steve-wynn-stock-net-worth-sexual-misconduct> [https://perma.cc/L2VF-R5KN].

20. *Id.*

This Note examines these risks and downsides alongside other effects of the clause and suggests improvements to help maximize its potential benefits. Most centrally, I argue that the clause should focus on a company's reporting channels and harassment policies rather than the number of recorded sexual-harassment incidents. This reorientation would promote reporting channels and more effectively target the underlying risk of toxic workplace culture. Similarly, I suggest that the clause should target settlement agreements, which are more indicative of underlying harassment problems. Although the Weinstein clause's profit-maximizing origins might invite suspicion, I argue that the clause generally benefits the workplace by involving more corporate actors in conversations about harassment and by engaging with a long-term cultural shift driven by women of color.

One suggested change to the clause is adopted in this Note. Instead of referring to the provision clause as the "Weinstein clause," I have termed it the "#MeToo clause" to center the conversation on "power and privilege"²¹ rather than a specific offender. Admittedly, using this symbol in the context of corporate law risks "blunt[ing]" its "rage, despair, and horror"²² for ease of reference. But the #MeToo symbol has become so widespread²³ that its use in corporate law does not dilute its focus on victims of sexual harassment.

This Note uses interview data from practitioners and public M&A filings to examine the #MeToo clause's origins and evaluate its implications. In Part I, I provide background information on M&A agreements, discuss the origins of the #MeToo clause, and provide a content analysis of thirty-nine public filings featuring such a clause. Although public filings provide only a glimpse of all M&A deals, variations among these provisions show how the #MeToo clause can be tailored to assign liability, define the scope of harassment issues under scrutiny, and determine due-diligence measures. My analysis of contract language is further informed by qualitative data obtained through interviews with twenty-seven practitioners. These interviews provide broader insights on the public filings based on practitioners' experiences in both public and private transactions.

21. See Elizabeth Adetiba, *Tarana Burke Says #MeToo Should Center Marginalized Communities*, NATION (Nov. 17, 2017), <https://www.thenation.com/article/tarana-burke-says-metoo-isnt-just-for-white-people> [<https://perma.cc/7565-MC8L>].

22. Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 2 (1995).

23. See Erin Gallagher, *#MeToo Hashtag Network Visualization*, MEDIUM (Oct. 20, 2017), https://medium.com/@erin_gallagher/metoo-hashtag-network-visualization-96odd5a97cdf [<https://perma.cc/6THV-4QDG>]; Symbolic Sys. Program, *#MeToo Wins Symbol of the Year for 2017*, STAN. NEWS (Feb. 5, 2018, 4:07 PM), <https://news.stanford.edu/thedish/2018/02/05/metoo-wins-symbol-of-the-year-for-2017> [<https://perma.cc/6RUS-7SEF>].

In Part II, I argue that the #MeToo clause is an example of what John Coates terms “reactive growth,” wherein M&A contracts change to accommodate shifting external risks. However, unlike the examples discussed by Coates and raised by practitioners during interviews, the #MeToo clause was driven by a social movement. As a result, I argue that the clause is more likely to have a lasting presence in M&A, as it is not attached to an isolated law or even the egregious Weinstein episode, but rather anchored in a long-term shift in public attitudes toward sexual harassment. Further, Part II discusses the clause’s potential to foster broader conversations surrounding harassment, legitimize victims’ allegations through legal recognition, improve the due-diligence process, and incentivize burgeoning companies with acquisition aims to foster harassment-free corporate cultures from their inception. I also address concerns that the clause may disincentivize future reports of sexual harassment or at least stigmatize their discussion.

In Part III, I address the clause’s drawbacks by proposing a replacement clause that would represent the nature and extent of a company’s sexual-harassment reporting channels rather than target allegations. This version of the #MeToo clause incentivizes target companies to memorialize information acquired through due diligence and to establish effective reporting infrastructures. Recognizing that the implementation of this proposal may be unrealistic given M&A conventions, I alternatively propose targeting settlement agreements rather than allegations because such agreements are more indicative of improperly handled harassment allegations. I also summarize existing scholarship on improving access to standardized policies, collecting anonymous survey data, and exploring information-escrow technologies to help improve the due-diligence process. Finally, I suggest that practitioners conducting due diligence on the clause should communicate their focus on effective reporting mechanisms to companies being acquired, thus incentivizing the maintenance of sexual-harassment reporting channels without stigmatizing the recording of allegations.

I. THE #METOO CLAUSE’S EMERGENCE IN M&A TRANSACTIONS

In this Part, I provide an overview of M&A agreements and discuss the #MeToo clause’s origins. Although the clause was a response to heightened awareness of sexual harassment and reputational harm to companies, it was not explicitly drafted with the goal of creating a safer workplace. I then use publicly available sample provisions and interviews with practitioners to outline nine key aspects of the clause.

A. Navigating M&A Agreements

M&A involves the deliberate transfer of business ownership organized in one or more corporations.²⁴ Global M&A activity has climbed from just over twenty-six thousand deals in 2000 to over thirty-four thousand deals in 2016, with the average U.S. deal size reaching \$155.3 million in 2016.²⁵ Companies engage in such transactions for economic and strategic purposes.²⁶ Generally speaking, M&A transactions have the goal of maximizing shareholder value.²⁷

M&A deals are made through contracts. M&A contracts are filled with legal boilerplate but are negotiated and at least partly tailored.²⁸ Transactional lawyers usually do not draft the agreement from scratch but rather use precedents to develop a tailored contract for the deal.²⁹ M&A agreements feature four main components: (1) representations and warranties, (2) covenants, (3) conditions to closing, and (4) indemnification.³⁰

The #MeToo clause is a representation. That is to say, it is “a statement of fact” that induces a party to enter a contract³¹ – in this case, by asserting that

24. John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice* 1 (Harvard John M. Olin Discussion Paper Series, Paper No. 825, 2015), https://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_825.pdf [<https://perma.cc/JEK4-H8JP>].
25. Jay Bothwick & Hal Leibowitz, *2017 M&A Report*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (June 1, 2017), <https://corpgov.law.harvard.edu/2017/06/01/2017-ma-report> [<https://perma.cc/W57B-DPAE>].
26. Scott Moeller et al., *The Economic Impact of M&A - Implications for UK Firms*, CASS BUS. SCH. (Feb. 5, 2013), <https://www.cass.city.ac.uk/faculties-and-research/research/cass-knowledge/2013/february/the-economic-impact-of-m-and-a-implications-for-uk-firms> [<https://perma.cc/KP3Z-XK5W>].
27. *See Revlon, Inc. v. MacAndrew & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that when a company’s breakup is inevitable, the board’s fiduciary duty is to “maximiz[e] . . . the company’s value at a sale for the stockholders’ benefit”); Erik Lopez, *M&A Fiduciary Duties: Maximizing Shareholder Value*, M&A L. BLOG (July 2, 2015), <https://www.themalawyer.com/ma-fiduciary-duties> [<https://perma.cc/C4LP-DVD3>].
28. Coates, *supra* note 24, at 1.
29. Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 64 (2017).
30. Matt Swartz, *Mergers and Acquisitions: The Basics*, A.B.A. (July 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/july_2012/mergers_acquisitions_basics [<https://perma.cc/9HWX-8NRK>].
31. Will Perkins & N. Tasmin Din, *M&A Academy Representations and Warranties* 4, MORGAN, LEWIS & BOCKIUS LLP (Nov. 15, 2016), <https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2016/ma-academy-representations-and>

corporate leaders have not been subjects of sexual-harassment allegations. Representations take up a significant portion of M&A agreements—thirty-nine percent of words on average—yet have been subject to little academic commentary.³² Representations play a “risk-sharing role” by allowing parties to allocate the risk that “value-relevant facts turn out to be other than believed.”³³ In addition, representations address inevitable information asymmetries.³⁴ A buyer is usually given rights to access relevant corporate records and due-diligence information, thus allowing the investigation of potential risks before signing.³⁵ Representations, therefore, are usually supplemented by disclosure schedules with relevant information³⁶ and are typically linked to indemnities, which allow buyers to recover from sellers for losses arising from certain breaches of the sellers’ representations.³⁷ Further, representations are typically required to be true at closing, giving the target “good ex ante incentives to disclose value-relevant information to the buyer.”³⁸

Another M&A concept important to understanding the #MeToo clause is the distinction between private M&A transactions, which involve the sale of a private company or subsidiary, and public M&A transactions, where the target (and possibly the acquirer) is a publicly traded company. Public and private transactions differ in terms of an acquirer’s recourse to indemnification post-closing. Large, publicly traded companies in the United States are usually defined by dispersed shareholder ownership.³⁹ An acquirer has limited recourse

-warranties-15nov16.ashx?la=en&hash=75851124C313AFD18707B17275EAF549D097F410 [https://perma.cc/J7MH-FCDG].

32. Coates, *supra* note 24, at 9; see also Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 331 (2005) (“Despite its immense commercial significance, . . . the standard acquisition agreement has excited almost no academic commentary.”); John C. Coates IV, *Why Have M&A Contracts Grown?: Evidence from Twenty Years of Deals* 1 (Harvard John M. Olin Discussion Paper Series, Paper No. 889, 2016), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_889.pdf [https://perma.cc/46N5-JH38] (noting that M&A contracts are “understudied”).
33. Coates, *supra* note 24, at 16.
34. *Id.* at 17.
35. *Id.*
36. *Id.* at 9-10.
37. Jeffrey Chapman et al., *Representations and Warranties Insurance in M&A Transactions*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Dec. 11, 2017), <https://corpgov.law.harvard.edu/2017/12/11/representations-and-warranties-insurance-in-ma-transactions> [https://perma.cc/A5UA-AWLA].
38. Coates, *supra* note 24, at 17.
39. See John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 7 (2001) (noting the evolution of dispersed

to postclosing damages in this context because it is more difficult to recover damages from a larger group of dispersed shareholders.⁴⁰ By contrast, an acquirer can usually recover damages from a known, private owner after the deal has closed.⁴¹ As a result, private deal negotiations usually focus on the seller's representations and related indemnification provisions.⁴² By contrast, public deals generally focus on closing conditions.⁴³ Although indemnification can sometimes be provided by a controlling shareholder in a public deal,⁴⁴ the #MeToo clause has a more meaningful impact on damages in the private deal context because it is generally subject to postclosing indemnification. The clause is nevertheless meaningful in both contexts because, as further discussed in Section I.B, it structures the due-diligence process.

Public and private transactions also differ because the terms of private M&A transactions generally remain private.⁴⁵ The material terms of public deals, by contrast, are filed with the Securities and Exchange Commission (SEC) and mailed to all target-company shareholders.⁴⁶ Moreover, "public company merger agreements are among the most visible and high-profile documents in all of transactional legal practice."⁴⁷ The publishing of deal terms may lead to discomfort for deal participants given the possibility of negative or generally disruptive publicity.⁴⁸ Therefore, the #MeToo clause has more discursive potential in the public-deal context, since companies have to consider the public's reaction to their deal terms. Buyers may include the clause to appear socially conscious, while targets may push back on the clause to avoid

ownership in the United States); Érica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 NW. J. INT'L L. & BUS. 439, 441-43 (2009) (discussing the prevalence of dispersed ownership in publicly held corporations in the United States).

40. Tracy A. Belton & Danielle N. Rosato, *Basics in M&A: Indemnification Provisions*, ARNOLD & PORTER (Mar. 23, 2016), https://www.arnoldporter.com/en/perspectives/publications/2016/03/20160323_basics_in_ma_indemnification_pr_12768 [https://perma.cc/9RXF-PMRZ].

41. See Eva Davis & John Schreiber, *Eight Key Differences: Public vs. Private Company Acquisitions in the US*, WINSTON & STRAWN LLP 1, 4 (Jan. 2017), <https://www.winston.com/images/content/1/1/v4/119086/Corp-8-Key-Differences-article-JAN2017.pdf> [https://perma.cc/48LF-UB4R].

42. *Id.*

43. *Id.*

44. Belton & Rosato, *supra* note 40.

45. Davis & Schreiber, *supra* note 41, at 5.

46. *Id.*

47. Anderson & Manns, *supra* note 29, at 65.

48. Davis & Schreiber, *supra* note 41, at 5.

speculation about possible sexual-harassment issues within their ranks. Although this Note addresses the #MeToo clause's impact on both private and public deals by discussing the clause's due-diligence, economic, and discursive effects, its analysis tilts toward public deals because their contracts are more accessible.

B. *The #MeToo Clause's Origins*

The #MeToo clause's emergence a few months after the Weinstein scandal is no coincidence. As practitioners who were among the first to draft the clause noted, the clause was a response to a new and ferocious corporate risk. This Section explains how the #MeToo clause differs from previous provisions regarding sexual harassment and details the clause's origins.

To assemble quantitative and qualitative information about the #MeToo provision, I collected publicly filed incidences of the provision and interviewed practitioners. I found thirty-nine instances of the provision in publicly recorded M&A transactions within a year of when the clause first appeared in public filings on March 14, 2018.⁴⁹ This figure includes any instance of a clause representing that no allegations of sexual harassment had been made against particular company employees and/or that no settlement agreements involving sexual-harassment allegations had been reached.⁵⁰

M&A contracts predating the #MeToo movement sometimes included representations regarding sexual harassment or misconduct. However, past provisions differ from the #MeToo clause in two main respects. First, past provisions grouped sexual-harassment complaints within a longer list of workplace matters, such as equal pay and employee safety.⁵¹ They represented,

49. See *infra* Appendix B.

50. For further information on this Note's methodology, see *infra* Appendix A. As noted in Section I.A, private M&A agreements do not need to be filed with the SEC. In addition, even public companies do not need to file agreements with the SEC if the deal does not have a sufficiently significant impact on the company. See 17 C.F.R. §§ 210.1-02(w), 210.3-05 (2019); see also Usha Rodrigues & Mike Stegemoller, *An Inconsistency in SEC Disclosure Requirements? The Case of the "Insignificant" Private Target*, 13 J. CORP. FIN. 251 (2007) (explaining that the SEC does not require disclosure of information for acquisitions it deems insignificant). Therefore, this Note's primary source of analysis is significantly limited.

51. Cf., e.g., Telephone Interview with Subject I (Nov. 29, 2018) [hereinafter Subject I] ("[I]solating [sexual harassment] means it gets more attention . . . It's more of a focus."); Telephone Interview with Subject J (Dec. 5, 2018) [hereinafter Subject J] (noting that the provision "brings some focus" to sexual harassment by isolating it); Telephone Interview with Subject M (Dec. 11, 2018) [hereinafter Subject M] (explaining that the provision is "more specific" because it targets sexual harassment); Telephone Interview with Subject O (Mar. 4,

for example, that no “complaints, charges or claims” against a company were threatened in connection with “employment discrimination, equal pay, sexual harassment, employee safety and health, wages and hours or workers’ compensation.”⁵² Second, past provisions targeted legally cognizable claims, whereas the #MeToo clause also pertains to complaints, allegations, and settlement agreements.⁵³ For instance, past provisions represented that no “federal or state claims” were made “based on employment equity, sex, sexual or other harassment, age, disability, race or other discrimination or common law claims, including claims of wrongful dismissal, severance pay, payment in lieu of notice or bad faith termination.”⁵⁴ Past provisions thus set a higher reporting threshold. In sum, the #MeToo clause is unique because it isolates sexual harassment from other possible workplace issues and addresses allegations rather than purely formal legal claims.⁵⁵

2019) [hereinafter Subject O] (explaining that the provision is “more specific” than clauses targeting similar information in a contract’s employment section). For examples of M&A contracts that include provisions on sexual harassment among other workplace matters, see *Agreement and Plan of Reorganization Among Cardiac Control Systems, Inc., CCS Subsidiary, Inc. and Electro-Catheter Corporation*, art. IV, § 4.18 (Jan. 20, 1998); *Agreement and Plan of Merger by and Among SCI Acquisition Inc. and Swiss Chalet, Inc.*, art. 3, § 3.13(b) (May 8, 2000); and *Agreement and Plan of Merger Between Warp Technology Holdings Inc. and Unify Corp.*, art. III, § 3.10(f) (Mar. 14, 2006).

52. *Agreement and Plan of Merger by and Between Franklin Electronic Publishers, Inc. and Saunders Acquisition Corp.*, art. IV, § 4.11(b) (Sept. 30, 2009).
53. See, e.g., Email from Subject K to author (Dec. 6, 2018) (on file with author) [hereinafter Subject K] (criticizing the provision for encompassing “an allegation without . . . (an independent) finding”); Telephone Interview with Subject D (Nov. 6, 2018) [hereinafter Subject D] (noting the provision’s focus on “allegations” due to reputational concerns); Telephone Interview with Subject Z (Apr. 5, 2019) [hereinafter Subject Z] (explaining that harassment “allegations” are now possibly material to a large company). For further examples of M&A contracts with provisions on sexual harassment claims, see *Agreement and Plan of Merger by and Among DMH International, Inc., DMH Acquisition Subsidiary, LLC and Virtual Physicians Network, Inc.*, art. 4, § 4.10 (July 22, 2014); *Agreement and Plan of Merger Among NetLibrary, Inc., NL PP.com Acquisition Corporation and Peanutpress.com, Inc.*, § 2.18 (Feb. 18, 2000); and *Agreement and Plan of Merger Between PA Consulting Group Ltd. and Hagler Bailly Inc.*, art. III, § 3.8(b) (June 19, 2000).
54. *Agreement and Plan of Merger by and Between Riptide Software, Inc. and Shea Development Corp.*, art. II, § 2.19(c) (Apr. 4, 2007).
55. Eight of the sample provisions are within a larger provision addressing other labor matters such as union organizing, nondisclosure agreements, or work slowdowns. *Agreement and Plan of Merger by and Among Denbury Resources Inc., Dragon Merger Sub Inc., DR Sub LLC and Penn Virginia Corp.*, art. III, §3.11(b) (Oct. 28, 2018) [hereinafter *Denbury Resources Inc. Merger*]; *Agreement and Plan of Merger Dated as of September 14, 2018 by and Among Essendant Inc., Egg Parent Inc., Egg Merger Sub Inc. and Staples, Inc.*, art. IV, § 4.15 [hereinafter *Essendant Inc. Merger*]; *Agreement and Plan of Merger by and Among Esterline Technologies Corp., TransDigm*

The first #MeToo clause surfaced in a publicly filed M&A agreement in March of 2018 between Connecticut Water Service, Inc. (CTWS) and SJW Group, a water utility company based in California.⁵⁶The clause reads:

To the Knowledge of CTWS, in the last five years, no allegations of sexual harassment have been made to CTWS against any individual in his or her capacity as (i) an officer of CTWS, (ii) a member of the CTWS Board or (iii) an employee of CTWS or any CTWS Subsidiary at a level of Vice President or above.⁵⁷

Practitioners who were among the first firms to develop the clause said that it was drafted because of corporate liability associated with sexual-harassment scandals.⁵⁸ “Once it became clear that [the Weinstein scandal] wasn’t a one-off

Group Inc., and Thunderbird Merger Sub Inc., art. III, § 3.11 (Oct. 9, 2018) [hereinafter *Esterline Technologies Corp. Merger*]; *Agreement and Plan of Merger by and Among Farfetch US Holdings, Inc., Yankee Merger Sub, LLC, Stadium Enterprises LLC, Farfetch Limited*, art. II, § 2.12(h) (Dec. 12, 2018) [hereinafter *Farfetch US Holdings, Inc. Merger*]; *Agreement and Plan of Merger Dated as of April 12, 2018 by and Among Genuine Parts Co., Rhino SpinCo, Inc., Essendent Inc. and Elephant Merger Sub Corp.*, art. IV, §4.16 [hereinafter *Genuine Parts Co. Merger*]; *Agreement and Plan of Merger Among Pacific Biosciences of California, Inc., Illumina, Inc. and FC OPS Corp.*, art. 4, § 4.18(s) (Nov. 1, 2018) [hereinafter *Pacific Biosciences Merger*]; *Asset Purchase Agreement by and Among Phoenix Top Holdings LLC, Pernix Therapeutics Holdings, Inc., Pernix Ireland Pain Designated Activity Co., and the Other Sellers Set Forth on Annex A*, art. III, § 3.10(e) (Feb. 18, 2019) [hereinafter *Phoenix Top Holdings LLC Purchase*]; *Securities Purchase Agreement Among Zix Corporation, and AR Topco, LLC*, Art. III §3.12(c) (Jan. 14, 2019) [hereinafter *Zix Corporation Purchase*]. While these provisions do not isolate allegations of sexual harassment to the same extent as the other twenty-eight, they nevertheless do so more than provisions predating the #MeToo clause. Similarly, three of the sample provisions also address pending or threatened litigation involving allegations of sexual harassment. *Agreement and Plan of Merger by and Among Birner Dental Management Services, Inc., Mid-Atlantic Dental Services Holdings, LLC, and Bronco Acquisition, Inc.*, art. IV, § 4.13(g) (Oct. 3, 2018) [hereinafter *Birner Dental Management Services, Inc. Merger*]; *Agreement and Plan of Merger by and Among Forrester Research, Inc., Supernova Acquisition Corp., SiriusDecisions, Inc., the Founder Stockholders Named Herein and Fortis Advisors LLC as Stockholder Representative*, art. 2, § 2.17(k) (Nov. 26, 2018) [hereinafter *Forrester Research, Inc. Merger*]; *Agreement and Plan of Merger by And Among Zoe’s Kitchen, Inc., Cava Group, Inc., and Pita Merger Sub, Inc.*, Art. III §3.13(g) (Aug. 16, 2018) [hereinafter *Zoe’s Kitchen, Inc. Merger*]. Taken together, these provisions recognize both broader allegations and those that meet a higher legal threshold. They are still classified as #MeToo clauses because they uniquely address allegations of harassment.

56. *Agreement and Plan of Merger Dated as of March 14, 2018 Among SJW Group, Hydro Sub, Inc. and Connecticut Water Service, Inc.*, art. IV, § 4.12(d) [hereinafter *SJW Group Merger*]; *infra* Appendix B.
57. *SJW Group Merger*, *supra* note 56, art. IV, § 4.12(d).
58. Telephone Interview with Subject B (Nov. 2, 2018) [hereinafter Subject B]; Telephone Interview with Subject G (Nov. 16, 2018) [hereinafter Subject G].

situation,” one practitioner said, “we started to realize that there was enough of a concern that we ought to start including [the clause].”⁵⁹

The clause was drafted with several goals in mind: curbing economic risk given the expense of litigation, limiting reputational risk, and improving due diligence.⁶⁰ Reducing reputational risk can be “more important” than the other concerns, one practitioner said, because a company’s value can tank due to sexual-harassment allegations.⁶¹ To ensure that reputational risk is captured, the provision usually spans longer than the statute of limitations for sexual-harassment claims.⁶² Moreover, it reflects the understanding that a sufficiently egregious sexual-harassment scandal may cause a “Material Adverse Change” (MAC) and therefore prevent a deal from closing.⁶³

Further, the clause was drafted to discover and discuss any sexual-harassment concerns before concluding a transaction.⁶⁴ Importantly, it applies to “allegations,” a broader term than settlements or lawsuits. “We’ve seen that an allegation itself can be something that gets an incredible amount of focus and so this is trying to draw that out. If anyone’s accused an officer of something, that’s what we want to know about,” a practitioner noted.⁶⁵

Although the clause was developed in response to public concern over sexual-harassment allegations, it was ultimately drafted to serve purely instrumental functions for buyers. Nevertheless, practitioners acknowledged the clause’s positive side effects: drawing more attention to sexual-harassment concerns and broadening relevant conversations to additional corporate actors.⁶⁶

59. Subject B, *supra* note 58.

60. Subject G, *supra* note 58.

61. Subject B, *supra* note 58.

62. *Id.*

63. A MAC provision typically gives the acquirer the right to end the transaction if a material adverse change occurs. It also lists exceptions that do not fall within the definition, such as the outbreak of war or changes in financial markets. See Andrew M. Herman & Bernardo L. Pioreck, *Revisiting the MAC Clause in Transaction: What Can Counsel Learn from the Credit Crisis?*, BUS. L. TODAY (Aug. 2, 2010), <https://www.kirkland.com/siteFiles/Publications/Article%20PDF%20-%20PRINTING%20ALLOWED%20-%20Business%20Law%20Today%20-%20Herman%20byline.pdf> [<https://perma.cc/HGX2-3FJA>].

64. Subject G, *supra* note 58.

65. *Id.*

66. Subject B, *supra* note 58 (“I would hope that the more people focus on these issues, the better for everybody If people know that this is an issue that buyers and boards are looking at, I think that’s for everyone’s good.”); Subject G, *supra* note 58 (“It’s helped move the conversation about these types of issues from not just a company-to-company conversation, but also, you know, so that outside lawyers are hearing the conversation.”).

C. Content Analysis of Thirty-Nine Clauses

To assess how the #MeToo clause has been deployed, this Section presents a content analysis of publicly available M&A contracts.⁶⁷ The #MeToo clauses disclosed in the thirty-nine sample deals include a variation of nine distinct features: (1) a knowledge requirement, (2) a reference to the disclosure schedule, (3) a specific time span, (4) a statement regarding allegations of sexual harassment or misconduct, (5) a professional-capacity limitation, (6) a current-employee limitation, (7) a hierarchical or role-based limitation, (8) a written-allegation limitation, and (9) a reference to settlements.

According to practitioners, the extent and nature of such variations depend on factors like a buyer's leverage,⁶⁸ the amount of time parties can spend on negotiations,⁶⁹ a target company's size,⁷⁰ the relevant industry's risks,⁷¹ and the standard "push and pull" in any deal.⁷² In addition, because the diligence process takes place as the representations are being drafted, acquiring companies with more significant harassment issues may result in longer negotiation periods and

67. Content analysis is an approach to the analysis of documents that "seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner." ALAN BRYMAN, *SOCIAL RESEARCH METHODS* 274 (3d ed. 2008). Scholars using this method "collect[] a set of documents, such as judicial opinions on a particular subject, and systematically read[] them, recording consistent features of each and drawing inferences about their use and meaning." Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64 (2008). This method "aims for a scientific understanding of the *law itself* as found in judicial opinions and other legal texts," *id.* at 64, and "combines a disciplined focus on legal subject matter with an assumption that other investigators should be able to replicate the research results," *id.* at 65. Scholars have applied content analysis to study legal opinions on negligence law, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); defamation litigation, Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 457; and sex segregation in the workplace, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). For further examples of content analysis among legal scholars, see generally Hall & Wright, *supra* note 67.

68. Telephone Interview with Subject R (Mar. 27, 2019) [hereinafter Subject R].

69. Email from Subject L to author (Dec. 11, 2018) [hereinafter Subject L] (on file with author) ("You can have an endless debate over each little word like that in each kind of category in each clause.").

70. Telephone Interview with Subject F (Nov. 15, 2018) [hereinafter Subject F] (noting that the provision "wasn't . . . very hotly negotiated" in their deal because the target company was "relatively small" and "exceedingly well run").

71. See Subject R, *supra* note 68 ("I think it depends a lot on the industry. There are certainly industries where people would see a higher degree of risk than others.").

72. See Subject F, *supra* note 70.

more tailored provisions.⁷³ Buy-side lawyers generally seek broader representations, while sell-side lawyers attempt to limit their scope.⁷⁴ The following Sections detail ten distinct characteristics of the #MeToo clause and variations across contracts.

1. Knowledge Qualification

Most of the sample provisions include knowledge qualifications to particularize the due-diligence process and mitigate the target company's share of risk.⁷⁵ A knowledge qualification limits a representation to what a company or particular individual knows.⁷⁶ It is viewed as favorable to the target company⁷⁷ because it limits the information covered by the provision. In the context of the #MeToo clause, the knowledge qualification specifies that a target is responsible only for reporting allegations of which it has knowledge as defined in the agreement. Almost all of the sample provisions—thirty out of thirty-nine—feature a knowledge requirement.⁷⁸ Most of the agreements therefore specify and limit the type of information for which the target company is accountable.

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73. See, e.g., Subject G, *supra* note 58 (“There wasn’t a lot of back-and-forth or consternation about this because the company was comfortable that it just didn’t have any of these issues.”); Telephone Interview with Subject Q (Mar. 26, 2019) [hereinafter Subject Q] (“If during diligence you find out that there have been issues with sexual harassment in the past, you can have a stronger sexual harassment rep that is more intense than some of the other reps.”); Subject R, *supra* note 68 (“[T]he more comfortable a buyer gets with the fact that the target is following best practices, the less they’re going to look for strong and sweeping representations on the subject.”).
74. E.g., Telephone Interview with Subject A (Oct. 23, 2018) [hereinafter Subject A] (“If you’re on the buy side, you obviously want to dive down as deep as possible within the organization [W]hen you’re on the sell side, you really want to limit the universe of the employees who this is going to cover.”); Subject J, *supra* note 51 (“[W]e [on the buy side] want to draft those provisions as broadly as possible in order to have . . . some coverage On the sell side . . . you’re trying to limit the provisions.”).
75. These two functions—particularizing the due-diligence process and mitigating a target company’s share of risk—are recurring themes.
76. Daniel Avery, *Trends in M&A Transactions: Use of Knowledge Qualifiers for Representations and Warranties*, GOULSTON & STORRS 1 (May 9, 2018), <https://www.goulstonstorr.com/content/uploads/pdf/trends-in-ma-transactions-use-of-knowledge-qualifiers-for-representations-and-warranties.pdf> [<https://perma.cc/6QXR-FN7E>].
77. Importantly, each contract has a unique combination of characteristics, which interact to form unique risk distributions. For example, just because a provision has a knowledge requirement does not make it favorable to the target company as a whole. Rather, the provision may be more favorable to the acquiring company given other characteristics discussed in this Section.
78. *Agreement and Plan of Merger by and Among Amicus Therapeutics, Inc., Columbus Merger Sub Corp., Celenex, Inc. and Shareholder Representative Services LLC, as Shareholders’ Representative,*

art. I, § 1.1 (Sept. 19, 2018) [hereinafter *Amicus Therapeutics, Inc. Merger*]; *Agreement and Plan of Merger among AthenaHealth, Inc., May Holding Corp. and May Merger Sub Inc.*, art. V, § 5.1(a) (Nov. 11, 2018) [hereinafter *AthenaHealth, Inc. Merger*]; *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *Agreement and Plan of Merger by and Among CafePress Inc., Snapfish, LLC and Snapfish Merger Sub, Inc.*, art. I, § 1.1 (Sept. 28, 2018) [hereinafter *CafePress Inc. Merger*]; *Denbury Resources Inc. Merger*, *supra* note 55, art. IX, § 9.03; *Agreement and Plan of Merger by and Among Edwards Lifesciences Holding, Inc., Crown Merger Sub, Inc., and CAS Medical Systems, Inc.*, art. III, § 3.13(g) (Feb. 11, 2019) [hereinafter *Edwards Lifesciences Holding, Inc. Merger*]; *Essendant Inc. Merger*, *supra* note 55, art. IV, § 4.15; *Esterline Technologies Corp. Merger*, *supra* note 55, art. VIII, § 8.16; *Farfetch US Holdings, Inc. Merger*, *supra* note 55, art. II, § 2.12(h); *Equity Purchase Agreement by and Between FedNat Holding Company, 1347 Property Insurance Holdings, Inc., Maison Managers, Inc., Maison Insurance Company, and Claimcor, LLC*, art. III, § 3.10(e) (Feb. 25, 2019) [hereinafter *FedNat Holding Company Purchase*]; *Agreement and Plan of Merger by and Among Forest City Realty Trust, Inc. and Antlia Holdings LLC, and Antlia Merger Sub Inc.*, art. X, § 10.14 (July 30, 2018) [hereinafter *Forest City Realty Trust, Inc. Merger*]; *Forrester Research, Inc. Merger*, *supra* note 55, art. 2, § 2.17(k); *Genuine Parts Co. Merger*, *supra* note 55, art. IV, § 4.16; *Agreement and Plan of Merger Among JetPay Corp., NCR Corp., and Orwell Acquisition Corp.*, art. I, § 1.01(a) (Oct. 19, 2018) [hereinafter *Jetpay Corp Merger*]; *Stock Purchase Agreement by and Among Midatech Pharma PLC, Midatech Pharma US Inc., and Kanwa Holdings, LP*, art. I, § 1.1 (Sept. 26, 2018) [hereinafter *Midatech Pharma PLC Purchase*]; *Agreement and Plan of Merger by and Among The Navigators Group, Inc., The Hartford Financial Services Group, Inc., and Renato Acquisition Co.*, art. VIII, § 8.13(a) (Aug. 22, 2018) [hereinafter *The Navigators Group Merger*]; *Agreement and Plan of Merger by and Among Omega Healthcare Investors, Inc., OHI Healthcare Properties Limited Partnership, MedEquities Realty Trust, Inc., MedEquities OP GP LLC, and MedEquities Realty Operating Partnership, LP*, art. III, § 3.15(f) (Jan. 2, 2019) [hereinafter *Omega Healthcare Investors, Inc. Merger*]; *Agreement and Plan of Merger Dated as of November 1, 2018, among Pacific Biosciences of California, Inc., Illumina, Inc., and FC OPS Corp.*, art. I, § 1.01 [hereinafter *Pacific Biosciences of California, Inc. Merger*]; *Phoenix Top Holdings LLC Purchase*, *supra* note 55, art. III, § 3.10(e); *Merger Agreement Dated as of March 5, 2019 by and Among Prescribe Wellness, LLC, Tabula Rasa Healthcare, Inc., TRHC PW Acquisition, LLC, and Fortis Advisors LLC*, art. III, § 3.29 [hereinafter *Prescribe Wellness, LLC Merger*]; *Agreement and Plan of Merger Dated as of September 14, 2018 by and Among The Providence Service Corp., Logisticare Solutions, LLC, Catapult Merger Sub, Inc., Circulation, Inc., and Fortis Advisors LLC*, art. I, § 1.1 [hereinafter *The Providence Service Corp. Merger*]; *Agreement and Plan of Merger by and Among RLJ Entertainment, Inc., AMC Networks Inc., Digital Entertainment Holdings LLC and River Merger Sub Inc.*, art. I, § 1.1 (July 29, 2018) [hereinafter *RLJ Entertainment, Inc. Merger*]; *Business Combination Agreement by and Among Saban Capital Acquisition Corp., Panavision Acquisition Sub, Inc., Sim Acquisition Sub, Inc., Panavision Inc., Sim Video International Inc., The Shareholders of Sim Video International Inc. Party Hereto Solely in Its Capacity as the Initial Panavision Holder Representative Hereunder, Cerberus PV Representative, LLC, and Granite Film and Television Equipment Rentals Inc.*, art. I, § 1.1 (Sept. 13, 2018) [hereinafter *Saban Capital Acquisition Corp. Merger*]; *Agreement and Plan of Merger and Reorganization Among Sendgrid, Inc., Twilio, Inc., and Topaz Merger Subsidiary, Inc.*, art. VIII, § 8.12(gg) (Oct. 15, 2018) [hereinafter *Sendgrid, Inc. Merger*]; *SJW Group Merger*, *supra* note 56; *Agreement and Plan of Merger by and Between STL Parent Corp. and American Railcar Industries, Inc.*, art. VIII, § 8.4 (Oct. 22, 2018) [hereinafter *STL Parent Corp. Merger*]; *Agreement and Plan of Merger by and Among Stryker Corp., Austin Merger Sub Corp., and K2M Group Holdings, Inc.*, app. A (Aug. 29, 2018) [hereinafter *Stryker Corp. Merger*]; *Purchase Agreement by and Among Victory Capital*

Company knowledge is defined in the sample agreements with varying specificity. The level of specificity is significant because it affects due diligence by setting a target company's duties of inquiry. The knowledge definitions of the sample provisions generally fit within three categories: (1) "actual knowledge" of particular personnel, (2) "actual knowledge" of particular personnel following "due" or "reasonable" inquiry or investigation, and (3) "actual knowledge" of particular personnel following "reasonable" inquiry of direct reports.⁷⁹

Six of the sample provisions fall within the first and least specific category of company-knowledge definitions.⁸⁰ This definition of knowledge is most favorable to the target because it does not require company personnel to seek out relevant information. Rather, it allows the company to merely verify whether personnel have "actual knowledge" of allegations regardless of how much effort they put into obtaining such knowledge. Fourteen of the sample provisions fall within the second category, requiring actual knowledge of personnel following reasonable investigation.⁸¹ This definition imposes more stringent requirements on the target to seek out relevant information. Five of the provisions fall within the third category and more specifically require reasonable inquiry from direct reports.⁸² This requirement is presumably aimed at targeting employees with significant oversight and thus with access to more information.

Holdings, Inc., Harvest Volatility Management, LLC, The Members of Harvest Volatility Management, LLC, and Curtis F. Brockelman, Jr. and the LPC Member, art. I, § 1.1 (Sept. 21, 2018) [hereinafter *Victory Capital Holdings, Inc. Purchase*]; *Agreement and Plan of Merger by and Among Verscend Technologies, Inc., Rey Merger Sub, Inc., and Cotiviti Holdings, Inc.*, art. I, § 1.01 (June 19, 2018) [hereinafter *Verscend Technologies, Inc. Merger*]; *Agreement and Plan of Merger by and Among WordStream, Inc., Garnett Co., Inc., Orca Merger Sub, Inc., and Shareholder Representative Services LLC*, art. I, § 1.1 (May 9, 2018) [hereinafter *WordStream, Inc. Merger*].

79. One contract's knowledge definition was included in a privately held schedule. See *Forrester Research, Inc. Merger*, *supra* note 78, art. 8, § 8.2.
80. *Essendant Inc. Merger*, *supra* note 55; *Genuine Parts Co. Merger*, *supra* note 55; *JetPay Corp Merger*, *supra* note 78; *The Navigators Group Merger*, *supra* note 78, art. VIII § 8.13(a); *Omega Healthcare Investors, Inc. Merger*, *supra* note 78, art. IX, § 9.1; *SJW Group Merger*, *supra* note 56, art. IX, § 9.03.
81. *Amicus Therapeutics, Inc. Merger*, *supra* note 78; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *Esterline Technologies Corp. Merger*, *supra* note 55, art. VIII, § 8.16; *Farfetch US Holdings, Inc. Merger*, *supra* note 78; *FedNat Holding Company Purchase*, *supra* note 78, art. I, § 1.01(z); *Forest City Realty Trust, Inc. Merger*, *supra* note 78; *Phoenix Top Holdings LLC Purchase*, *supra* note 55, art. I, § 1.1; *Prescribe Wellness, LLC Merger*, *supra* note 78, art. I, § 1.2; *Sendgrid, Inc. Merger*, *supra* note 78; *STL Parent Corp. Merger*, *supra* note 78; *Stryker Corp. Merger*, *supra* note 78; *Verscend Technologies, Inc. Merger*, *supra* note 78; *Victory Capital Holdings, Inc. Purchase*, *supra* note 78; *WordStream, Inc. Merger*, *supra* note 78.
82. *AthenaHealth, Inc. Merger*, *supra* note 78; *Birner Dental Management Services, Inc. Merger*, *supra* note 55, art. I, § 1.1 (Oct. 3, 2018); *CafePress Inc. Merger*, *supra* note 78; *RLJ Entertainment, Inc. Merger*, *supra* note 78; *Saban Capital Acquisition Corp. Merger*, *supra* note 78.

The four remaining provisions with knowledge requirements provide more tailored due-diligence requirements.⁸³ For example, one provision requires “actual knowledge” of personnel who would “reasonably be expected to have actual knowledge” of the matter.⁸⁴ Inquiries of individuals with relevant information is therefore explicitly mandated. This provision is presumably aimed at preventing companies from cabining unsavory knowledge within particular departments and thereby maintaining ignorance for representation purposes.

Ten of the provisions do not feature knowledge requirements.⁸⁵ Because representations are not limited to knowledge unless explicitly marked as such,⁸⁶ the lack of a knowledge requirement allocates more risk to the target.⁸⁷

By contrast, knowledge qualifiers can be used to protect the target and to limit what might otherwise be an overly broad representation.⁸⁸ They may help

83. *Denbury Resources Inc. Merger*, *supra* note 55, art. IX, § 9.03; *Midatech Pharma PLC Purchase*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *The Providence Service Corp. Merger*, *supra* note 78.

84. *Pacific Biosciences Merger*, *supra* note 55, art. 1, § 1.01.

85. *Membership Interest Purchase Agreement by and Among Sellers Party Hereto and Aquaventure Holdings, Inc. and Aquaventure Holdings Ltd.*, art. IV, § 4.19(f) (Nov. 1, 2018) [hereinafter *Aquaventure Holdings, Inc. Purchase*]; *Agreement and Plan of Merger by and Among CamberView Partners Holdings, LLC, PJT Partners Inc., PJT Partners Holdings LLP, Blue Merger Sub LLC, and CC CVP Partners Holdings, L.L.C., as the Securityholder Representative*, art. IV § 4.13(f) (Aug. 27, 2018) [hereinafter *CamberView Partners Holdings, LLC Merger*]; *Purchase Agreement and Plan of Merger by and Among Del Frisco’s Restaurant Group, Inc., Bentley Merger Sub, LLC, Barteca Holdings, LLC, RCP Barteca Corp., General Atlantic (BT) Blocker, LLC, The Blocker Sellers (as Defined Herein) and The Sellers’ Representative*, art. 2.12(j) (May 6, 2018) [hereinafter *Del Frisco’s Restaurant Group, Inc. Purchase Agreement*]; *Unit Purchase Agreement by and among Environmental Materials, LLC, The Members of Environmental Materials, LLC, NCI Building Systems, Inc., and The Seller Representative*, art. 4.15(d) (Jan. 12, 2019) [hereinafter *Environmental Materials Unit Purchase Agreement*]; *Forrester Research, Inc. Merger*, *supra* note 78, art. 2, § 2.17(k); *Agreement and Plan of Merger Among GlaxoSmithKline PLC, Adriatic Acquisition Corporation and Tesaro, Inc.*, art. 4.14(e) (Dec. 3, 2018) [hereinafter *GlaxoSmithKline PLC Merger*]; *Agreement and Plan of Merger by and Among Horizon Bancorp, Inc. and Salin Bancshares, Inc.* art. III, § 3.05(d) (Oct. 29, 2018) [hereinafter *Horizon Bancorp, Inc. Merger*]; *Agreement and Plan of Merger Among WC SACD One Parent, Inc., WC SACD One Merger Sub, Inc. and Intersections Inc.*, art. IV, § 4.12(g) (Oct. 31, 2018) [hereinafter *WC SACD One Parent, Inc. Merger*]; *Zix Corporation Purchase*, *supra* note 55; *Zoe’s Kitchen, Inc. Merger*, *supra* note 55.

86. *See Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, Nos. 3158-VCL, 3406-VCL, 2009 WL 1111179, at *9 (Del. Ch. Apr. 27, 2009).

87. *See Avery*, *supra* note 76.

88. *E.g.*, Telephone Interview with Subject S, (Mar. 29, 2019) [hereinafter Subject S]; Telephone Interview with Subject T (Mar. 29, 2019) [hereinafter Subject T]; Telephone Interview with Subject U (Mar. 29, 2019) [hereinafter Subject U].

exclude passing comments about sexual-harassment incidents that are not recorded by Human Resources (HR), since a company is not deemed to have access to such “knowledge.”⁸⁹ Further, ascertaining the appropriate “knowledge part[ies]” is important for effective diligence,⁹⁰ since “[y]ou’re only as good as the knowledge of the people who are providing you with the documentation and the information.”⁹¹ Most of the sample provisions therefore include knowledge qualifications to focus the due-diligence process and to ease some of the target company’s share of risk.

2. Reference to Disclosure Schedule

Only four of the thirty-nine sample provisions reference a disclosure schedule.⁹² For example, one of those four provisions reads: “Except as set forth on Schedule 4.19(f), in the last five (5) years, no allegations of sexual harassment have been made”⁹³ SEC rules do not require companies to publish disclosure schedules,⁹⁴ thus allowing companies to shield sensitive information.

Some practitioners remarked that the prefatory reference to a disclosure schedule might harm a company’s reputation by suggesting that it has significant sexual-harassment liabilities. Noting the existence of a schedule in the provision itself is often “an irrelevant quirk of drafting,” but a client could conceivably oppose a direct reference to it “because then people might say there’s

89. Telephone Interview with Subject W (Apr. 3, 2019) [hereinafter Subject W] (“Nobody wants to be at fault where somebody has said, passing in the hall, you should watch out for Billy he’s very handsy or something of that nature.”); Subject Z, *supra* note 53 (“[The knowledge qualifier] would cover you to the extent a claim of harassment was just someone repeated it to a coworker but didn’t report it up the line officially.”).

90. Subject J, *supra* note 51.

91. Subject W, *supra* note 89.

92. *Aquaventure Holdings, Inc. Purchase*, *supra* note 85; *Del Frisco’s Restaurant Group, Inc. Purchase Agreement*, *supra* note 85, art. 2.12(j); *Farfetch US Holdings, Inc. Merger*, *supra* note 55; *Horizon Bancorp, Inc. Merger*, *supra* note 85.

93. *Aquaventure Holdings, Inc. Purchase*, *supra* note 85, art. IV, § 4.19(f).

94. See 17 C.F.R. § 229.601 (2019) (“Schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document.”); Timothy R. Donovan & Jodi A. Simala, *The Definitive M&A Agreement—Preparing Disclosure Schedules*, 3 SUCCESSFUL PARTNERING BETWEEN INSIDE OUTSIDE COUNSEL § 41:32 (Apr. 2019) (“Disclosure schedules typically contain a boilerplate statement that the disclosure of a matter in the schedules may not be taken to mean that it is material to the M&A transaction.”).

something in the schedule.”⁹⁵ Although subjects disagreed about the extent to which referencing a disclosure schedule raises concerns, even a slight risk of negative publicity may explain their rarity in the sample provisions.

3. *Specific Time Span*

Most of the provisions target a limited time span. This limitation facilitates due diligence and shifts risk away from the target. Twenty-five of the thirty-nine sample provisions limit the representation to a certain number of years with respect to allegations, settlements, and/or claims.⁹⁶ Similarly, one provision has a one-year limit for allegations and a specific date for settlement agreements,⁹⁷ and six go back to a specific date.⁹⁸ Seven are not bound by any look-back

95. Subject L, *supra* note 69; *see also* Subject M, *supra* note 51 (saying that information contained in schedules might be a “red flag” and that disclosing the schedules could “cause an overreaction”).

96. *Aquaventure Holdings, Inc. Purchase*, *supra* note 85; *AthenaHealth, Inc. Merger*, *supra* note 78; *CafePress Inc. Merger*, *supra* note 78; *Denbury Resources Inc. Merger*, *supra* note 55; *Environmental Materials Unit Purchase Agreement*, *supra* note 85; *Essendant Inc. Merger*, *supra* note 55; *Esterline Technologies Corp. Merger*, *supra* note 55; *FedNat Holding Company Purchase*, *supra* note 78; *Forest City Realty Trust, Inc. Merger*, *supra* note 78; *Forrester Research, Inc. Merger*, *supra* note 55; *Genuine Parts Co. Merger*, *supra* note 55; *Horizon Bancorp, Inc. Merger*, *supra* note 85; *JetPay Corp. Merger*, *supra* note 78; *The Navigators Group, Inc. Merger*, *supra* note 78; *Omega Healthcare Investors, Inc. Merger*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *Phoenix Top Holdings LLC Purchase*, *supra* note 55; *RLJ Entertainment, Inc. Merger*, *supra* note 78; *Saban Capital Acquisition Corp. Merger*, *supra* note 78; *Sendgrid, Inc. Merger*, *supra* note 78; *SJW Group Merger*, *supra* note 56; *Victory Capital Holdings, Inc. Purchase*, *supra* note 78; *WC SADC One Parent, Inc. Merger*, *supra* note 85; *WordStream, Inc. Merger*, *supra* note 78; *Zoe’s Kitchen, Inc. Merger*, *supra* note 55.

97. *Stryker Corp. Merger*, *supra* note 78.

98. *CamberView Partners Holdings, LLC Merger*, *supra* note 85; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *GlaxoSmithKline PLC Merger*, *supra* note 85; *The Providence Service Corp. Merger*, *supra* note 78; *STL Parent Corp. Merger*, *supra* note 78; *Zix Corporation Purchase*, *supra* note 55. Such provisions may signal that the company has had material harassment reports in the past, since the provision had to be tailored to avoid a particular timeframe. Subject W, *supra* note 89 (noting that a provision featuring “an odd date that’s not used anywhere else” in combination with other limitations may signal “there’s probably something here,” since the provision had to be tailored to avoid a particular timeframe); Subject Z, *supra* note 53 (describing some of the time periods in public agreements as “unusual” and possibly “telling” because they signal that “there may have been an issue six years ago versus five years ago”).

period.⁹⁹ The shortest sample time span is two years and eight months,¹⁰⁰ while the longest explicit time span is ten years.¹⁰¹ The most common time span is five years, appearing in sixteen of the thirty-nine provisions.¹⁰²

Strikingly, these provisions often outspan the statute of limitations for harassment, demonstrating the clause's focus on reputational rather than litigation-driven damage. Sexual-harassment claims must be filed with the EEOC within 180 days or up to 300 days depending on the state.¹⁰³ The statute of limitations for civil sexual-assault claims is within two to five years from the date of the incident in most states,¹⁰⁴ including Delaware.¹⁰⁵ Interview subjects said that the provision was focused on targeting reputational risk rather than purely legal liability because hits to a company's reputation have economic consequences.¹⁰⁶ Addressing reputational issues in M&A contract provisions is unusual.¹⁰⁷ As I argue below, the #MeToo clause thus demonstrates a social movement's power to change M&A drafting conventions.

99. *Amicus Therapeutics, Inc. Merger*, *supra* note 78; *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *Del Frisco's Restaurant Group, Inc. Purchase Agreement*, *supra* note 85; *Fairfetch US Holdings, Inc. Merger*, *supra* note 78; *Midatech Pharma PLC Purchase*, *supra* note 78; *Prescribe Wellness, LLC Merger*, *supra* note 78; *Verscend Technologies, Inc. Merger*, *supra* note 78.

100. *The Providence Service Corp. Merger*, *supra* note 78.

101. See, e.g., *Pacific Biosciences Merger*, *supra* note 55.

102. *AthenaHealth, Inc. Merger*, *supra* note 78; *Aquaventure Holdings, Inc. Purchase*, *supra* note 85; *Denbury Resources Inc. Merger*, *supra* note 55; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *Essendant Inc. Merger*, *supra* note 55; *FedNat Holding Company Purchase*, *supra* note 78; *Forest City Realty Trust, Inc. Merger*, *supra* note 78; *Genuine Parts Co. Merger*, *supra* note 55; *Horizon Bancorp, Inc. Merger*, *supra* note 85; *JetPay Corp. Merger*, *supra* note 78; *The Navigators Group, Inc. Merger*, *supra* note 78; *Phoenix Top Holdings LLC Purchase*, *supra* note 55; *SJW Group Merger*, *supra* note 56; *Stryker Corp. Merger*, *supra* note 78; *Victory Capital Holdings, Inc. Purchase*, *supra* note 78; *Zoe's Kitchen, Inc. Merger*, *supra* note 55.

103. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/PH7R-J2UC>].

104. See, e.g., ALA. CODE § 6-2-38 (2019); CAL. CIV. PROC. CODE § 335.1 (West 2019); IND. CODE § 34-11-2-4 (2019); KAN. STAT. ANN. § 60-513 (2019); WYO. STAT. ANN. § 1-3-105 (2019). See also *Sexual Assault Civil Statutes of Limitation by State*, FINDLAW (2018), <https://injury.findlaw.com/torts-and-personal-injuries/sexual-assault-civil-statutes-of-limitations-by-state.html> [<https://perma.cc/93GH-H3WS>].

105. 10 DEL. CODE ANN. tit. 10, § 8119 (West 2019).

106. Subject B, *supra* note 58 (noting that reputation is "more important" than legal risk in the context of sexual harassment claims); Telephone Interview with Subject C (Nov. 2, 2018) [hereinafter Subject C] (saying that the provision was drafted to "suss[] out the risk of public scandal"); Subject G, *supra* note 58 (stating that "reputational issues can ultimately be much more damaging than the cost of a legal settlement").

107. Subject D, *supra* note 53 (noting that M&A provisions do not "normally" address reputational issues); Telephone Interview with Subject H (Nov. 21, 2018) [hereinafter Subject H] (saying

4. Allegations of Sexual Harassment or Misconduct

Importantly, all sample #MeToo clauses refer to “allegations of sexual harassment.” The provisions therefore target claims that are not necessarily legally cognizable. Some provisions are limited to workplace conduct, while others possibly embrace a wider scope of behavior.

Thirty-one of the thirty-nine sample provisions represent that “no allegations of sexual harassment” were made or that no settlements involving “allegations of sexual harassment” have taken place.¹⁰⁸ Although “sexual harassment” is not defined, Title VII of the Civil Rights Act of 1964 prohibits harassment on the basis of sex¹⁰⁹ and provides a legal definition of sexual harassment.¹¹⁰ Eight deals refer to misconduct in addition to sexual

that they have only seen “this kind of focus on reputation in legal documents” in the context of firing key executives for cause).

108. *Amicus Therapeutics, Inc. Merger*, *supra* note 78, art. III, § 3.17(e); *AthenaHealth, Inc. Merger*, *supra* note 78, art. V, § 5.1(i)(iii); *Aquaventure Holdings, Inc. Purchase*, *supra* note 85, art. IV, § 4.19(f); *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *CafePress Inc. Merger*, *supra* note 78, art. VI § 6.14(c); *Del Frisco’s Restaurant Group, Inc. Purchase Agreement*, *supra* note 85, art. 2.12(j); *Denbury Resources Inc. Merger*, *supra* note 55, art. III § 3.11(b); *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *Essendant Inc. Merger*, *supra* note 55; *FedNat Holding Company Purchase*, *supra* note 78; *Forest City Realty Trust, Inc. Merger*, *supra* note 78, art. V, § 5.8(n); *Forrester Research, Inc. Merger*, *supra* note 55, art. 2, § 2.17(k); *Genuine Parts Co. Merger*, *supra* note 55; *Horizon Bancorp, Inc. Merger*, *supra* note 85; *JetPay Corp. Merger*, *supra* note 78, art. IV § 4.18(e); *Omega Healthcare Investors, Inc. Merger*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *Phoenix Top Holdings LLC Purchase*, *supra* note 55; *Prescribe Wellness, LLC Merger*, *supra* note 78; *The Providence Service Corp. Merger*, *supra* note 78, art. IV § 4.17(c); *Saban Capital Acquisition Corp. Merger*, *supra* note 78, art. IV, § 4.14(e); *Sendgrid, Inc. Merger*, *supra* note 78, art. III § 3.1(f); *SJW Group Merger*, *supra* note 56; *STL Parent Corp. Merger*, *supra* note 78, art. 3 § 3.24; *Stryker Corp. Merger*, *supra* note 78, art. III, § 3.13(c); *Verscend Technologies, Inc. Merger*, *supra* note 78, art. IV, § 4.16(h); *Victory Capital Holdings, Inc. Purchase*, *supra* note 78, art. III, § 3.14(f); *WC SACD One Parent, Inc. Merger*, *supra* note 85; *WordStream, Inc. Merger*, *supra* note 78, art. IV § 4.19(i); *Zix Corporation Purchase*, *supra* note 55; *Zoe’s Kitchen, Inc. Merger*, *supra* note 55.

109. 42 U.S.C. § 2000e-2(a) (2018).

110. “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a) (2019). The term “sexual harassment” first became widely used in the 1970s. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1593 (2018). Among the term’s progenitors was feminist-activist Lin Farley, who defined it as “[a]ny repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find

harassment.¹¹¹ Unlike sexual harassment, misconduct is not codified, nor expressly limited to the professional sphere.¹¹² While most of the sample provisions focus on sexual harassment, a term with established legal meaning, some of the provisions potentially embrace a wider range of conduct.

The term “allegation” is left undefined in all sample agreements.¹¹³ Certain target-side practitioners said they were reluctant to accept the #MeToo clause for that reason. “When people just say allegations . . . I don’t know what that means. What happens if you’re at the company cocktail party and someone says in passing, that person harassed me?,” one subject explained.¹¹⁴ Another warned that targets could well later claim ignorance about what constitutes an “allegation” under the clause.¹¹⁵ When asked why they thought such a key term

objectionable or offensive and causes you discomfort on your job.” LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 20 (1978).

111. The provisions explicitly state: no “allegations of sexual harassment or misconduct,” *RLJ Entertainment, Inc. Merger*, *supra* note 78, art. V, § 5.15(c); *Esterline Technologies Corp. Merger*, *supra* note 55; no allegations of “sexual harassment or sexual misconduct,” *Farfetch US Holdings, Inc. Merger*, *supra* note 78; *Midatech Pharma PLC Purchase*, *supra* note 78, art. V, § 5.15(e); *Environmental Materials Unit Purchase Agreement* *supra* note 85, no allegations of “sexual harassment or other sexual misconduct,” *The Navigators Group, Inc. Merger*, *supra* note 78, art. III, § 3.11(f); no allegations of “sexual harassment or unlawful sexual misconduct,” *CamberView Partners Holdings, LLC Merger*, *supra* note 85; and “sexual harassment or other sexual misconduct allegations,” *GlaxoSmithKline PLC Merger*, *supra* note 85.
112. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting that “sexual misconduct” becomes prohibited “sexual harassment” if the conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” (citing 29 C.F.R. § 1604.11(a)(3) (1985))); *Misconduct*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining misconduct as “[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp[ecially] by someone in a position of authority or trust”); Alexia Fernández Campbell, *The Legal Difference Between Sexual Misconduct, Assault, and Harassment, Explained*, VOX (May 25, 2018), <https://www.vox.com/policy-and-politics/2018/1/26/16901998/weinstein-arrest-sexual-assault-harassment-rape-misconduct> [<https://perma.cc/6L4G-4PQ>] (noting that “sexual misconduct” is a broad term that can “cover everything from asking a work subordinate out on a date to pressuring them for sex in exchange for career advancement”).
113. One sample provision excludes allegations “which, having been appropriately investigated, have been found to not have been substantiated,” *STL Parent Corp. Merger*, *supra* note 78, art. 3, § 3.24, thus somewhat limiting the definition of “allegation.”
114. Subject I, *supra* note 51. Similarly, a practitioner said they would want to know to whom a complaint would need to be made for it to fall within the representation. Subject R, *supra* note 68.
115. Subject L, *supra* note 69 (“The seller says ‘look, I . . . don’t know what an allegation is . . . Is it oral? Is it mentioned to a coworker? How will I know if it was made, even?’”). One subject said that if asked to include the provision as a target’s lawyer, they would insist on using a narrower term like “complaints to Human Resources” rather than “allegations.” Telephone

is left undefined, practitioners said that they did not believe “private parties would want to define a term that the law hardly defines.”¹¹⁶

But other practitioners maintained that the phrase “allegations of sexual harassment” is clear enough for companies to satisfy the representation without much difficulty. “[A]ll of these companies should be able to call HR and the head of HR should know,” one practitioner noted.¹¹⁷ In response to concerns about defined terms, another practitioner remarked: “That sounds like a lawyer trying to get out of something.”¹¹⁸ Practitioners thus disagreed about the feasibility of conducting due diligence on #MeToo provisions. Nevertheless, all of the sample provisions target harassment claims that may not trigger legal liability, thus recognizing harassment that does not satisfy legal requirements.

5. Professional-Capacity Limitation

Most of the sample provisions are not explicitly restricted to employee behavior on the job, but rather target harassment allegations more broadly.¹¹⁹

Interview with Subject X (Apr. 5, 2019) [hereinafter Subject X]; *see also* Subject R, *supra* note 68 (saying they would ideally seek definitions of all relevant terms).

116. Telephone Interview with Subject Y (Apr. 5, 2019) [hereinafter Subject Y]. Another practitioner said parties might seek guidance from the EEOC. Subject X, *supra* note 115.

117. Subject T, *supra* note 88. As someone representing “gigantic companies that are pretty well organized,” another subject said, finding relevant information is not an issue. Subject X, *supra* note 115. Although “pushback” against the representation may be more legitimate for smaller businesses with less sophisticated infrastructures, such businesses are also more likely to know about relevant information by virtue of their more modest operations. *Id.*

118. Subject X, *supra* note 115.

119. Thus, twenty-eight of the sample provisions are not limited to allegations against individuals with respect to any particular capacity but rather apply more broadly. *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *CafePress Inc. Merger*, *supra* note 78; *Del Frisco’s Restaurant Group, Inc. Purchase Agreement*, *supra* note 85, art. 2.12(j); *Denbury Resources Inc. Merger*, *supra* note 55; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *Environmental Materials Unit Purchase Agreement*, *supra* note 85, art. 4.15(d); *Essendant Inc. Merger*, *supra* note 55; *Farfetch US Holdings, Inc. Merger*, *supra* note 78, art. II, § 2.12(h); *FedNat Holding Company Purchase*, *supra* note 78; *Forrester Research, Inc. Merger*, *supra* note 55, art. 2, § 2.17(k); *Genuine Parts Co. Merger*, *supra* note 55; *JetPay Corp. Merger*, *supra* note 78; *Midatech Pharma PLC Purchase*, *supra* note 78; *Omega Healthcare Investors, Inc. Merger*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *Phoenix Top Holdings LLC Purchase*, *supra* note 55, art. III, § 3.10(e); *Prescribe Wellness, LLC Merger*, *supra* note 78; *The Providence Service Corp. Merger*, *supra* note 78; *RLJ Entertainment, Inc. Merger*, *supra* note 78; *Saban Capital Acquisition Corp. Merger*, *supra* note 78; *Sendgrid, Inc. Merger*, *supra* note 78; *STL Parent Corp. Merger*, *supra* note 78; *Stryker Corp. Merger*, *supra* note 78; *Verscend Technologies, Inc. Merger*, *supra* note 78; *WC SACD One Parent, Inc. Merger*, *supra* note 85; *WordStream, Inc. Merger*, *supra* note 78; *Zix Corporation Purchase*, *supra* note 55; *Zoe’s Kitchen, Inc. Merger*, *supra* note 55.

Eleven provisions, however, do target employee behavior on the job in particular.¹²⁰ By restricting the representation to an individual's professional conduct, these provisions shift risk to the buyer because the target is not obligated to investigate harassment beyond the workplace. However, since the term "sexual harassment" is arguably already rooted in the context of employment,¹²¹ the professional capacity limitation may be redundant in certain provisions.

6. *Current-Employee Limitation*

Most of the sample provisions are not limited to current employees.¹²² They therefore capture a company's ongoing culture surrounding harassment, including incidents that may have led to firings. Such provisions are less favorable to the target because they require broader disclosure of allegations against past employees. But it makes economic sense for provisions to capture all possible indications of a hostile work environment. As one practitioner noted, all allegations surrounding employees—including an employee "before the person even arrived at the present company"—are pertinent to reputation and may potentially affect share price.¹²³

120. Nine of the thirty-nine provisions limit the representations to allegations against an employee in their "capacity" as a company affiliate or "in connection with" the employee's company affiliation. *Amicus Therapeutics, Inc. Merger*, *supra* note 78, art. III, § 3.17(e); *Aquaventure Holdings, Inc. Purchase*, *supra* note 85; *CamberView Partners Holdings, LLC Merger*, *supra* note 85; *Esterline Technologies Corp. Merger*, *supra* note 78; *Forest City Realty Trust, Inc. Merger*, *supra* note 78, art. V, § 5.8(n); *Horizon Bancorp, Inc. Merger*, *supra* note 85; *The Navigators Group, Inc. Merger*, *supra* note 78, art. III, § 3.11(f); *SJW Group Merger*, *supra* note 56; *Victory Capital Holdings, Inc. Purchase*, *supra* note 78, art. III, § 3.14(f). Another is restricted to relevant employees' professional capacities but applies to board members more generally. *AthenaHealth, Inc. Merger*, *supra* note 78, art. V, § 5.1(i)(iii). Finally, one provision is partially restricted to conduct "during and related to [the person's] tenure at the Company." *GlaxoSmithKline PLC Merger*, *supra* note 85.

121. *See supra* Section I.C.5.

122. Of the thirty-nine sample provisions, only five are limited to "current" company affiliates, *AthenaHealth, Inc. Merger*, *supra* note 78, art. V, § 5.1(i)(iii); *Essendant Inc. Merger*, *supra* note 55; *FedNat Holding Company Purchase*, *supra* note 78; *Genuine Parts Co. Merger*, *supra* note 55; *JetPay Corp. Merger*, *supra* note 78, art. IV, § 4.18(e), two explicitly encompass any "current or former" company affiliates, *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *WordStream, Inc. Merger*, *supra* note 78, art. IV, § 4.19(i), and two are limited to "current or former" company affiliates in the context of settlement agreements involving allegations of sexual harassment, *Stryker Corp. Merger*, *supra* note 78, art. III, § 3.13(e); *Zoe's Kitchen, Inc. Merger*, *supra* note 55.

123. Subject Z, *supra* note 53.

7. *Hierarchical or Role-Based Limitation*

About two-thirds of the provisions target employees of a certain seniority level.¹²⁴ By focusing on top-level executives, these provisions allow target companies to reasonably narrow their due-diligence obligations.¹²⁵ Moreover, they focus on company actors who have more power and potential to trigger publicity at the organization.¹²⁶ Allegations against these actors are thus more

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124. Twenty-three of the thirty-nine provisions are limited to sexual harassment allegations against company officers, directors, board members, and/or employees of a certain seniority level. *AthenaHealth, Inc. Merger*, *supra* note 78; *CafePress Inc. Merger*, *supra* note 78; *Denbury Resources Inc. Merger*, *supra* note 55; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78; *Essendant Inc. Merger*, *supra* note 55; *Esterline Technologies Corp. Merger*, *supra* note 78; *FedNat Holding Company Purchase*, *supra* note 78; *Forest City Realty Trust, Inc. Merger*, *supra* note 78; *Genuine Parts Co. Merger*, *supra* note 55; *Horizon Bancorp, Inc. Merger*, *supra* note 85; *JetPay Corp. Merger*, *supra* note 78; *Midatech Pharma PLC Purchase*, *supra* note 78; *The Navigators Group, Inc. Merger*, *supra* note 78; *Omega Healthcare Investors, Inc. Merger*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *Phoenix Top Holdings LLC Purchase*, *supra* note 55; *RLJ Entertainment, Inc. Merger*, *supra* note 78; *Saban Capital Acquisition Corp. Merger*, *supra* note 78; *SJW Group Merger*, *supra* note 56; *Stryker Corp. Merger*, *supra* note 78; *Verscend Technologies, Inc. Merger*, *supra* note 78; *Victory Capital Holdings, Inc. Purchase*, *supra* note 78; *Zix Corporation Purchase*, *supra* note 55. One provision is limited to any director, officer, or contractor, *Amicus Therapeutics, Inc. Merger*, *supra* note 78, and one provision is solely restricted to the company's Chief Executive Officer, *CamberView Partners Holdings, LLC Merger*, *supra* note 85. In addition, four provisions feature some seniority limitations with respect to settlement agreements, *Environmental Materials Unit Purchase Agreement*, *supra* note 85; *STL Parent Corp. Merger*, *supra* note 78, or complaints, *Prescribe Wellness, LLC Merger*, *supra* note 78; *The Providence Service Corp. Merger*, *supra* note 78.
125. A subject noted that they expected carveouts for senior executives because "it is basically impossible for a company to say that no employee has ever had such an allegation," and that one would expect the company to have knowledge of allegations against top executives. Subject Z, *supra* note 53.
126. They include variations such as "officer of the Company or any of its Subsidiaries," *RLJ Entertainment, Inc. Merger*, *supra* note 78, "any individual in his or her capacity as an employee . . . at a level of Senior Vice President or above," *Forest City Realty Trust, Inc. Merger*, *supra* note 78, and "(A) any officer or director of the Company or any of its Subsidiaries or (B) any employee of the Company or any of its Subsidiaries who, directly or indirectly, supervises at least eight (8) other employees of the Company or any of its Subsidiaries," *Midatech Pharma PLC Purchase*, *supra* note 78.

likely to cause reputational damage.¹²⁷ It is also more expensive to replace key executives.¹²⁸

The reputational risks and replacement costs of top-level executives are particularly salient in the context of founder-led businesses. Companies helmed by “larger-than-life figure[s]”¹²⁹ like Elon Musk or Michael Dell are especially vulnerable to the impact of public perception because “[their CEOs are] the face of the company twenty-four hours a day.”¹³⁰ The provision disproportionately appears in deals involving “strong, founder-led businesses,” such as “technology and media and entertainment companies.”¹³¹

8. *Written-Allegation Limitation*

Three of the sample provisions are limited to “written” allegations of sexual harassment.¹³² According to several practitioners, limiting the provision’s scope in this way facilitates the target’s due-diligence process.¹³³ The remaining clauses refer without further qualification to “allegations” and therefore potentially encompass a broader range of allegations, whether oral or in writing.

While most sample provisions are concerned with all “allegations” of sexual harassment, five are limited to settlement agreements, threatened or pending litigation/arbitration, or complaints involving allegations of sexual

127. *E.g.*, Subject B, *supra* note 58 (noting that a company’s pricing or reputation is less likely to be impacted by sexual-harassment allegations against “lower level managers”); Subject T, *supra* note 88 (saying that they are “not all that concerned” about allegations regarding “lower-level people”); Subject W, *supra* note 89 (“If a low-level employee is harassed by a fellow low-level employee or a first-level supervisor and it is handled by the company, it’s not really deal-relevant.”).

128. *E.g.*, Subject J, *supra* note 51 (“You see companies lose key executives, which then impacts stock price, which impacts the overall business”); Subject T, *supra* note 88 (noting that a client sought a mid-seven-figure purchase-price reduction because of the expense of finding a new CEO).

129. Subject F, *supra* note 70.

130. Subject G, *supra* note 58.

131. Telephone Interview with Subject E (Nov. 6, 2018) [hereinafter Subject E].

132. *CamberView Partners Holdings, LLC Merger*, *supra* note 85; *Esterline Technologies Corp. Merger*, *supra* note 78; *Saban Capital Acquisition Corp. Merger*, *supra* note 78.

133. *See* Subject I, *supra* note 51 (“[I]f [the allegation is] written, you should have it.”); Subject W, *supra* note 89 (noting that “nobody wants to be at fault” if a company is later held liable for failing to disclose an oral allegation about an employee).

harassment.¹³⁴ These five provisions therefore require pertinent harassment allegations to rise to additional levels beyond unqualified allegations, thus limiting a target’s due-diligence scope and solely acknowledging allegations recognized to some extent by the law.

9. Reference to Settlements

A little under half of the sample provisions address settlement agreements in addition to allegations.¹³⁵ This addition is designed to target entities, like the Weinstein Company, that routinely engage in settlements to fend off public accusations against their CEO.¹³⁶ A lawyer representing Weinstein reportedly said that entering into settlement agreements is not “evidence of anything.”¹³⁷ Interview subjects did not share this view. According to one subject, asking about settlements effectively means asking “how many times have you bought

134. *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *Forrester Research, Inc. Merger*, *supra* note 55; *The Providence Service Corp. Merger*, *supra* note 78; *Stryker Corp. Merger*, *supra* note 78; *Zoe’s Kitchen, Inc. Merger*, *supra* note 55.

135. Nineteen provisions include a subclause representing a lack of settlement agreements and/or settlement discussions relating to allegations of sexual harassment. *CafePress Inc. Merger*, *supra* note 78; *Del Frisco’s Restaurant Group, Inc. Purchase Agreement*, *supra* note 85; *Edwards Lifesciences Holding, Inc. Merger*, *supra* note 78, art. III, § 3.13(g); *Environmental Materials Unit Purchase Agreement*, *supra* note 85; *Esterline Technologies Corp. Merger*, *supra* note 78; *Farfetch US Holdings, Inc. Merger*, *supra* note 78, art. II, § 2.12(h); *GlaxoSmithKline PLC Merger*, *supra* note 85; *Horizon Bancorp, Inc. Merger*, *supra* note 85; *Midatech Pharma PLC Purchase*, *supra* note 78; *Pacific Biosciences Merger*, *supra* note 55; *Prescribe Wellness, LLC Merger*, *supra* note 78, art. III, § 3.29; *The Providence Service Corp. Merger*, *supra* note 78; *RLJ Entertainment, Inc. Merger*, *supra* note 78; *STL Parent Corp. Merger*, *supra* note 78; *Stryker Corp. Merger*, *supra* note 78; *Verscend Technologies, Inc. Merger*, *supra* note 78; *WC SACD One Parent, Inc. Merger*, *supra* note 85; *Zix Corporation Purchase*, *supra* note 55, art. III, § 3.12(c); *Zoe’s Kitchen, Inc. Merger*, *supra* note 55. Two provisions solely address such settlement agreements. *Birner Dental Management Services, Inc. Merger*, *supra* note 55; *Forrester Research, Inc. Merger*, *supra* note 55. These provisions are not restricted to settlement agreements beyond a certain threshold amount. The remaining eighteen provisions do not refer to settlements.

136. See Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/2G3G-5FLF>]. According to the *New York Times*, Weinstein reached at least eight settlements with individuals who collected between \$80,000 and \$150,000. See Kantor & Twohey, *supra* note 4. A total of about \$13 million was paid out to address complaints regarding *Fox News* host Bill O’Reilly. See Emily Steel & Michael S. Schmidt, *Bill O’Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [<https://perma.cc/2LY9-KBA8>].

137. Kantor & Twohey, *supra* note 4.

off somebody making allegations of harassment?”¹³⁸ For this reason, as another subject explained, a “historical practice of making these settlements” would be a significant concern if discovered during the diligence process.¹³⁹

In addition, it is more difficult for a company to evade questions about the prevalence of settlement agreements as opposed to allegations because such agreements are recorded and involve payouts.¹⁴⁰ Targeting settlement agreements therefore effectively scrutinizes a practice repeatedly used by companies seeking to hide underlying harassment issues.

II. A NEW SOCIOCULTURAL IMPACT ON M&A

Following Part I’s description of the rise of the #MeToo clause and its features, this Part argues that the clause is a unique form of what John Coates terms “reactive growth.”¹⁴¹ Section II.A explains reactive-growth theory and highlights the #MeToo clause’s reflection of a collective, ongoing social movement spearheaded by women of color. Section II.B describes the #MeToo clause’s main benefits, including its ability to broaden conversations surrounding sexual harassment and its recognition of claims historically ignored by the law. Section II.C argues that the #MeToo clause also has drawbacks, most notably the stigmatization of harassment records.

A. *The #MeToo Clause: A Unique Form of “Reactive Growth”*

The #MeToo clause emerged in response to heightened attention to sexual harassment and is therefore a form of “reactive growth” in M&A contracts. Unlike past examples of such growth, the clause is driven by social activism rather than purely legal developments. As a result, the clause is more likely to leave a lasting imprint on the industry.

138. Subject W, *supra* note 89 (“Whenever I see big settlements, I see a company that likes brushing things under the carpet.”).

139. Subject Y, *supra* note 116.

140. *E.g.*, Subject H, *supra* note 107 (noting that settlement agreements result in a “dollar loss”); Subject R, *supra* note 68 (“[A provision regarding settlements is] very focused and it’s very hard for a company to say ‘that’s too vague, I don’t know how to diligence that.’”); Subject S, *supra* note 88 (“Certainly focusing on settlements is more concrete than just undefined allegations.”).

141. Coates, *supra* note 24, at 1.

1. *Reactive Growth in M&A*

The #MeToo clause is a form of what John Coates terms “reactive growth.”¹⁴² Coates defines reactive growth as “the idea that lawyers add contract language to prior models in reaction to external shocks—new case law, new statutes, or new financial risks.”¹⁴³ Reactive-growth provisions emerge from a “heightened focus” on particular, at times preexisting, legal risks.¹⁴⁴ The #MeToo clause addresses a preexisting legal risk—sexual harassment—in light of heightened attention to misconduct, thereby responding to external shifts in risk allocation. Several subjects compared the #MeToo clause to provisions that surfaced to address the Foreign Corrupt Practices Act (FCPA),¹⁴⁵ uncertainty surrounding the ability of computers to transition into the twenty-first century,¹⁴⁶ and concerns over environmental liabilities.¹⁴⁷

However, unlike other reported instances of reactive growth, the #MeToo clause was spurred by the social impact of sexual-harassment victims, particularly the women of color who first started the movement years ago.¹⁴⁸ The #MeToo clause therefore marks a unique moment in M&A history: a moment when the external pressure of a social movement is shaping corporate negotiations and due diligence.

Sexual harassment was certainly a preexisting corporate risk because of potential litigation and settlement costs. But, as one subject explained, “[i]t used to be that a typical harassment allegation would not be material to a large company because the individual damages that [a] particular claimant could get were relatively minimal and not material to the company.”¹⁴⁹ The #MeToo clause has significantly amplified this corporate risk by assigning massive

142. *Id.*

143. *Id.*

144. *Id.* at 18.

145. Subject H *supra* note 107; Subject M, *supra* note 51.

146. Subject F, *supra* note 70.

147. Subject R, *supra* note 68. Coates cites representations regarding bribes and SEC disclosure control systems as reactions to SOX and the rise in prosecuted cases under the FCPA. Coates, *supra* note 24, at 17-18. In response to increased FCPA enforcement, M&A contracts increasingly featured representations stating that target companies maintained disclosure controls as required by SEC rules, or that target-company executives disclosed significant deficiencies in control measures to auditors. *Id.*

148. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/X2JD-MK5X>].

149. Subject Z, *supra* note 53.

reputational damage to allegations of sexual harassment. Moreover, unlike other chronicled roots of reactive growth, the #MeToo movement amplified risk outside the confines of the law. It has condemned legal remedies to harassment as insufficient by challenging corporate wrongs through collective consumer action and transcending the formal barriers of settlement agreements and statutes of limitations.

The vast majority of interviewees noted the clause's genesis in the #MeToo movement or in the Weinstein scandal,¹⁵⁰ and many noted the clause's reflection of shifting societal norms regarding sexual-harassment allegations.¹⁵¹ Interviewees also said that the #MeToo movement creates significant reputational risks that lead clients to ask about potential liabilities related to sexual harassment.¹⁵² They cited the volume and notoriety of cases in which companies lost funds because of sexual-harassment allegations, even when unsubstantiated.¹⁵³ The provision only exists because companies are cognizant of the #MeToo movement and the ensuing seismic shift in consumer attitudes.

150. *E.g.*, Subject F, *supra* note 70 (saying that the provision's genesis is "pretty obvious" given the Weinstein scandal and subsequent cases of public concern); Subject J, *supra* note 51 (noting the "political landscaping" and the "uptick" in #MeToo cases); Subject L, *supra* note 69 (noting when asked about their impressions of the provision that "the world has awoken to Me Too"); Subject O, *supra* note 51 (noting that the provision was triggered by the #MeToo movement).

151. *E.g.*, Subject D, *supra* note 53 (noting that sexual-harassment concerns have generally become "more front and center"); Subject E, *supra* note 131 (mentioning the existence of "more awareness overall in society" regarding sexual harassment); Telephone Interview with Subject N (Dec. 11, 2018) [hereinafter Subject N] (explaining that sexual harassment is a "hot topic" given what has been happening "across the country"). As noted *infra* Appendix A, when contacting practitioners for interviews, I did not describe the provision as emanating from the #MeToo movement or from the Weinstein scandal.

152. Subject C, *supra* note 106 ("The #MeToo movement is a huge business risk and so you would probably expect clients on the business side to say we want to know if they have any of these skeletons."); Subject D, *supra* note 53 ("We all watch the news and read the newspapers. [Sexual harassment has] just become more front and center. . . . Clients are more focused on it, lawyers are more focused on it."); Subject F, *supra* note 70 ("The genesis is pretty obvious, right, the Weinstein [case] and all the ones subsequent to that Buyers are demanding a little bit of knowledge on that front."); Subject L, *supra* note 69 (mentioning the #MeToo movement and noting that "buyers and their lawyers now ask, and expect an answer in writing, in the form of a representation").

153. *See* Subject G, *supra* note 58 ("We've seen that an allegation itself can be something that gets an incredible amount of focus."); Subject J, *supra* note 51 (noting that "allegations" of harassment may have an "impact on the overall value of the business" given "our culture right now"); Subject T, *supra* note 88 (noting that a client did not want to retain an executive because of allegations of harassment at his previous workplace). In the #MeToo era, allegations cause reputational harm regardless of whether or not they are legally cognizable, as evidenced by the impact of Kate Upton's Tweet on Guess stock. *See* Cooney, *supra* note 17.

2. *The #MeToo Clause Is Here to Stay*

Because the #MeToo clause is rooted in a broader shift in social norms, it will likely become a fixture in M&A boilerplate.¹⁵⁴ Unlike a representation centered around a particular law or an individual case of liability, the #MeToo clause draws strength from a global network of activists who have rallied around this issue for years. Some practitioners predict that the #MeToo clause will be in “virtually all deals” within one or two years¹⁵⁵ and foresee the clause expanding to cover other forms of workplace misconduct such as bullying or racism.¹⁵⁶

While the clause’s roots in the #MeToo movement suggest its longevity, the clause was by no means motivated by the M&A industry’s altruistic attempt to reduce sexual harassment in the workplace. Subjects described the clause’s rise as motivated by a desire to reduce business risks associated with sexual harassment, not as an ethically driven measure to prevent harassment in the first place.¹⁵⁷ Although the clause is remarkable for its reflection of #MeToo activism, it is aimed at minimizing buy-side risk, above all else.

Nevertheless, the fact that the M&A industry responded at all is noteworthy. It demonstrates the #MeToo movement’s power to impact deal terms and to transform due-diligence practices. Although the industry has seen reactive growth before in response to new legislation or to an agency’s enforcement actions, the #MeToo clause explicitly reacts and lends legal legitimacy to a social movement.

B. The Benefits of the #MeToo Clause

This Section argues that the #MeToo clause has several potential benefits that render it a welcome addition to M&A advisory. But the onus is on practitioners to bring these benefits to fruition. Through the right negotiation practices and due-diligence methods, M&A lawyers can help carry the #MeToo

154. The #MeToo clause also benefits from the general intuition that boilerplate is not often removed because it may “feel risky to take it out.” Subject C, *supra* note 106; *see also* Robert Anderson & Jeffrey Manns, *Boiling Down Boilerplate in M&A Agreements: A Response to Choi, Gulati, & Scott*, 67 DUKE L.J. ONLINE 219, 221 (2019) (noting that “[l]awyers routinely recycle boilerplate provisions from earlier precedents” while providing “idiosyncratic edits”).

155. Subject M, *supra* note 51.

156. Subject H, *supra* note 107. Another practitioner noted that it is “uncommon for boilerplate to be removed” because “once something becomes standard it starts to feel risky to take it out.” Subject C, *supra* note 106.

157. *See* Subject D, *supra* note 53 (describing the clause’s emergence as “more reactive than proactive”); Subject E, *supra* note 131 (describing the clause as the product of a societal “feedback loop”); Subject H, *supra* note 107; Subject I, *supra* note 51; Subject J, *supra* note 51.

movement to the board room and stave off the drawbacks addressed in Section II.C. The #MeToo clause has at least four potential benefits: (1) driving conversations among practitioners and company actors regarding sexual-harassment issues; (2) amplifying harassment claims historically ignored by the law; (3) improving the due-diligence process; and (4) incentivizing target companies to adopt proactive and preventative approaches with respect to sexual harassment.

1. *Driving Conversations Among Lawyers, Executives, and HR Personnel*

The #MeToo clause has encouraged awareness among a range of transactional actors by triggering more explicit conversations about sexual harassment among M&A lawyers, company executives, and HR personnel. “I think something this specific about sexual harassment would have been seen probably as borderline offensive or something you wouldn’t put in a purchase agreement prior to the #MeToo movement,” one subject said.¹⁵⁸ The clause makes sexual harassment “part of the normal discussion”¹⁵⁹ and doesn’t “raise a lot of eyebrows.”¹⁶⁰ Further, practitioners noted that their firms were having “internal discussions”¹⁶¹ and “healthy [conversations]”¹⁶² about the clause and its broader social implications.

Although conversations about sexual harassment may have previously taken place between company executives, the provision now more explicitly implicates lawyers and the due-diligence process.¹⁶³ Just as companies routinely ask about a target’s funding strategy, questions about corporate culture regarding issues like sexual harassment may become the norm.¹⁶⁴ These conversations therefore implicate a wider range of transactional actors and require broader awareness of sexual-harassment issues.

To be sure, the degree to which the clause sparks conversation varies. As one practitioner explained, some of their clients are “very concerned” about sexual-harassment issues and ask probing questions, while others “don’t care.”¹⁶⁵ Another noted that “employment issues rarely drive the deal” and that they have

158. Subject D, *supra* note 53.

159. Subject E, *supra* note 131.

160. Subject N, *supra* note 151.

161. Subject Y, *supra* note 116.

162. Telephone Interview with Subject V (Mar. 29, 2019) [hereinafter Subject V].

163. Subject G, *supra* note 58.

164. Subject E, *supra* note 131.

165. Subject W, *supra* note 89.

not had “significant” conversations with clients about the clause thus far because they have not encountered a company with “red flags.”¹⁶⁶ Nevertheless, the clause invites discussion and awareness of a subject which has historically been marginalized in the M&A context, and may at least in some cases force corporate lawyers and company actors to have difficult conversations.

2. *Deepening Inquiries into Sexual-Harassment Policies During Due Diligence*

The #MeToo clause also enhances and particularizes the due-diligence process. Interview subjects consistently said that the clause is aimed at triggering more focused due diligence and institutional memory regarding sexual harassment. Because the clause pinpoints sexual-harassment issues, it ideally encourages lawyers to ask more specific questions and leads target companies to review their harassment histories more thoroughly.¹⁶⁷

The extent to which the clause targets substantively new information depends on the contract’s existing provisions. Even if sexual harassment is technically addressed in another provision, the #MeToo clause’s specificity still enhances the due-diligence process. Some subjects said that the clause does not change the substantive “meaning” of the agreement,¹⁶⁸ but rather is designed to “make sure you’re asking the right questions of the right people” and to assure clients that relevant questions have been posed before closing.¹⁶⁹ “Sometimes a rep[resentation] like this will be the catalyst for that discussion [regarding sexual harassment],” one subject noted, “and other times you might have that whole discussion and then the rep[resentation] is put in and it’s held up with suspenders to . . . keep them honest.”¹⁷⁰ The contract therefore “doesn’t just

166. Subject X, *supra* note 115.

167. Subject B, *supra* note 58 (explaining that the clause is “more direct and on the point”); Subject C, *supra* note 106 (saying that the clause “intended to trigger the notice and memory of the individuals responsible for gathering the data from the other side”); Subject I, *supra* note 51 (noting that the clause “get[s] the parties focused on the issue”); Subject J, *supra* note 51 (arguing that the provision “makes targets think about what they’ve experienced in this area during the diligence process”); Subject N, *supra* note 151 (saying that the provision is meant to “ferret out any . . . bad behavior”); Subject O, *supra* note 51 (describing the clause as “more specific”).

168. Subject L, *supra* note 69; *see* Subject A, *supra* note 74.

169. Subject H, *supra* note 107.

170. Subject G, *supra* note 58.

serve a function once it exists,” but rather is “part of the contracting and the diligence process.”¹⁷¹

Similarly, practitioners said that a target company’s hesitation to answer more specific questions about sexual-harassment allegations can be “telling” and lead practitioners to investigate certain time periods or executives.¹⁷² For example, one practitioner recounted a deal where a “very senior person” was subject to sexual-harassment allegations and where hesitant remarks by a lawyer on the other side led the practitioner to believe they were “covering this up and it wasn’t the first time.”¹⁷³

3. *Legal Recognition of Harassment Allegations*

As discussed in Section II.A, the #MeToo clause legitimizes allegations of sexual harassment as worthy of legal attention. Although the custom of superiors subjecting subordinates to unwanted sexual relations at work is centuries old,¹⁷⁴ the American legal system has historically provided individuals “scant protection from sexual coercion at work.”¹⁷⁵ Sexual harassment was made legally actionable under Title VII of the Civil Rights Act of 1964, which requires a showing of “reasonable cause” for relief.¹⁷⁶ Moreover, the EEOC did not recognize sexual harassment as a form of sex discrimination under the Act until 1980.¹⁷⁷ The Supreme Court took another six years to make the same leap in *Meritor Savings Bank v. Vinson*, finding “a claim of ‘hostile environment’ sex discrimination . . . actionable under Title VII.”¹⁷⁸

The #MeToo clause is not weighed down by the slow pace of such legal developments, in part because it is situated in M&A due diligence instead of criminal law or even civil liability. The clause prioritizes allegations unaffected

171. Subject L, *supra* note 69.

172. Subject Z, *supra* note 53.

173. Subject W, *supra* note 89.

174. Reva B. Siegel, *A Short History of Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003). African Americans were offered particularly few protections under the law. Slaves were not protected under rape law, and “prosecutors and judges relied on all kinds of race- and class-based assumptions about the ‘promiscuous’ natures of the women in domestic service and other forms of market labor” when reviewing rape cases. *Id.* at 4.

175. *Id.*

176. 42 U.S.C. § 2000e-5 (2018).

177. See Hemel & Lund, *supra* note 110, at 1599.

178. 477 U.S. 57, 73 (1986). For a more detailed review of the history of sexual harassment law in the United States, see Hemel & Lund, *supra* note 110, at 1593-1610.

by legal standards and does not impose materiality constraints. Although the law “might not be up to speed” on sexual-harassment dynamics, one subject noted, the #MeToo clause is aimed at eliciting information that shows a troubled corporate culture regardless of legal liability.¹⁷⁹

The #MeToo clause’s independence from questions of legal liability may be problematic to some because it raises due-process concerns. Along these lines, one subject noted that the provisions “constitute impermissible HR disclosure if the sexual misconduct was only an allegation,”¹⁸⁰ thereby forcing the disclosure of sensitive information even though the claim may be unsubstantiated. But addressing sexual harassment in the context of M&A law provides a unique opportunity for companies and acquirers to recognize sexual-harassment claims without imposing legal harms. Even if not held to the law’s relevant standards of proof, such allegations still face the same degree of scrutiny employed in any HR inquiry involving conduct that does not rise to legal liability but is nevertheless unwelcome at the company.

4. *Incentivizing Companies to Prevent Sexual Harassment*

Another benefit of the #MeToo clause is its ability to incentivize companies, especially those with the goal of being acquired, to prevent sexual harassment from occurring in the first place. If questions from investors about harassment rates, settlement agreements, and reporting channels become routine, companies may be encouraged to prioritize establishing safe and equitable workplace cultures from their inception.¹⁸¹ The clause may thus lead companies to think about sexual-harassment concerns “at earlier stages in their lifecycle” to improve their chances of being acquired.¹⁸²

179. Subject U, *supra* note 88.

180. Subject K, *supra* note 53.

181. Such encouragement is especially important in the startup industry, where “female staffers and workers of color say sexual misconduct, discrimination and retaliation are rampant.” Sam Levin, *Startup Workers See Sexual Harassment on “Breathtaking” Scale in Silicon Valley*, GUARDIAN (Mar. 1, 2017), <https://www.theguardian.com/world/2017/mar/01/silicon-valley-sexual-harassment-startups> [<https://perma.cc/68E9-EJ2E>]. Private-equity clients in particular are especially concerned about sexual harassment at a company they acquire, in part because they have limited opportunities to oversee the company’s day-to-day operations. *E.g.*, Subject T, *supra* note 88 (noting that PE firms “jump on [sexual-harassment issues] immediately” but cannot manage day-to-day operations); Subject U, *supra* note 88 (“A lot of PE clients say ‘we want a sexual harassment rep.’”); Subject W, *supra* note 89 (“Our private equity clients are very concerned about what they call . . . environmental safety.”).

182. Subject C, *supra* note 106.

The clause further incentivizes companies to prevent sexual harassment by promoting more extensive vetting of executives when deciding whom to keep at the new entity. This vetting may prevent harassers from advancing in their careers, thereby reducing the number of harassers in executive positions.¹⁸³ Moreover, allegations of harassment uncovered during the due-diligence process may tip the scale when investors are deciding whom to let go after acquiring a new company.¹⁸⁴

In sum, the #MeToo clause's rise broadens conversations about sexual harassment to include a range of corporate actors, lends greater recognition to historically suppressed victims, enhances due diligence, and incentivizes burgeoning companies to emphasize safe workplace cultures. While the extent of these benefits depends on the time and leverage of those involved in a deal, they nevertheless reflect the #MeToo movement's meaningful impact on a multibillion-dollar industry.

C. *The Drawbacks of the #MeToo Clause*

Despite its powers for progressive change in the corporate context, the #MeToo clause raises several concerns. This Note has already responded to some of these. In response to worries that the clause might be a passing trend, I have argued that it actually marks a permanent shift in M&A law, given its origins in a collective and enduring social movement. Similarly, I argue that the clause's profit-maximizing goal does not prevent it from achieving social good. Regardless of the motives driving the clause, it has the potential to spur incremental change and involve stakeholders who are not traditionally associated with sexual-harassment reform.¹⁸⁵

This Section anticipates a major objection that has so far gone unaddressed: by focusing on allegations of misconduct, the clause risks disincentivizing or stigmatizing sexual-harassment records. Although several practitioners noted that M&A representations do not aim to "stigmatize," but rather focus on objectively disclosing risk,¹⁸⁶ others acknowledged that companies are hesitant

^{183.} *Id.*

^{184.} See Subject T, *supra* note 88.

^{185.} For a more thorough discussion of the implications of using corporate law to support the #MeToo movement's aims, see Hemel & Lund, *supra* note 110, at 1670. See also Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1229-30 (2002).

^{186.} *E.g.*, Subject E, *supra* note 131 ("If there has been something that's in a confidential HR file, we're happy to hear about it, we just don't want something to be hidden and then it comes up as a material financial liability after the transaction."); Subject Q, *supra* note 73 ("The

to disclose the extent of harassment allegations and often require probing questions to reveal sensitive information.¹⁸⁷ Practitioners mentioned, for example, situations where HR managers discouraged employees from filing reports.¹⁸⁸ If the clause becomes a permanent fixture in M&A, it may lead companies to avoid disclosure by suppressing reports or by otherwise fudging the official recording of allegations. This would undermine not only the clause's ability to elicit accurate corporate-risk assessments, but also its ability to incentivize a healthier corporate culture.

This concern is particularly grave because sexual harassment is notoriously underreported.¹⁸⁹ The EEOC found in 2016 that approximately 75% of individuals who experienced harassment at work “never even talked to a supervisor, manager, or union representative about the harassing conduct.”¹⁹⁰ Further, the EEOC reported that “anywhere from 87% to 94% of individuals [who experienced harassment] did *not* file a formal complaint” because they anticipated disbelief, retaliation, or inaction, among other outcomes.¹⁹¹ Given this backdrop, all companies are likely to have incidences of sexual harassment. Allegations of harassment should therefore be encouraged. The #MeToo clause risks signaling that reports of harassment are undesirable, thus undermining a necessary push for reporting. This risk should be addressed by rephrasing the clause and by having open conversations about the clause's purpose, as discussed in the following Part.

III. THE #METOO CLAUSE GOING FORWARD

This final Part proposes ways of changing the #MeToo clause to focus on a company's sexual-harassment reporting channels rather than its tally of

question isn't really stigma and the issue isn't really the rep as much as the disclosures. . . . The reason to have a rep is to clarify who bears the risk.”).

187. See *supra* Section II.B.1.

188. Subject T, *supra* note 88.

189. A 2018 Society for Human Resource Management (SHRM) survey found that of those non-management employees who said they experienced some form of sexual harassment in the past twelve months, only seventy-six percent reported the incident. Press Release, Soc'y for Human Res. Mgmt., SHRM Research Finds Some Employees Unaware of Company Sexual Harassment Policies (Jan. 31, 2018) [hereinafter SHRM Research], <https://www.shrm.org/about-shrm/press-room/press-releases/pages/sexual-harassment-survey.aspx> [https://perma.cc/859E-WA6R].

190. Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016) [hereinafter *Harassment Report*], https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/T2FS-4GQW].

191. *Id.*

harassment allegations. In Section III.A, I address the clause's most significant drawback by proposing that the clause be phrased as a representation targeting the extent of a company's sexual-harassment reporting infrastructure rather than targeting knowledge about past allegations. Recognizing that this proposal may not be practical given the existing conventions of M&A representations, I propose in Section III.B that the clause should target settlement agreements rather than allegations. In Section III.C, I summarize improvements to the underlying sexual-harassment reporting infrastructure that others have suggested as general best practices. I further argue in Section III.D that the due-diligence process should focus on the extent of a company's sexual-harassment reporting infrastructure.

A. Reimagining the #MeToo Clause to Focus on Reporting Infrastructure

In its current form, the #MeToo clause risks disincentivizing the recording of sexual-harassment allegations and signaling that the existence of harassment allegations in a company's files should be avoided. Rather than focusing on uncovering a tally of allegations, acquirers should ask target companies to represent that a disclosure schedule contains a description of their sexual-harassment reporting infrastructure. The representation should be phrased accordingly: "To the Knowledge of the Head of Human Resources, the extent of [Target Company's] sexual-harassment reporting channels is set forth on Schedule [X]." The target could then attach a description of their reporting infrastructure along with answers to the acquirer's questions regarding the target's handling of sexual-harassment allegations.

Interview subjects said that they analyze a range of issues when conducting due diligence for the #MeToo clause, including whether allegations were repeatedly made against certain individuals,¹⁹² whether there are any discernible noncompliance patterns,¹⁹³ how the company's harassment reporting pipeline functions,¹⁹⁴ how its culture informs sexual-harassment issues,¹⁹⁵ and whether certain groups within the company have shown unusual rates of attrition.¹⁹⁶ One subject said that their due diligence may now even include reviewing employment contracts, given that Weinstein's agreement laid out the types of fines to which he would be subject for repeated infringements of the company's

192. Subject G, *supra* note 58; Subject H, *supra* note 107.

193. Subject G, *supra* note 58.

194. Subject R, *supra* note 68; Subject X, *supra* note 115.

195. Subject G, *supra* note 58.

196. Subject H, *supra* note 107.

code of conduct.¹⁹⁷ Moreover, subjects said that the diligence process is “usually not memorialized anywhere,”¹⁹⁸ takes place through phone calls,¹⁹⁹ and may involve background checks and social-media reviews.²⁰⁰

Recording key findings regarding a company’s harassment reporting infrastructure in the agreement would focus the due-diligence process on a company’s means of recognizing harassment concerns without stigmatizing the existence of allegations. This revision would encourage companies to make sure victims have access to effective reporting channels and not punish them for having a robust database of complaints, especially at a large company where harassment is inevitable. Further, target companies would be less likely to push back against the clause because it would not require defining broad terms in the contract.²⁰¹ Instead, the clause would restrict sensitive information to the schedule rather than inviting speculation based on publicly disclosed language. This reorientation would also better serve victims of harassment at large, and not solely those who come into contact with key executives. While having an accessible reporting channel and effective investigation measures does not necessarily mean that reports will be investigated, it signals a company’s commitment to creating a safe work environment and encourages employees to take sexual harassment seriously.²⁰²

A few practitioners endorsed this reimagination of the #MeToo clause,²⁰³ while others said that it would be “highly unusual” to attach more detailed

197. See Subject Z, *supra* note 53.

198. See Subject R, *supra* note 68.

199. See Subject Y, *supra* note 116.

200. See Subject H, *supra* note 107; Subject I, *supra* note 51; Subject Z, *supra* note 53.

201. While the schedule would include an account of the company’s reporting channels, potentially with defined terms, the representation itself would not render the company liable for failing to disclose broadly phrased allegations.

202. *Harassment Report*, *supra* note 190 (explaining that an “effective and safe reporting system” communicates that “the employer takes harassment seriously,” leading to more complaints and “a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace”).

203. Subject S, *supra* note 88 (noting that they preferred the idea of focusing on harassment-reporting channels as a means of targeting underlying risk and that it would “soften” a target’s reluctance to the clause); Subject X, *supra* note 115 (saying that the revision is a “good idea” and that “you definitely could have a rep or at least a diligence request that kind of walks through what their [reporting] process is”); Subject Y, *supra* note 116 (noting that a representation targeting a company’s harassment infrastructure may be a “kind of compromise”).

information about a company's harassment policies to a schedule.²⁰⁴ Lawyers therefore argued that the proposed provision would place unrealistic demands on an acquirer's lawyers to memorialize what is conventionally conducted through due diligence. While this objection has merit, I argue that since due diligence already lies at the heart of the clause's contributions, the proposal is an extension of the clause's main function. Practitioners should be motivated to enhance the clause's diligence function because more effective due diligence helps uncover salient information about the target. This enhancement could take place without using a representation, by changing due-diligence practices as further discussed in Section III.D. Using a representation would supplement this benefit because it would highlight due-diligence practices in the deal's guiding document and ensure that the extent of a company's harassment reporting channel has been memorialized.

B. Targeting Settlement Agreements

Another way of harnessing the #MeToo clause's core benefits and minimizing its drawbacks is by targeting settlement agreements instead of allegations. Existing provisions embodying this principle already exist, providing that no company representative is "party to a settlement agreement" involving allegations of sexual harassment with relevant executives.²⁰⁵ This form of the provision avoids disincentivizing the recording of harassment allegations and instead casts a shadow on companies that dispose of harassment issues through confidential settlements. A practitioner who refused to agree to a #MeToo clause because it was too broad suggested that settlement agreements more effectively capture company misconduct and facilitate due diligence by providing a more concrete request.²⁰⁶ "If you've got a target that is continually paying significant amounts in settlement about claims like this," the subject noted, "you know that there's probably a problem somewhere."²⁰⁷

However, other subjects said that settlement agreements are more typically targeted by other provisions,²⁰⁸ and that focusing on settlement agreements may

204. Subject T, *supra* note 88; *see also* Subject V, *supra* note 162 (saying that the extent of a company's reporting pipeline is more suited to due-diligence discussions); Subject W, *supra* note 89 (noting that policies and practices are not often "reduced to writing in an agreement").

205. *See Birner Dental Management Services, Inc. Merger*, *supra* note 55, art. IV, § 4.13(g).

206. Subject R, *supra* note 68; *see also* Subject S, *supra* note 88 ("Certainly focusing on settlements is more concrete than just undefined allegations.").

207. Subject R, *supra* note 68.

208. Subject U, *supra* note 88.

put target companies in a difficult position because they are limited by confidentiality restrictions.²⁰⁹ Focusing the #MeToo clause on settlement agreements risks stigmatizing them, just as the current clause stigmatizes recorded allegations. Moreover, this reorientation sacrifices the clause's recognition of extralegal complaints and risks stigmatizing favorable settlement agreements for victims. This shift in the clause is more realistic, however, because it preserves the clause's risk-sharing function.

C. Improving Sexual-Harassment Reporting Infrastructure

This Section summarizes several existing proposals for improving sexual-harassment due diligence that would further the #MeToo clause's due-diligence function and counteract its reporting disincentives. These proposals include improving access to standardized policies, reviewing anonymous survey data, and facilitating harassment reporting through escrow technology.

The #MeToo clause's effectiveness, regardless of the form in which it is drafted, fundamentally depends on the nature of underlying sexual-harassment channels at corporations. It is especially challenging to evaluate the extent of such channels given that a company may have a handbook outlining practices and procedures, but not actually follow them.²¹⁰ This risk is especially considerable "when someone is bringing a charge against a very powerful

209. Subject Y, *supra* note 116. Such confidentiality constraints have become a more prominent concern in the wake of #MeToo, as some argue that they prevent victims from coming forward. Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, A.B.A. (2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement [<https://perma.cc/LLN4-B3W8>]. Sixteen states have introduced bills addressing the enforceability of confidentiality provisions. *Id.* It is unclear, however, whether preventing confidential settlement agreements actually helps victims. On the one hand, such agreements hinder antiharassment measures by allowing organizations to suppress the identities of harassers and the extent of their misconduct. Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 *YALE L.J.F.* 121, 140 (2018). Employers are incentivized to settle harassment claims to "avoid the possibility of a public trial and prevent any negative publicity." Bradford J. Kelley & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, *BUS. L. TODAY* (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims> [<https://perma.cc/NF7F-ZQDQ>]. On the other hand, such agreements allow victims to settle individual claims and shield themselves from possible retaliation. Mizrahi, *supra*, at 140. States may adopt a middle ground by banning confidentiality provisions unless the complainant requests one. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019) (banning confidentiality provisions in sexual-harassment settlement agreements "unless the condition of confidentiality is the complainant's preference").

210. Subject T, *supra* note 88.

individual at the company,” one subject explained.²¹¹ Moreover, although ninety-four percent of surveyed HR professionals said their organization had sexual-harassment policies, twenty-two percent of nonmanagement employees did not know with certainty that these policies existed.²¹²

Well-known elements of successful antiharassment structures include having transparent sexual-harassment policies,²¹³ providing training sessions for employees,²¹⁴ ensuring direct communication between HR and the CEO,²¹⁵ removing mandatory employee-arbitration clauses,²¹⁶ enforcing complaint-resolution procedures,²¹⁷ and maintaining a centralized reporting database.²¹⁸

Before assessing the extent of a company’s sexual-harassment infrastructure, the entity must have practices and policies in place. Although this might seem obvious, six percent of HR professionals said their organizations do not have antiharassment policies.²¹⁹ Any company’s lack of a sexual-harassment policy is striking, especially since employers have had an affirmative defense to vicarious liability for an employee’s harassing conduct since *Faragher v. City of Boca Raton* was decided in the 1990s.²²⁰

211. *Id.*

212. SHRM Research, *supra* note 189.

213. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 U. MINN. L. REV. 229, 287 (2018) (recommending that employers “revise their harassment and discrimination policies to be more transparent”).

214. SHRM Research, *supra* note 189.

215. Susan M. Heathfield, *Why HR Should Report to the CEO: A Business Management Success Tip About the HR Reporting Structure*, BALANCE CAREERS (Aug. 16, 2019), <https://www.thebalancecareers.com/why-hr-should-report-to-the-ceo-1918401> [<https://perma.cc/5ZVU-RSN7>].

216. See, e.g., Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS (May 15, 2018, 6:59 AM), <https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2> [<https://perma.cc/DPH9-PUGQ>].

217. SHRM Research, *supra* note 189.

218. Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. DEP’T EDUC. 48 (June 2004), <https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf> [<https://perma.cc/ASU2-9VCZ>].

219. SHRM Research, *supra* note 189.

220. *Faragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998). Employers can avoid liability by (1) demonstrating “reasonable care” to promptly prevent and correct harassment and by showing (2) that the employee “unreasonably failed” to use “preventive or corrective opportunities provided by the employer.” *Id.* at 778. Showing that an employee failed “to use any complaint procedure provided by the employer” will “normally suffice” to satisfy the second element of the company’s burden. *Id.* The Court therefore “made it clear that employers can protect themselves against big-money sexual harassment lawsuits by

Improving access to standardized policies would help mend this gap and thus further the #MeToo clause's due-diligence function.²²¹ The existence of written policies supports the due-diligence process by providing specific guidelines to which the companies purport to adhere. Having a concrete frame of reference for the company's policies is essential to evaluating its ability to put those policies into practice.

In addition, a company's tally of harassment allegations does not shed light on the extent of reporting mechanisms. Therefore, practitioners should probe employees' lived experiences at the company through online and company resources. To assess how a company's harassment infrastructure works in practice, practitioners should review anonymous employee survey data regarding sexual-harassment policies and procedures.²²² Further, if such surveys are not available, practitioners should consult online-review resources like Glassdoor.²²³ Practitioners could also look at the EEOC's collection of pay data

establishing and communicating effective anti-harassment policies and procedures." Eric Matusewitch, *Developing and Publishing Effective Sexual Harassment Policies*, 12 ANDREWS EMP. LITIG. REP., Oct. 27, 1998, at 3; see also Barbara Harris, *Sexual Harassment at Work: "Just a Pat on the Butt!"*, 48 R.I. B.J. 5, 5 (1999) (noting that companies "must establish an anti-harassment policy" to minimize liability in light of *Faragher*); cf. Davida S. Perry & Brian Heller, *Harassment in the Workplace 20 Years After Faragher*, 32 WESTLAW J. EMP., Feb. 27, 2018, at 12 ("[I]n the years following the *Faragher* decision, many employers argued that merely having a policy against sexual harassment was enough to insulate them from liability, even though the Supreme Court specifically held otherwise."). Creating a sexual-harassment policy is the "bare minimum" to ensure a safe workplace. Mark Joseph Stern, *Who's to Blame for America's Sexual Harassment Nightmare?*, SLATE (Oct. 17, 2017, 7:02 PM), <https://slate.com/news-and-politics/2017/10/blame-the-supreme-court-for-americas-sexual-harassment-nightmare.html> [<https://perma.cc/M6Q2-5EQB>].

221. For example, one practitioner noted that the National Venture Capital Association (NVCA), which provides model documents for private financings, posted sample HR policies and best practices regarding sexual harassment and discrimination in the wake of #MeToo. Subject Q, *supra* note 73. See also NVCA *Unveils Resources to Help Address Sexual Harassment in Venture Ecosystem*, NAT'L VENTURE CAP. ASS'N (Feb. 22, 2018), <https://nvca.org/pressreleases/nvca-unveils-resources-help-address-sexual-harassment-venture-ecosystem> [<https://perma.cc/4UZC-DVVY>] (discussing the release of NVCA's model documents). Moreover, New York now requires every employer to adopt a sexual-harassment prevention policy that satisfies certain guidelines, and provides a range of model policies and standards online. *Model Sexual Harassment Policies*, N.Y. ST., <https://www.ny.gov/combating-sexual-harassment-workplace/employers> [<https://perma.cc/C7S5-UCC7>].
222. Subject Z, *supra* note 53.
223. *Id.* Glassdoor is a job and recruiting site that provides job listings along with "company reviews, CEO approval ratings, salary reports, interview reviews and questions, benefits reviews" and other information provided by employees. *About Us*, GLASSDOOR, <https://www.glassdoor.com/about-us> [<https://perma.cc/3XEP-PV6J>].

to assess discrimination and wage disparity,²²⁴ which may provide another window into a company's cultural practices.²²⁵ Investigating the experiences of employees on the ground would help practitioners ascertain underlying risks and encourage target companies to maintain effective reporting channels.

A number of applications and online platforms have been developed to facilitate sexual-harassment reporting by allowing victims to chronicle incidences of sexual harassment and later decide whether to report them.²²⁶ Such technology is aimed at encouraging employees to secure time-stamped evidence of harassment without the immediate pressure of reporting it to HR. Moreover, the applications typically encrypt the user's report and give them the option of holding it in escrow until someone else accuses the same person, providing comfort in numbers.²²⁷ These "information escrows" operate by having an intermediary escrow agent forward sensitive information once they "receive[] a prespecified number of complementary harassment allegations concerning the same accused harasser."²²⁸ Clunky corporate policy handbooks are thereby supplemented by convenient online applications that cater to employees' lived experiences. These tools have the potential to provide functional reporting mechanisms.²²⁹

D. Effective Communication During Due Diligence

Regardless of how the #MeToo clause is drafted, lawyers representing acquirers should indicate in their negotiations that they do not seek to penalize the existence of recorded harassment incidents. Rather, they should state that they are concerned with the company's ability to address workplace harassment issues if and when they arise. Making this focus explicit would reduce the #MeToo clause's possible drawback of stigmatizing reports and would more effectively target risks for the acquiring company. A target with no allegations of

224. Nat'l Women's Law Ctr. v. Office Mgmt. & Budget, 358 F. Supp. 3d 66 (D.D.C. 2019).

225. Subject Z, *supra* note 53.

226. See, e.g., CALLISTO, <https://www.projectcallisto.org> [<https://perma.cc/H9LQ-NQ2M>]; SILENT CHOIR PROJECT, <https://www.silentchoir.org> [<https://perma.cc/U59S-5FCZ>]; VAULT, <https://vaultplatform.com> [<https://perma.cc/GH87-NB75>].

227. Tovia Smith, *How Smartphone Apps Could Change the Way Sexual Assault Is Reported*, NPR (Aug. 21, 2018, 4:27 PM ET), <https://www.npr.org/2018/08/21/637122361/how-smartphone-apps-could-change-the-way-sexual-assault-is-reported> [<https://perma.cc/F3V4-P3LT>].

228. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 147 (2012).

229. Such technologies are still evolving and raise data privacy concerns beyond the scope of this Note. See Heidi Liu, *When Whispers Enter the Cloud: Evaluating Technology to Prevent and Report Sexual Assault*, 31 HARV. J. L. & TECH. 939, 949-56 (2018).

harassment but a nonexistent reporting channel presents far more risks than one with reported allegations but a robust reporting and response mechanism. Conversely, the presence of allegations of harassment at a company “may not be indicative of [the company] having a problem. It may just mean that there’s an open line of communication where people can complain.”²³⁰ Acquirer-side lawyers should more explicitly address this reality in conversations with target companies. As a result, companies would be more incentivized to share information and foster a “speak-up culture” where “people feel free to voice their complaints.”²³¹

CONCLUSION

The evolution of the #MeToo clause in M&A contracts is a unique example of reactive growth. The clause resulted from a social movement led by individuals who are underrepresented in deal rooms, and likely represents a long-term industry shift given its roots in collective social action. The clause has numerous benefits, notably its ability to broaden conversations about harassment and to incentivize companies to prioritize healthy corporate culture before acquisition. But practitioners should ensure in their negotiations that the clause does not become a short-sighted punishment of recorded harassment allegations. Practitioners can help incentivize companies to tackle sexual harassment by reimagining the clause and explicitly orienting due-diligence conversations around reporting channels. Additionally, by harnessing and enhancing the clause’s key benefits, practitioners can reduce buy-side risk while also serving the #MeToo movement’s goals.

APPENDIX A: METHODOLOGY

To assemble data for this Note, I collected publicly filed incidences of the provision and interviewed relevant practitioners. This Appendix provides further details on my methodology.

1. *Quantitative Method*

I searched for publicly filed contracts, which are mandated by the SEC’s disclosure rules for public companies with sufficient assets,²³² using Bloomberg

²³⁰. Subject W, *supra* note 89.

²³¹. Subject Z, *supra* note 53.

²³². See *Using EDGAR to Research Investments*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/oiea/Article/edgarguide.html> [<https://perma.cc/62GZ-39UM>].

Law and the SEC's EDGAR database. My searches encompassed a date range from March 14, 2018 to March 14, 2019. Using Bloomberg Law, I reviewed any agreements featuring the phrase "sexual harassment" within five to twenty terms of the phrases "no allegations," "involving allegations of," "not been allegations," or "no written allegations." In addition, I reviewed agreements with the phrase "allegations of sexual harassment" within five to twenty terms of "not been any." I also replaced the term "harassment" with "misconduct" and "assault" in these same searches. Using EDGAR, which does not allow searching phrases separated by a certain number of terms,²³³ I reviewed agreements featuring the phrase "no allegations of sexual harassment," "no written allegations of sexual harassment," "involving allegations of sexual harassment," "involving written allegations of sexual harassment," "not been any allegations of sexual harassment," and "not been any written allegations of sexual harassment." I replaced the term "harassment" with "misconduct" and "assault" in these same searches.²³⁴

This Note's primary source of analysis is significantly limited. A total of 40,029 M&A deals were announced worldwide in 2017.²³⁵ Of those deals, only 13,134 involved a public target or a public acquirer.²³⁶ Similarly, 37,646 global deals were announced and completed in 2018, but only 11,482 involved a public target or a public acquirer.²³⁷ One practitioner noted that the "vast majority" of M&A deals are private,²³⁸ and another commented that public filings are "not representative of the M&A marketplace."²³⁹

The size of this Note's sample—thirty-nine clauses—corresponds with publicly reported figures regarding the clause's prevalence.²⁴⁰ The sample deals

233. *Search Overview*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/edgar/searchedgar/search_help.htm [<https://perma.cc/L9VU-9UY8>].

234. This modification did not yield additional results, presumably because "harassment" is more explicitly associated with the workplace. See *supra* Section I.C.5.

235. This figure was obtained using a ThomsonOne M&A screening analysis, which only includes deals that were eventually completed. Without this limitation, a ThomsonOne search yields 55,675 deals. WilmerHale reported 53,854 M&A deals worldwide in 2017. See *2018 M&A Report*, WILMERHALE 2, <https://www.wilmerhale.com/-/media/f9ad782aaefc4e639ec376e91efcb2fe.pdf> [<https://perma.cc/X2ND-8XQL>].

236. ThomsonOne provides that 4,669 involved a public target and 9,745 involved a public acquirer in 2017.

237. ThomsonOne provides that 3,943 involved a public target and 8,777 involved a public acquirer in 2018.

238. Subject H, *supra* note 107.

239. Subject R, *supra* note 68.

240. Bloomberg identified seven public deals with the provision in August of 2018, Ahmed, *supra* note 1, the *Washington Post* referenced this same figure, Jena McGregor, *The Challenges*

involve fifty law firms²⁴¹ and companies from a variety of industries including manufacturing, office supplies, gastronomy, and healthcare.

2. Qualitative Method

To collect qualitative information about the #MeToo clause, I sent email requests for phone interviews to one lawyer from each of the fifty law firms that took part in a publicly filed transaction featuring the clause. In addition, I sent email requests for phone interviews to individuals who were quoted speaking about the clause in media publications. The lawyers who were listed as the primary contacts on the deal sometimes introduced me to labor specialists from their firms. To ensure that I also spoke with practitioners who were less enthusiastic about the clause, who dealt primarily with private transactions, or who had not encountered it in their practice, I reached out to employment lawyers and general M&A practitioners from firms that I did not come across in public filings. In my requests for interviews, I noted that data would be anonymized. In addition, I described the clause's content rather than labeling it as a #MeToo or Weinstein clause to ensure that practitioners would not be guided in their description of the provision's emergence.

of *Enforcing Wall Street's 'Weinstein Clauses,'* WASH. POST (Aug. 5, 2018), <https://www.washingtonpost.com/business/2018/08/06/challenge-behind-wall-streets-weinstein-clauses> [<https://perma.cc/8TEC-NRU6>], and *Compliance Week* identified fifteen in October of 2018, Jaelyn Jaeger, *The 'Weinstein Clause': M&A Deals in the #MeToo Era*, COMPLIANCE WK. (Oct. 12, 2018), <https://www.complianceweek.com/the-weinstein-clause-manda-deals-in-the-metoo-era/2113.article> [<https://perma.cc/EMP6-AKMB>]. One subject noted in April of 2019 that their firm had found seventeen examples of the provision in publicly filed contracts. Subject W, *supra* note 89.

241. The full list of firms includes: Arent Fox LLP; Baker Botts LLP; Barnes & Thornburg LLP; Benesch, Friedlander, Coplan & Aronoff LLP; Brown Rudnick LLP; Bryan Cave Leighton Paisner LLP; Cooley LLP; Covington & Burling LLP; Davis Graham & Stubbs LLP; Davis Polk & Wardwell LLP; Debevoise & Plimpton LLP; Dechert LLP; DLA Piper LLP; Duane Morris LLP; Faegre Baker Daniels LLP; Fenwick & West LLP; Gesmer Updegrove LLP; Gibson, Dunn & Crutcher LLP; Goodwin Procter LLP; Greenberg Traurig, LLP; Hogan Lovells LLP; Kirkland & Ellis LLP; Kramer Levin Naftalis & Frankel LLP; McGuire Woods LLP; Mayer Brown LLP; Morgan, Lewis & Bockius LLP; Morrison & Foerster LLP; Nelson Mullins Broad and Cassel LLP; Olshan Frome Wolosky LLP; Paul, Weiss, Rifkind, Wharton & Garrison LLP; Pepper Hamilton LLP; Pillsbury Winthrop Shaw Pittman LLP; Ropes & Gray LLP; Schulte Roth & Zabel LLP; Seward & Kissel LLP; Shearman & Sterling LLP; Sidley Austin LLP; Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Stevens & Lee PC; SmithAmundsen LLC; Stikeman Elliott LLP; Thompson Hine LLP; Sullivan & Cromwell LLP; Vinson & Elkins LLP; Wachtell, Lipton, Rosen & Katz LLP; Weil, Gotshal & Manges LLP; Willkie Farr & Gallagher LLP; Wiggin and Dana LLP; and Wilson Sonsini Goodrich & Rosati LLP.

Interviewing “elites” such as corporate lawyers and investment bankers “represents unique methodological problems.”²⁴² Research access is more difficult in this context because it requires requesting part of the subject’s professional time,²⁴³ lends itself to creating an uneven relationship between the researcher and the subject,²⁴⁴ and possibly involves respondents who are especially reluctant to discuss “sensitive issues” given their high-power roles.²⁴⁵ Having knowledge of the subject’s background,²⁴⁶ ties with relevant individuals in the elite sphere,²⁴⁷ and establishing credibility by disclosing one’s knowledge of niche information²⁴⁸ help facilitate such research.

To increase the probability of receiving positive responses, I affiliated email subject lines with Yale Law School. Further, I described the interview time commitment as ten to fifteen minutes and explicitly noted that subjects would be anonymized. In one case, I referenced my personal affiliation with another lawyer from the same law firm. Further, when possible, I specified the deal in which the subject had taken part or pointed out an interesting comment they had made about the #MeToo clause in a particular article.

Twenty-seven subjects agreed to provide their insights on the clause, two of whom corresponded via email.²⁴⁹ Of the subjects who were listed in public company deals featuring a #MeToo provision, seven represented the target company and five represented the acquirer. The interviews were semi-structured. All subjects were asked about their introduction to the #MeToo clause, what functions they believe it serves, and how they integrated it into their practice. Questions otherwise varied depending on the conversation’s natural direction and, if applicable, the particular provision implicating the individual. Interviews each lasted between ten and forty minutes.

242. Robert Mikecz, *Interviewing Elites: Addressing Methodological Issues*, 18 *QUALITATIVE INQUIRY* 482, 482 (2012).

243. Juha Laurila, *Promoting Research Access and Information in Corporate Settings: Notes from Research on a Crisis Company*, 13 *SCANDINAVIAN J. MGMT.* 407, 407 (1997).

244. *Id.*

245. Frederik Thuesen, *Navigating Between Dialogue and Confrontation: Phronesis and Emotion in Interviewing Elites on Ethnic Discrimination*, 17 *QUALITATIVE INQUIRY* 613, 613 (2011).

246. Mikecz, *supra* note 242, at 482.

247. Laurila, *supra* note 243, at 410.

248. *Id.* at 410-11.

249. Subject K, *supra* note 53; Email from Subject P to author (Mar. 25, 2019) (on file with author).

APPENDIX B: #METOO PROVISIONS IN PUBLIC M&A DEALS

Research for this Note uncovered the following thirty-nine instances of a #MeToo clause in public filings within a year of March 14, 2018.

| Date | Parties | Law Firms | Clause |
|-------------|--|---|---|
| 03/05/19 | Prescribe Wellness, LLC; Tabula Rasa Healthcare, Inc.; TRHC PW Acquisition, LLC; Fortis Advisors LLC | Morgan Lewis & Blockius LLP; Cooley LLP | To the knowledge of the Company, (a) no allegations of sexual harassment have been made against (i) any officer or director of the Company or its Subsidiaries, (ii) any employee of the Company or its Subsidiaries who, directly or indirectly, supervises at least five (5) other employees of the Company or its Subsidiaries, and (b) none of the Company or its Subsidiaries has entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by an employee, contractor, director, officer or other Representative. |
| 02/25/19 | FedNat Holding Co.; 1347 Property Insurance Holdings, Inc.; Maison Managers, Inc.; Maison Insurance Company; ClaimCor, LLC | Nelson Mullins Broad and Cassel LLP; Thompson Hine LLP | To the Knowledge of Parent, in the immediately preceding five (5) year period, no allegations of sexual harassment have been made against: (i) any current executive officer or director of Parent or any of the Companies, or any of their respective Affiliates; or (ii) any current officer or employee of the Companies at the level of Vice President or above. |
| 02/18/19 | Phoenix Top Holdings LLC; Pernix Therapeutics Holdings, Inc.; Pernix Ireland Pain Designated Activity Company | Skadden, Arps, Slate, Meagher & Flom LLP; Davis Polk & Wardwell LLP | In the last five (5) years, to the Knowledge of the Sellers, no allegations of sexual harassment have been made against (i) any Business Employee set forth in Section 5.4(b) of the Disclosure Letter or (ii) any individual who is an officer or director of any Seller as of the date hereof. |
| 02/11/19 | Edwards Lifesciences Holding, Inc.; Crown Merger Sub, Inc.; CAS Medical Systems, Inc. | Pepper Hamilton LLP; Wiggin and Dana LLP | Since January 1, 2015, none of the Company or its Subsidiaries has entered into a settlement agreement with a current or former officer, an employee or independent contractor of the Company or its Subsidiaries that involves allegations relating to sexual harassment by either (i) an executive officer of the Company or its Subsidiaries or (ii) a key employee of the Company or its Subsidiaries. In the last five (5) years, to the Knowledge of the Company, no allegations of sexual harassment have been made against (x) an executive officer of the Company or its Subsidiaries or (y) an employee at the level of Vice President (or any similarly-leveled employee) or above of the Company or its Subsidiaries. |

| | | | |
|----------|--|--|--|
| 01/14/19 | Zix Corp.; AR Topco, LLC; Appraver Marlin Blocker Corp.; Appraver Holdings, LLC; Appraver Marlin Topco, L.P.; Appraver Management Holding, LLC; Marlin Equity IV, L.P.; Marlin Topco GP, LLC | Kirkland & Ellis LLP; Baker Botts LLP | Since the Look-Back Date, no allegations of sexual harassment have been made against (i) any officer or director of the Company or any of its Subsidiaries or (ii) any employee of the Company or any of its Subsidiaries who, directly or indirectly, supervises at least eight (8) other employees. Neither the Company nor any of its Subsidiaries has entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by an employee, contractor, director, officer or other Representative since the Look-Back Date. |
| 01/12/19 | Environmental Materials, LLC; The Members of Environmental Materials, LLC; NCI Building Systems, Inc.; The Seller Representative | Debevoise & Plimpton LLP; Davis Graham & Stubbs LLP | There is no pending or, to the Sellers' Knowledge, threatened claim or litigation against the Company or any of its Subsidiaries with respect to allegations of sexual harassment or sexual misconduct, and in the last three (3) years (i) there have been no reported internal or external complaints accusing any supervisory or managerial employee of the Company or any of its Subsidiaries of sexual harassment or sexual misconduct and (ii) there has been no settlement of, or payment arising out of or related to, any litigation or complaint with respect to sexual harassment or sexual misconduct. |
| 01/02/19 | Omega Healthcare Investors, Inc.; OHI Healthcare Properties Limited Partnership; MedEquities Realty Trust, Inc.; MedEquities OP GP, LLC; MedEquities Realty Operating Partnership, LP | Bryan Cave Leighton Paisner LLP; Morrison & Foerster LLP | Within the last three (3) years, to the Knowledge of the Company, there have been no allegations of sexual harassment made against any officer or director of the Company or any Company Subsidiary. |
| 12/12/18 | Farfetch US Holdings, Inc.; Yankee Merger Sub, LLC; Stadium Enterprises LLC; Jed Stiller; Farfetch Ltd. | Fenwick & West LLP; White and Williams LLP | Except as set forth on Schedule 2.12(h) of the Company Disclosure Letter, the Company has not entered into any settlement agreement relating to an allegation of sexual harassment or other sexual misconduct by, and to the knowledge of the Company, no allegations of sexual harassment or other sexual misconduct have been made against, any officer, employee, contractor or other representative of the Company. |

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| 12/3/18 | GlaxoSmithKline PLC, Adriatic Acquisition Corp.; Tesaro, Inc. | Shearman & Sterling LLP; Ropes & Gray LLP; Hogan Lovells US LLP | From January 1, 2015 through the date hereof, except as would not individually or in the aggregate be expected to have a Material Adverse Effect, (i) no officer of the Company, member of the Company Board, or employee of the Company or any of its Subsidiaries at a level of Vice President or above (each, a "Covered Person"), has been the subject of any sexual harassment or other sexual misconduct allegations during and related to his or her tenure at the Company, and (ii) the Company has not entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by any Covered Person. |
| 11/26/18 | Forrester Research, Inc.; Supernova Acquisition Corp.; SiriusDecisions, Inc.; The Founder Stockholders Named Herein; FortisAdvisors LLC as Stockholder Representative | DLA Piper LLP (US); Skadden, Arps, Slate, Meagher & Flom LLP; DLA Piper LLP | Neither the Company nor any of its Subsidiaries is a party to a settlement agreement with a current or former officer, employee or independent contractor of the Company or its Subsidiary, as applicable, involving allegations of sexual harassment by an officer or employee of the Company or any of its Subsidiaries. There is no, and for the past ten (10) years, there has not been any, litigation or arbitration pending or, to the Knowledge of the Company, threatened, against the Company or any of its Subsidiaries, in each case, involving allegations of sexual harassment by an officer or employee of the Company or any of its Subsidiaries, as applicable. |
| 11/11/18 | AthenaHealth, Inc., May Holding Corp.; May Merger Sub Inc. | Weil Gotshal & Manges LLP; Schulte Roth & Zabel LLP | To the Knowledge of the Company, no allegations of sexual harassment in the last five (5) years have been made to the Company against (A) any current director of the Company or (B) any individual in his or her current capacity as an employee of the Company at a level of Senior Vice President or above. |
| 11/01/18 | Pacific Biosciences of California, Inc.; Illumina, Inc.; FC OPS Corp. | Covington & Burling LLP; Wilson Sonsini Goodrich & Rosati PC | To the Company Knowledge, in the last ten years, (a) no allegations of sexual harassment have been made against any Company Employee who is (i) an executive officer or (ii) at the level of senior vice president or above, and (b) the Company and its Affiliates have not entered into any settlement agreements related to allegations of sexual harassment or misconduct by a Company Employee. |
| 11/01/18 | AquaVenture Holdings, Inc.; AquaVenture Holdings Ltd. | Goodwin Procter LLP; Stevens & Lee PC | Except as set forth on Schedule 4.19(f), in the last five (5) years, no allegations of sexual harassment have been made to the Acquired Group against any individual in his or her capacity as an employee of any member of the Acquired Group. |

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| 10/31/18 | WC SADC One Parent, Inc.; WC SADC One Merger Sub, Inc.; Intersections Inc. | Kramer Levin Naftalis & Frankel LLP; Olshan Frome Wolosky LLP; Gibson, Dunn & Crutcher LLP | In the last ten years, (i) no allegations of sexual harassment have been made against (A) any officer of the Company or its Subsidiaries; (B) any employee of the Company or its Subsidiaries; (C) any contractor of the Company or its Subsidiaries or (D) any other Company-related individual (including members of the Board of Directors) and (ii) neither the Company nor any of its Subsidiaries has entered into any settlement agreements related to allegations of sexual harassment or misconduct by an employee, contractor, director or any other Company-related individual. |
| 10/29/18 | Horizon Bancorp, Inc.; Salin Bancshares, Inc. | Barnes & Thornburg LLP; SmithAmundsen LLC | Except as set forth in Schedule 3.05(d) of the SBI Disclosure Schedule, in the last five (5) years, no allegations of sexual harassment, wrongful termination, or discrimination have been made to SBI or SBTC, and no settlement discussions or settlements have occurred or been made, against or with respect to any individual in his or her capacity as a director or employee of SBI or SBTC at a level of Vice President or above. |
| 10/28/18 | Denbury Resources Inc.; Dragon Merger Sub Inc.; DR Sub LLC; Penn Virginia Corp. | Gibson, Dunn & Crutcher LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Vinson & Elkins LLP | To the Knowledge of the Company, in the last five years, no allegations of sexual harassment have been made against (i) any officer of the Company or any Company Subsidiary or (ii) an employee of the Company or any Company Subsidiary at a level of Vice President or above. |
| 10/22/18 | STL Parent Corp.; American Railcar Industries, Inc. | Thompson Hine LLP; Willkie Farr & Gallagher LLP | To the Knowledge of the Company, since January 1, 2013, (i) no allegations of sexual harassment have been made against any director or officer of the Company or any Subsidiary of the Company (other than any which, having been appropriately investigated, have been found to not have been substantiated), and (ii) none of the Company or any Subsidiary of the Company has entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by any director, officer or employee of the Company. |
| 10/19/18 | JetPay Corp.; NCR Corp.; Orwell Acquisition Corp. | Benesch, Friedlander, Coplan & Aronoff LLP; Dechert LLP | To the Company's Knowledge, in the last five years, no allegations of sexual harassment have been made against (i) any current executive officer of the Company or any of the Company Subsidiaries or (ii) any current employee of the Company or any of the Company Subsidiaries at the level of Senior Vice President or above. |

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| 10/15/18 | SendGrid, Inc.; Twilio Inc.; Topaz Merger Subsidiary, Inc. | Cooley LLP; Goodwin Procter LLP | To the Knowledge of the Company, in the last three (3) years, no allegations or reports of sexual harassment have been made to the Company against an employee or independent contractor of the Company. |
| 10/09/18 | Esterline Technologies Corp.; TransDigm Group Inc.; Thunderbird Merger Sub Inc. | Baker & Hostetler LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Wachtell, Lipton, Rosen & Katz LLP | To the Knowledge of the Company, in the last three (3) years, (i) no written allegations of sexual harassment or misconduct have been made to the Company against any person who is an officer of the Company in his or her capacity as such and (ii) the Company has not entered into any settlement agreements related to allegations of sexual harassment or misconduct by any persons described in clause (i). |
| 10/03/18 | Birner Dental Management Services, Inc.; Mid-Atlantic Dental Services Holdings, LLC; Bronco Acquisition, Inc. | Duane Morris LLP; Faegre Baker Daniels LLP | None of the Company, any of its Subsidiaries or any of the Professional Corporations is party to a settlement agreement with a current or former officer, employee or independent contractor of the Company, any of its Subsidiaries or any of the Professional Corporations involving allegations of sexual harassment by an officer or employee of the Company, any of its Subsidiaries or any of the Professional Corporations. |
| 09/28/18 | CafePress, Inc.; Snapfish, LLC; Snapfish Merger Sub, Inc. | Arent Fox LLP; In-House Counsel; Pillsbury Winthrop Shaw Pittman LLP | To the Company's Knowledge, in the last ten (10) years, (i) no allegations of sexual harassment have been made against any officer of the Company, and (ii) the Company has not entered into any settlement agreements related to allegations of sexual harassment or misconduct by an officer of the Company. |
| 09/26/18 | Midatech Pharma PLC; Midatech Pharma U.S., Inc.; Kanwa Holdings, LP | Brown Rudnick LLP; McGuireWoods LLP | To the Knowledge of the Company, (i) no allegations of sexual harassment have been made against (A) any officer or director of the Company or any of its Subsidiaries or (B) any employee of the Company or any of its Subsidiaries who, directly or indirectly, supervises at least eight (8) other employees of the Company or any of its Subsidiaries, as applicable, and (ii) neither the Company nor any of its Subsidiaries has entered into any settlement agreement related to allegations of sexual harassment or sexual misconduct by an employee, contractor, director, officer or other representative. |
| 09/21/18 | Victory Capital Holdings, Inc.; Harvest Volatility Management, LLC; The Members of Harvest Volatility Management, LLC; Curtis F. Brockelman, Jr.; The LPC Member | Morgan, Lewis & Bockius LLP; Seward & Kissel LLP; Willkie Farr & Gallagher LLP | To the Knowledge of the Company, in the last five (5) years, no allegations of sexual harassment have been made to the Company or any of its Subsidiaries against any individual in his or her capacity as a director or any employee or other service provider of the Company that is either an investment professional or at a level of director or above. |

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| 09/19/18 | Amicus Therapeutics, Inc.; Columbus Merger Sub Corp.; Celenex, Inc.; Shareholder Representative Services LLC | Fenwick & West LLP; Skadden, Arps, Slate, Meagher & Flom LLP | To the Knowledge of the Company, no allegations of sexual harassment have been made against any director, officer or Contractor of the Company in connection with his or her affiliation with the Company. |
| 09/14/18 | Essendant, Inc.; Egg Parent Inc.; Egg Merger Sub Inc.; Staples, Inc. | Kirkland & Ellis LLP; Skadden, Arps, Slate, Meagher & Flom LLP | To the knowledge of the Company, in the last five years, no allegations of sexual harassment have been made against (i) any current executive officer of the Company or any of its Subsidiaries or (ii) any current employee of the Company or any of its Subsidiaries at the level of Senior Vice President or above. |
| 09/14/18 | The Providence Service Corp.; LogistiCare Solutions, LLC; Catapult Merger Sub, Inc.; Circulation, Inc.; Fortis Advisors, LLC | Debevoise & Plimpton LLP | There is no pending or, to the Company's Knowledge, threatened, Action against any Company Employee with respect to allegations of sexual harassment or sexual misconduct, and to the Company's Knowledge, since January 19, 2016, there have been no reported internal or external complaints accusing any supervisory or managerial employee of the Company of sexual harassment or sexual misconduct and no Company Employee has entered into a Contract for the settlement of any Action with respect to sexual harassment or sexual misconduct. |
| 09/13/18 | Saban Capital Acquisition Corp.; Panavision Acquisition Sub, Inc.; SIM Acquisition Sub, Inc.; Panavision Inc.; SIM Video International Inc.; The Shareholders of SIM Video International Inc. Party Hereto; Cerberus PV Representative, LLC; Granite Film and Television Equipment Rentals Inc. | Kirkland & Ellis LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Stikeman Elliott LLP | To the Knowledge of SIM, in the last three (3) years, no written allegations of sexual harassment have been made against (i) any officer of the SIM Group or (ii) any employee of the SIM Group at a level of Vice President or above or any employee of the SIM Group who supervises five (5) or more employees of the SIM Group. |

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| 08/29/18 | Stryker Corp.; Austin Merger Sub Corp.; K2M Group Holdings, Inc. | Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP | Since January 1, 2015, none of the Company or its Subsidiaries has entered into a settlement agreement with a current or former officer, an employee or independent contractor of the Company or its Subsidiaries that substantially involves allegations relating to sexual harassment by either (i) an executive officer of the Company or its Subsidiaries or (ii) a key employee of the Company or its Subsidiaries. In the last five (5) years, to the Knowledge of the Company, no allegations of sexual harassment have been made against (x) an executive officer of the Company or its Subsidiaries or (y) an employee at the level of Vice President (or any similarly-leveled employee) or above of the Company or its Subsidiaries. |
| 08/27/18 | CamberView Partners Holdings, LLC; PJT Partners Inc.; PJT Partners Holdings LP; Blue Merger Sub LLC; CC CVP Partners Holdings, L.L.C. | Simpson Thacher & Bartlett LLP; Weil, Gotshal & Manges LLP | Since January 1, 2015, no written allegations of sexual harassment or unlawful sexual misconduct have been made to the Company or any of its Subsidiaries against the Chief Executive Officer in his capacity as an employee of the Company or any of its Subsidiaries. |
| 08/22/18 | The Navigators Group, Inc.; The Hartford Financial Services Group, Inc.; Renato Acquisition Co. | Mayer Brown LLP; Sidley Austin LLP | (f) There is not currently pending, and to the Knowledge of the Company, in the last five (5) years, there have not been any allegations of sexual harassment or other sexual misconduct made against any individual in his or her capacity as an officer or executive of the Company or any of its Subsidiaries. |
| 08/16/18 | Zoe's Kitchen, Inc.; Cava Group, Inc.; Pita Merger Sub, Inc. | Greenberg Traurig, LLP; Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Sullivan & Cromwell LLP | Neither the Company nor any of its Subsidiaries is party to a settlement agreement with a current or former officer, employee or independent contractor of the Company or any of its Subsidiaries involving allegations of sexual harassment by an officer or employee of the Company or any of its Subsidiaries. There are no, and for the past five (5) years there have not been any, Proceedings pending or, to the knowledge of the Company, threatened, against the Company or any of its Subsidiaries, in each case, involving allegations of sexual harassment by an officer or employee of the Company or any of its Subsidiaries. |

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| 07/30/18 | Forest City Realty Trust, Inc.; Antlia Holdings LLC; Antlia Merger Sub Inc. | Skadden, Arps, Slate, Meagher & Flom LLP; Sullivan & Cromwell LLP; Wachtell, Lipton, Rosen & Katz LLP; Weil, Gotshal & Manges LLP | (n) To the Knowledge of the Company, in the last five (5) years, no allegations of sexual harassment have been made to the Company against any individual in his or her capacity as an employee of the Company or Forest City Employer, LLC at a level of Senior Vice President or above. |
| 07/29/18 | RLJ Entertainment, Inc.; AMC Networks Inc.; Digital Entertainment Holdings LLC; River Merger Sub Inc. | Arent Fox LLP; Sullivan & Cromwell LLP | To the Company's Knowledge, in the last ten (10) years, (i) no allegations of sexual harassment have been made against any officer of the Company or any of its Subsidiaries, and (ii) the Company and its Subsidiaries have not entered into any settlement agreements related to allegations of sexual harassment or misconduct by an officer of the Company or any of its Subsidiaries. |
| 06/19/18 | Verscend Technologies, Inc.; Rey Merger Sub, Inc.; Cotiviti Holdings, Inc. | Skadden, Arps, Slate, Meagher & Flom LLP | Except in each case, as has not had and would not reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect, 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. |
| 05/09/18 | WordStream, Inc.; Gannett Co., Inc.; Orca Merger Sub, Inc.; Shareholder Representative Services LLC | Gesmer Updegrave LLP; Skadden, Arps, Slate, Meagher & Flom LLP | To the Knowledge of the Company, in the last eight (8) years, no allegations of sexual harassment or misconduct have been made against any current or former officer or employee of the Company or its Affiliates. |

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| 05/06/18 | Del Frisco's Restaurant Group, Inc.; Bentley Merger Sub, LLC; RCP Barteca Corp.; General Atlantic (BT) Blocker, LLC; The Blocker Sellers; The Sellers' Representative | Kirkland & Ellis LLP; Paul, Weiss, Rifkind, Wharton & Garrison LLP; Skadden, Arps, Slate, Meagher & Flom LLP | Except as set forth on <u>Schedule 2.12(j)</u> , none of the Barteca Entities is party to a settlement agreement with a current or former officer, employee or independent contractor of any Barteca Entity resolving allegations of sexual harassment by either (i) an officer of any Barteca Entity or (ii) an employee of any Barteca Entity. There are no, and since January 1, 2015 there have not been any Actions pending or, to the Company's Knowledge, threatened, against the Company, in each case, involving allegations of sexual harassment by (A) any member of the Senior Management Team or (B) any employee of the Barteca Entities in a managerial or executive position. |
| 04/12/18 | Genuine Parts Co.; Rhino SpinCo, Inc.; Essendant Inc.; Elephant Merger Sub Corp. | Davis Polk & Wardwell LLP; Skadden, Arps, Slate, Meagher & Flom LLP | To the knowledge of GPC, in the last five (5) years, no allegations of sexual harassment have been made against any current SpinCo Business Employee who is (i) an executive officer or (ii) at the level of Senior Vice President or above. |
| 03/14/18 | SJW Group; Hydro Sub, Inc.; Connecticut Water Service, Inc. | Skadden, Arps, Slate, Meagher & Flom LLP; Sullivan & Cromwell LLP | To the Knowledge of CTWS, in the last five years, no allegations of sexual harassment have been made to CTWS against any individual in his or her capacity as (i) an officer of CTWS, (ii) a member of the CTWS Board or (iii) an employee of CTWS or any CTWS Subsidiary at a level of Vice President or above. |