AN EPIDEMIC OF WORKPLACE SEXUAL MISCONDUCT: THE BIRTH OF THE WEINSTEIN CLAUSE IN MERGER AND ACQUISITION AGREEMENTS

Javon Johnson

I. INTRODUCTION

Harvey Weinstein's fall from grace is the quintessential example of the type of behavior that can pollute and collapse a successful company.[1] Weinstein created Miramax Films before it was acquired by the Walt Disney Company in 1993.[2] In 2005, the acclaimed producer co-founded the Weinstein Company, but in October 2017, allegations surfaced that Weinstein had a history of sexual exploitation in the workplace.[3]

Weinstein's downfall began after the *New York Times* reported that Weinstein paid settlements to multiple women after incidents of unwanted

1. *See Harvey Weinstein Biography*, BIOGRAPHY, https://www.biography.com/filmmaker/harvey-weinstein (last updated Sept. 6, 2019).
2. *Id.*
3. *Id.*

sexual encounters.[4] Weinstein defended his actions by claiming that he came from a time "when all the rules about behavior and workplaces were different."[5] Ultimately, Weinstein was fired by the board of Weinstein Company, rejected by the Academy of Motion Picture Arts and Sciences, and neck-deep in lawsuits.[6] In March 2017, Weinstein Company filed for bankruptcy and was acquired by Lantern Capital.[7] In May 2018, Weinstein was indicted by a New York City grand jury on charges related to sexual abuse and misconduct.[8]

Sexual misconduct allegations within large corporations sparked a trend among attorneys to add clauses in merger and acquisition (M&A) agreements that ask target companies to make legal representations regarding their executives' behavior in the workplace.[9] These provisions have become known, unofficially, as "Weinstein clauses."[10] These clauses began to appear around February 2018, and by August 2018, Weinstein clauses were commonplace in M&A agreements.[11]

This Comment addresses how the legal trend toward asking executives to disclose past sexual misconduct in the workplace will affect future M&A agreements.[12]

When companies implement Weinstein clauses, they must do so while alleviating buyer and seller concerns regarding issues such as: damage calculations; company protection from liabilities related to unreported acts of sexual misconduct; and future negotiation failures due to target companies' that are unwilling to comply with the required disclosures.[13] The concerns regarding unreported sexual misconduct are buttressed by the Society for Human Resource Management's report which states that 76% of subordinate employees who were sexually harassed in 2017 did not report their experience.[14] Additional concerns include buyers who will perpetuate the acceptance of sexual misconduct by ignoring the negative cultural reputation

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Nabila Ahmed, *Merger Deals Now Include #MeToo Sexual Harassment Clauses*, INS. J. (Aug. 9, 2018), https://www.insurancejournal.com/news/national/2018/08/09/497544.htm.
10. *Id.*
11. Emily Maier, *Can You Insure Against the "Weinstein Clause" in M&A Deals?*, BLOOMBERG L. (Oct. 5, 2018, 8:19 AM), https://news.bloomberglaw.com/corporate-law/insight-can-you-insure-against the-weinstein-clause-in-M-a-deals.
12. *See* Jena McGregor, *The Challenge Behind Wall Street's* '*Weinstein Clauses*', CT POST (Aug. 6, 2018, 7:55 AM), https://www.ctpost.com/business/article/The-challenge-behind-Wall-Street-s-Weinst ein-13134409.php.
13. *See id.*
14. *Harassment-Free Workplace Series: A Focus on Sexual Harassment*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 31, 2018), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/a-focus-on-sexual-harassment.aspx.

of a target company in lieu of a profitable acquisition.[15] Finally, it is important that Weinstein clauses use language that effectively conveys the drafter's intentions.[16]

This Comment predicts the future of M&A agreements as attorneys adapt in the wake of a social evolution that demands a focus on humanism and the protection of individual victims.[17] Attorneys must adapt while also protecting the reputation, brand, and financial stability of corporations during and after acquisitions.[18] One purpose of this Comment is to highlight the inseparable relationship between businesses and societal norms.[19] In general, unwritten rules of social acceptability dictate what society tolerates as permissible behavior; therefore, it is only logical that these unwritten rules of social engagement apply to the workplace.[20] This Comment discusses why buyers must perform "social due diligence" and seek out transparent disclosures when assessing the risk of acquiring a company.[21] The Comment achieves its purpose by providing an overview of why attorneys drafting M&A agreements are adding Weinstein clauses in response to stark changes in what society will tolerate as acceptable behavior in the workplace.[22] Companies are under public pressure to expand their due diligence efforts beyond a financial perspective and explore how buyers can shed, shift, or avoid the cultural reputation associated with a target company.[23]

Part II, the background of this Comment, lays out the composition of a standard M&A agreement and standard language customarily included in the agreement.[24] The background also discusses the significance of the Me Too movement as it relates to exposing issues of sexual misconduct in the workplace.[25] Part II discusses current and pending legislation regarding the disclosure of liabilities and other measures legislators are taking to improve workplace safety—including bans on victim nondisclosure agreements

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15. *See* McGregor, *supra* note 12 (noting an Equal Employment Opportunity Commission study which states that in 2016, 90% of individuals who had experienced sexual misconduct did not report it).

16. *See* Maier, *supra* note 11.

17. *See infra* Part IV (recommending a Weinstein clause that provides the most benefit to society and businesses).

18. *See* McGregor, *supra* note 12.

19. *See infra* notes 185–210 and accompanying text (discussing how a company's tolerance of inappropriate conduct can impact the lives of its employees).

20. *See generally* Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535 (2018).

21. *See* McGregor, *supra* note 12.

22. *See id.* (providing an overview of the current shift among acquirer companies to expand their due diligence to focus on target companies' compliance with social norms).

23. Ahmed, *supra* note 9.

24. *See generally* John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice* (Harv. John M. Olin Ctr. for L. Econ., & Bus. Discussion Paper Series Paper No. 825, Apr. 2015), http://nrs.harvard.edu/urn-3:HUL.InstRepos:17743076 (expounding on the standard and boilerplate components of M&A contracts).

25. *See generally About: History & Vision*, ME TOO, https://metoomvmt.org/about/ (last visited Oct. 9, 2019) (discussing the intent of the movement to aid victims of sexual violence).

following workplace incidents.[26] Specifically, this Comment discusses legislation aimed at protecting victims of workplace sexual misconduct and preventing employers from legally prohibiting victims from sharing their experiences.[27]

Part III, the analysis, introduces common components of M&A agreements that could encompass, or at least provide guidance, in deciding where to place the language necessary to effectuate a Weinstein clause.[28] The clause can be placed under the section of representations and warranties as a promise attesting to the cultural condition of the target company relating to executives and sexual misconduct.[29] The Weinstein clause could take form as a material adverse change (MAC) clause which, if violated, could potentially terminate the business transaction.[30] Also, the clause can be a part of the material disclosures in the disclosure schedule.[31] Admittedly, this is not an exhaustive list of sections in an M&A agreement under which a Weinstein clause can be located, but this Comment focuses exclusively on those three. Furthermore, the analysis covers the potential benefits and challenges associated with Weinstein clauses.[32]

Following the analysis, this Comment predicts how M&A agreements could look with Weinstein clauses, recommends what the language should convey to achieve its purpose, and recommends where in the agreement a Weinstein clause should fall.[33] The section provides recommendations on how companies can overcome the challenges related to Weinstein clauses, and sums up with a discussion of the ultimate impact of Weinstein clauses on society and the law as it relates to public policy.[34] The conclusion of this Comment summarizes the analytical findings, discusses related issues or ramifications, addresses the shortcomings of a Weinstein clause, and makes

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26. *See* Rachel La Corte, *Washington Gov. Jay Inslee Signs Package of Bills Sparked by #MeToo Movement*, SEATTLE TIMES (Mar. 21, 2018, 5:23 PM) https://www.seattletimes.com/seattle-news/politics/washington-gov-jay-inslee-signs-package-of-bills-sparked-by-metoo-movement/.

27. *See id.*

28. *See generally* Coates, *supra* note 24.

29. Anthony J. Rospert & Hope Y. Lu, *Pre-Closing Merger Disputes: Preventing Broken Deals by Navigating MAC Clauses*, CORP. L. ACCOUNTABILITY REP. (BNA) (Feb. 7, 2014), https://thompsonhine.com/uploads/1137/doc/Rospert_and_Lu_-_BNA.pdf.

30. *Id.*

31. *See* Richard Harroch, *The Importance of Disclosure Schedules in Mergers and Acquisitions*, FORBES (Aug. 7, 2016, 10:10 AM), https://www.forbes.com/sites/allbusiness/2016/08/07/the-importance-of-disclosure-schedules-in-mergers-and-acquisitions/#54425dd92c43.

32. *See infra* notes 181–229 and accompanying text (demonstrating the benefits and challenges associated with Weinstein clauses).

33. *See infra* Part IV (recommending that the effectiveness of a Weinstein clause comes from its operative language and placement within the M&A agreement).

34. *See infra* Part IV (discussing how to overcome the challenges associated with the Weinstein clause).

a final suggestion for legal practitioners as they move forward in drafting M&A agreements.[35]

II. BACKGROUND

Part II evaluates how representations and warranties, due diligence, disclosure schedules, and MAC clauses all play a role in M&A agreements. These subdivisions are important because they all pose suitable placements in M&A agreements for a Weinstein clause. Additionally, Part II discusses how the Me Too movement and state legislatures have influenced the proliferation of Weinstein clauses. The Me Too movement and state legislatures are important because they symbolize the human factor that has compelled businesses to adopt progressive policies.

A. Representations and Warranties

The representations and warranties section of an M&A agreement includes specific and broad representations that are written with the purpose of identifying liabilities, which include past, present, and future liabilities.[36] Warranties are utilized to contractually indemnify parties from the identified liabilities.[37] Essentially, representations and warranties are promises made by the buyer and seller regarding their businesses' "key facts."[38] "A representation is 'a presentation of fact—either by words or conduct'" that encourages someone to act in a particular way.[39] A warranty given by a seller includes an express or implied guarantee that would indemnify the buyer from liability related to past, present, or future matters that could adversely affect the buyer's interest in the acquisition.[40]

Buyers are tasked with protecting their interest by providing a balance of specificity and breadth to cover particularly worrisome liabilities, as well as unanticipated issues that may arise in the future.[41] Buyers achieve such protection by making extensive requests about a seller's finances, current contracts, litigation, taxes, environmental matters, undisclosed liabilities, and

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35. *See infra* Part V (concluding on the impact of Weinstein clauses and raising unresolved questions).

36. *See* Jeanne M. Grasso, Karen A. Caffee & Timothy J. Carlstedt, *Lessons Learned–An Eye Opening Look at Environmental Due Diligence in Stock Purchase Transactions*, 5 MERGERS AND ACQUISITIONS L. REP. (Mar. 18, 2002).

37. *See* MCLE, DRAFTING AND NEGOTIATING MASSACHUSETTS CONTRACTS § 4.2.1 (2d ed. 2016); *see also* Grasso et al., *supra* note 36 (discussing how representations and warranties are useful tools in performing environmental due diligence).

38. MICHAEL E. S. FRANKEL & LARRY H. FORMAN, MERGERS AND ACQUISITIONS BASICS: THE KEY STEPS OF ACQUISITIONS, DIVESTURES, AND INVESTMENTS 289 (2017).

39. MCLE, *supra* note 37, § 4.2.1.

40. *See id.*

41. Grasso et al., *supra* note 36.

any other information pertinent to the transaction.[42] While both representations and warranties require promises, they actually differ in a number of ways:

> (1) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material; (2) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation; (3) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement; and (4) an express warranty is usually written on the face of the contract, while a representation may be written or oral.[43]

For example, a buyer might seek a warranty if the buyer discovers that a target company has an inadequate environmental management program.[44] The buyer may seek an indemnity provision for protection, for a finite period of time, from liabilities obtained by the seller.[45] In that situation, the buyer basically wants a guarantee of protection in the event that a false or misleading representation exposes them to liability.[46] Sellers, on the other hand, seek information related to their primary concerns, such as the buyer's ability to pay the purchase price.[47] A "br[ing] down" is an additional safeguard during the closing phase of the deal, in which the parties verify the truth of the representations made by both parties, to affirm that the key facts remain as true as initially attested to.[48]

Because buyers and sellers often have competing interests during M&A negotiations, each party must do their best to advocate for the most beneficial agreement for their company.[49] Basically, this means negotiations between parties are "an exercise in risk allocation."[50] When a buyer is trying to avoid risk, they ask the seller to make representations and warranties, and when the seller wants to avoid risk, they "insist that the purchaser rely on the purchaser's own due diligence investigation instead of a representation and warranty."[51] Buyers utilize representations and warranties as a tool when performing due diligence; whereas, sellers utilize them as a chance to provide upfront explanations for liabilities, as opposed to letting those liabilities become potential dealbreakers during the closing phase.[52]

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42. FRANKEL & FORMAN, *supra* note 38, at 289; *see also* MCLE, *supra* note 37, § 4.5 (providing a list of typical representations and warranties).
43. MCLE, *supra* note 37, § 4.2.1.
44. *See* FRANKEL & FORMAN, *supra* note 38, at 289.
45. Grasso et al., *supra* note 36.
46. FRANKEL & FORMAN, *supra* note 38, at 289.
47. *See id.*
48. *See id.*
49. *See id.* at 290.
50. MCLE, *supra* note 37, § 4.2.4.
51. *Id.*
52. *Id.*

In the event of a misrepresentation or breach of warranty, the applicable state law will provide remedies; however, remedies can be negotiated in the agreement.[53] From a buyer's perspective, a well-written indemnification will include provisions securing the survival of the seller's promises and guarantees for a period of time after the closing of the agreement.[54] An indemnification of the buyer for misrepresentations and breaches of warranty and a contingency fund that would cover the seller's obligation created by the indemnity are two examples of a buyer's attempt to allocate risk.[55] If the parties decide to stipulate their own remedies, they will determine how to calculate loss and the extent or limitations of the seller's obligations.[56] The parties scrupulously negotiate the remedies in the agreement due to the amount of detail that goes into indemnification, such as deciding how long the representations and warranties will survive the closing—if at all.[57] A conscientious buyer will request that the seller retain funds in escrow in case a claim is made contemporaneous to the closing of the deal.[58] To be sure, a risk-averse seller will demand qualifiers in the representation and warranties to narrow the scope of the promises or guarantees.[59]

An example of a qualifier is a materiality threshold, or a requirement that the buyer proves that a breach was material to limit the liability they are exposed to after the closing of the deal.[60] For instance, sellers can deliberately craft language that will functionally limit liabilities by qualifying a representation with "knowledge."[61] This means the agreement would specify "whether knowledge is limited to actual or constructive knowledge or includes knowledge that a party should have."[62] Overall, the representations and warranties are pivotal for buyers and sellers to conduct transparent negotiations that satisfy the interests of all the parties involved. In contrast to representations and warranties, buyers and sellers use disclosure schedules to perform due diligence without directly revealing the disclosures in the M&A agreement.[63]

53. *Id.* §§ 4.3.3, 4.4.
54. *Id.* § 4.4.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* § 4.9.
60. *See id.* § 4.4.
61. *Id.* § 4.9.
62. *Id.*
63. *Id.*

B. Due Diligence and Disclosure Schedules

Due diligence is an obscure way of saying that buyers evaluate target companies and identify liabilities related to the acquisition.[64] By performing due diligence, a buyer confirms what it believes about the target company and discovers new information that may change the buyer's perception of the target company.[65] Generally, representations are the vehicle by which diligence is performed, and their purpose is to compel disclosures.[66] Buyers in the Me Too era want to know what they are getting into regarding a seller's reputation or culture of sexual harassment.[67] Sexual harassment disclosures are not the type of information exchanged in a casual oral conversation, and as a matter of fact, sexual harassment disclosures are becoming a standard procedure in M&A transactions and a regular part of M&A due diligence.[68] By asking sellers "to attest that no sexual harassment allegations have been made against top-level employees in recent years," buyers are expanding ordinary diligence to incorporate "social due diligence."[69] Social due diligence is often associated with environmental diligence, but as sexual misconduct issues continue to manifest, the phrase is becoming more associated with Weinstein clauses.[70] This is especially true when the public becomes concerned with the tangible human aspect of the problem.[71] To maximize diligence efforts, a buyer can also request seller information through a disclosure schedule.[72]

Disclosure schedules, which are composed of lists that detail exceptions and qualifications for representations and warranties, are protective measures that can shield a seller from breach allegations after the closing of the agreement.[73] In contrast to representations and warranties, sellers communicate disclosure schedules to the buyer, but they are not disclosed in the actual M&A agreement.[74] For example, in the actual M&A agreement, a seller could make representations that the company is not aware of any sexual misconduct among its executives; however, the truth of the matter could be, "if [the seller] *is* aware of any allegations of sexual harassment against its senior executives, [then] the buyer" has also been made aware through the

64. *See* FRANKEL & FORMAN, *supra* note 38, at 174.
65. *See id.*
66. *See* Matt Levine, *#MeToo Is A Due Diligence Issue Now*, BLOOMBERG OPINION (Aug. 2, 2018, 10:05 AM), https://www.bloomberg.com/opinion/articles/2018-08-02/-metoo-is-a-due-diligence-issue-now.
67. *See id.*
68. *See id.*
69. *See* McGregor, *supra* note 12.
70. *See id.*
71. *See id.*
72. Levine, *supra* note 66.
73. Harroch, *supra* note 31.
74. *Id.*

disclosure schedule.[75] One common mistake in disclosure schedules occurs when sellers fail to make complete disclosures regarding litigation, arbitration, or investigation.[76] One suggestion to avoid this type of mistake is to over-disclose rather than under-disclose.[77]

C. Materially Adverse Change Clauses

MAC clauses give parties an opportunity to terminate an agreement based on materially adverse changes in the "business, operations, properties, prospects, assets or condition of" the target company.[78] The clause provides parties with a broad range of reasons to terminate the agreement prior to closing if a situation exists that could have a materially adverse effect.[79] The botched merger agreement between Abbott Laboratories and Alere Inc. is an example of this type of clause.[80] In that case, Alere failed to disclose information related to a federal investigation that would have revealed Alere's legal troubles related to bribery.[81] Abbott attorney, James Hurst, said: "[f]or months, Alere has not been transparent with"[82] Abbott, which has resulted in their current dispute. When buyers invoke a MAC clause, it encourages sellers to accept a lower adjusted price to avoid expensive and time-consuming litigation.[83] Buyers settle largely for the same reasons sellers do: to avoid costly litigation that could ultimately result in the buyer paying the original purchase price anyway.[84] Considering that courts rarely find circumstances or events materially adverse, parties frequently employ MAC clauses to renegotiate the original agreement.[85]

D. Me Too

The Me Too movement has had immeasurable significance in its push for safe workplaces, empowerment of victims, and the promotion of the current national discussion on sexual misconduct in the workplace.[86] In 2006, Tarana Burke founded Me Too to aid victims of sexual violence, specifically

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75. Levine, *supra* note 66.
76. Harroch, *supra* note 31.
77. *Id.*
78. Rospert & Lu, *supra* note 29.
79. *Id.*
80. Jeff Feeley & Michelle Fay Cortez, *Abbott Judge Puts Suit Over Failing Alere Deal on Fast Track*, BLOOMBERG L. NEWS (Dec. 15, 2016, 11:00 p.m.), https://www.bloomberglaw.com/pharma-and-life-sciences/abbott-judge-puts-suit-over-failing-alere-deal-on-fast-track.
81. *Id.*
82. *Id.*
83. Adam Tsao, Comment, *Pricing Mechanisms in Mergers and Acquisitions: Thinking Inside the Box*, 18 U. PA. J. BUS. L. 1233, 1253–54 (2016).
84. *Id.* at 1254.
85. *See id.*
86. *About: History and Vision*, *supra* note 25, at 11.

indigent women of color.[87] Burke's social justice movement is committed to disrupting all systems that allow sexual violence to flourish.[88] The scope of the Me Too movement became abundantly clear after actress Alyssa Milano encouraged Twitter users to share their stories of sexual assault and harassment with the hashtag "MeToo."[89] Almost immediately, thousands of women and men replied with stories of their traumatic experiences.[90] In a world where social media platforms provide seemingly infinite news stories, it is nearly impossible to miss the continuous flow of headlines related to sexual misconduct in the workplace.[91] Unfortunately, sexual misconduct is an issue that has metastasized in companies "operating in a culture of silence," and the Me Too movement has become a force for change that seeks to give a voice to the victims of that silence.[92]

While a number of prominent business leaders have been exposed for their misconduct, there is a widespread realization that many companies are failing to adequately protect their employees from unacceptable behavior.[93] Examining the executives or leaders of a company can provide a gauge for determining the company's ideological culture regarding sexual misconduct.[94] For example, a number of female Nike employees distributed a survey to their colleagues concerning sexual harassment and delivered the results to CEO Mark Parker, and in response, multiple executives were removed from the company for exhibiting behavior that was contradictory to Nike's values and code of conduct.[95] A few examples of the complaints made by female Nike employees include a male Nike supervisor boasting about his condoms, a female employee's breast being referenced in an email to her, and staff engagements that would conclude at strip clubs.[96] Additionally, the abhorrent conduct included physically intrusive behavior by way of a male supervisor forcing his way into a restroom while trying to kiss a female

87. *Id.*

88. *Id.*

89. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976.

90. Heidi Stevens, *#MeToo Campaign Proves Scope of Sexual Harassment, Flaw in Mayim Bialik's Op-ed*, CHI. TRIB. (Oct. 16, 2017, 11:15 AM), http://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-monday-me-too-mayim-bialik-1016-story.html.

91. *See id.*

92. Maier, *supra* note 11, at 5.

93. Dina Gerdeman, *Sexual Harassment: What Employers Should Do About #MeToo*, FORBES (Apr. 11, 2018, 2:20 PM), https://www.forbes.com/sites/hbsworkingknowledge/2018/04/11/sexual-harassment-what-employers-should-do-about-metoo/#134387472acb.

94. *See* Avivah Wittenberg-Cox, *#MeToo Now Means Business*, FORBES (Apr. 30, 2018, 10:51 AM), https://www.forbes.com/sites/avivahwittenbergcox/2018/04/30/metoo-now-means-business/#58406c4ac236.

95. *Id.*

96. Julie Creswell, Kevin Draper, & Rachel Abrams, *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/business/nike-women.html?module=inline.

subordinate.[97] Despite reporting these actions to human resources, the incidents resulted in verbal warnings, victim blaming, or casual insensitivity.[98] Thankfully, a group of female employees sought to expose the toxic culture for what it was, and they were ultimately successful in invoking awareness and promoting progress.[99] The Nike example highlights the tremendous change that can be achieved when women are empowered "and become effective at building coalitions of influence."[100]

While some business leaders may not be aware of what conduct constitutes sexual harassment, a federal court has found that something as seemingly innocuous as a hug can fall into the category of unacceptable workplace conduct.[101] The Ninth Circuit Court of Appeals found in *Zetwick v. County of Yolo* that a supervisor's frequent hugs had the potential to create a hostile or abusive workplace when the contact was unwanted.[102] There, the court reversed the trial court's summary judgment and held that "the district court had *not* properly considered the totality of the circumstances."[103] The court explained that a reasonable juror could have concluded from the claimant's testimony that her supervisor's unsolicited hugs were creating an objectively and subjectively hostile environment that was outside the scope of normal workplace socialization.[104] This case illustrates one of the numerous forms of sexual harassment that can occur in the workplace, especially when individuals are either too ignorant or unwilling to address the fact that their behavior, along with their position of authority, can negatively affect the environment in which they work with their colleagues.

E. Legislative Action

Multiple states have enacted legislation aimed at protecting individuals from sexual harassment in businesses and government, requiring training on the subject, and criminalizing misconduct; however, this Comment will only focus on a select few pieces of legislation.[105] Senators Kamala Harris and Lisa Murkowski, a California Democrat and an Alaska Republican, respectively, introduced a bill in the United States Senate to "amend the Internal Revenue Code of 1986 to modify the tax treatment of amounts

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97. *Id.*

98. *See id.*

99. *Id.*

100. Wittenberg-Cox, *supra* note 94.

101. Maura Dolan, *Hugging Employees May Create a Hostile Work Environment, Appeals Court Rules*, L.A. TIMES (Feb. 23, 2017, 4:25 PM), http://www.latimes.com/local/california/la-me-ln-hugging-9th-circuit-20170223-story.html.

102. Zetwick v. Cty. of Yolo, 850 F.3d 436, 443 (9th Cir. 2017).

103. *Id.* at 444.

104. *Id.* at 443–44.

105. *Legislation on Sexual Harassment in the Legislature*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx (last updated Feb. 11, 2019).

related to employment discrimination and harassment in the workplace, including sexual harassment, [and] sexual assault."[106] This pending legislation is particularly noteworthy because it shows that the issue of sexual harassment in the workplace is a bipartisan issue that both Democrats and Republicans seek to resolve.[107]

Legislation introduced by California assembly member Freddie Rodriguez would have required California state agencies to provide an annual report of sexual harassment complaints received or filed by the agency.[108] This sexual harassment tracking report would have included the number of complaints and the dollar amount of judgements and settlements from the previous calendar year.[109] After the legislation was passed, however, former California Governor Edmond Brown vetoed the bill and commented that the "bill definitely covers an important topic but current management practices are taking the necessary steps to assure a suitable work environment."[110]

In contrast, Washington Governor Jay Inslee recognized a deficiency in "laws, rules and culture" when it comes to acknowledging and addressing sexual misconduct, and in response, he signed a package of bills directed at sexual misconduct in the workplace.[111] The bills cover a variety of areas aimed at protecting employees in the workplace.[112] The Washington legislature passed S.B. 5996, which forbids nondisclosure agreements that hinder victims of sexual misconduct from discussing their experiences.[113] Next, Washington S.B. 6471 requires the Human Rights Commission to create a collaborative committee of business leaders and victims of sexual violence to develop policies designed to prevent sexual harassment in workplaces.[114] Lastly, S.B. 6313 annuls employment contracts that do not provide protections for an employee's right to report sexual harassment, and the last bill allows victims to produce testimony and information regarding sexual misconduct despite a nondisclosure agreement.[115]

106. Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act, S. 2988, 115th Cong. Part 2 (2018).

107. *See id.*

108. ASSEMB. JUDICIARY COMM. REP., Assemb. B. 2713, 2017–2018 Reg. Sess. (Cal. 2018).

109. *Id.*

110. *AB-2713 Public Employment: Sexual Harassment Tracking*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB2713 (last visited Oct. 9, 2019).

111. La Corte, *supra* note 26.

112. *Id.*

113. S.B. 5996, 65th Leg., Reg. Sess. (Wash. 2018); *see* La Corte, *supra* note 26.

114. S.B. 6471, 65th Leg., Reg. Sess. (Wash. 2018); *see* La Corte, *supra* note 26.

115. S.B. 6313, 65th Leg., Reg. Sess. (Wash. 2018); *see* La Corte, *supra* note 26.

III. ANALYSIS

A. The Best Fit for a Weinstein Clause: Representations and Warranties

This Comment addresses the uncertainty regarding how future M&A agreements will be affected by the legal trend towards obligating executives and directors to disclose incidents of past sexual misconduct in the workplace, and the trend's effect on future M&A agreements.[116] As stated above, representations and warranties are promises and guarantees that aid buyers in assessing target companies.[117] M&A agreements are not all exactly the same, and the representations and warranties may either be displayed in their own article in the agreement or placed throughout the agreement; however, representations and warranties are fundamental components found in all M&A agreements.[118] By asking a target company to make representations regarding sexual misconduct by its executives, a buyer can uncover and assess the potential risk associated with acquiring a company with such unpleasant incidents in its past.[119]

For example, Brookfield Asset Management's agreement to purchase Forest City Realty Trust, Inc. presented the Weinstein clause under the representations and warranties as follows:

> 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.[120]

Dissecting the clause line-by-line, its effectiveness can be analyzed to determine which language was useful in achieving the purpose of a Weinstein clause and which language should be modified to maximize the value of the clause.

First, "[t]o the [k]nowledge of the Company" indicates a qualifier of knowledge, meaning the Company will disclose information that it is knowledgeable about; however, knowledge is not defined in the agreement and could be limited to actual or constructive knowledge, or encompass knowledge the Company should have had.[121] The clause could be improved,

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116. *See generally* McGregor, *supra* note 12.

117. *See* MCLE, *supra* note 37, § 4.2.4.

118. *Id.*

119. *Id.* § 4.1.

120. AGREEMENT AND PLAN OF MERGER BY AND AMONG FOREST CITY REALTY TRUST, INC., ANTLIA HOLDINGS LLC, AND ANTLIA MERGER SUB INC., 20 (July 30, 2018) [hereinafter FOREST CITY & ANTLIA MERGER AGREEMENT], https://www.sec.gov/Archives/edgar/data/1647509/000119312518233455/d582102dex21.htm; *see* Levine, *supra* note 66.

121. MCLE, *supra* note 37, § 4.9; FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 20.

in terms of buyer protection, if the buyer negotiated a broader definition of knowledge.[122]

Next, the clause states "in the last five (5) years, no allegations of sexual harassment have been made to the Company . . . at a level of Senior Vice President or above."[123] The case of Harvey Weinstein involved allegations that traced back as early as 1990,[124] which provides insight as to whether five years is an adequate time frame to seek disclosure. The buyer would benefit most if the clause embodied as large of a time frame as possible, but a seller would be hard-pressed to settle for any extended period of time because the seller would increase its exposure to liability.[125] But the clause does use the term "sexual harassment," which the Equal Employment Opportunity Commission (EEOC) defines as:

> [U]nwelcome sexual advances, request for sexual favors, and other verbal or physical harassment of a sexual nature.
>
> Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.[126]

Also, the clause limits disclosure to employees at the Senior Vice President level and above, but a buyer would be best served if the agreement included any top-level executive, director, or supervisor.[127] The Nike example, discussed above, illustrates that nonexecutive leaders can be the perpetrators of physical and verbal sexual misconduct.[128] Additionally, this agreement includes a non-survival clause stating that "[t]he representations and warranties in this Agreement . . . will terminate at the Effective Time," which is defined as the time when the articles of merger are filed.[129] A non-survival clause is a provision that favors sellers because it terminates their obligation to maintain that the representations remain true.[130] Notably, the agreement did not address the treatment or disclosure of settlement agreements.[131]

Comparatively, the merger agreement between Verscend Technologies, Inc., and Cotiviti Holdings, Inc., includes the following pertinent language:

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122. MCLE, *supra* note 37, § 4.9.

123. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 20.

124. Daniel Victor, *How the Harvey Weinstein Story Has Unfolded*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html.

125. MCLE, *supra* note 37, § 4.2.4.

126. *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Oct. 9, 2019).

127. MCLE, *supra* note 37, § 4.2.4.

128. Creswell et al., *supra* note 96.

129. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 79.

130. MCLE, *supra* note 37, § 1.5.4.

131. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120.

> 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.[132]

Here, the agreement defines knowledge in Article I to include actual knowledge.[133] Even though the buyer would benefit more from a broad definition of knowledge, the buyer will still benefit from knowing with specificity what constitutes knowledge.[134] The seller will also benefit because the agreement excludes liabilities related to constructive knowledge or knowledge that the Company should have.[135] The next line of the clause states: "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, supervise at least (8) other employees . . . ."[136] This portion of the clause is most ideal for buyers because it provides a broad range of employees the target company must include in their disclosure.[137] The last portion of the clause includes—importantly, I might add—a comprehensive list of company representatives the target company promises have not engaged in settlement agreements related to sexual misconduct or harassment in the workplace.[138] The buyer can effectively dissolve the dreaded "culture of silence" under which many companies operate by requiring sellers to disclose past settlements.[139] Bearing in mind that buyer and seller negotiations are "an exercise in risk allocation," each party is vying to minimize their allotment of the risk.[140] Considering the balance between breadth and specificity incorporated into this clause, it provides ideal protective measures in favor of the buyer.

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132. AGREEMENT AND PLAN OF MERGER BY AND AMONG VERSCEND TECHNOLOGIES, INC., REY MERGER SUB, INC., AND COTIVITI HOLDINGS, INC., 34 (June 19, 2018) [hereinafter VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT], https://www.sec.gov/Archives/edgar/data/1657197/000104746918004673/a2236085zex-2_1.htm.

133. *Id.* at 8.

134. *Id.*

135. *Id.*

136. *Id.* at 34.

137. MCLE, *supra* note 37, § 4.2.4.

138. *Id.*

139. Maier, *supra* note 11.

140. MCLE, *supra* note 37, § 4.2.4.

B. Disclosure Schedule

The disclosure schedule, sometimes called a disclosure letter, is an important and meticulously crafted part of the M&A agreement.[141] One reason for carefully drafting and reviewing the disclosure schedule is to avoid post-closing allegations claiming a breach of the representations and warranties.[142] Generally, the disclosure schedule will correlate to promises made in the representations and warranties, such as the Forest City Realty agreement which prefaces its representations and warranties section stating: "[e]xcept as disclosed . . . in the [d]isclosure [s]chedule . . . the Company hereby represents and warrants . . . ."[143] Despite being generally referenced throughout the M&A agreement, disclosure schedules are not actually disclosed in the public documents filed with the SEC; however, the buyer is aware of the disclosures.[144]

Admittedly, disclosure schedules are an important tool used during M&A transactions that can help both parties who are seeking to maximize their benefits and minimize their risk; however, they do lack an element of public transparency.[145] Businesses adapting to the Me Too era are pressed to make changes that are conducive to providing a safe, harassment-free work environment for all employees, but to obtain a safe work environment, companies must employ a reasonable level of transparency.[146] Granted, a risk-averse target company will do its best to limit the disclosure of information to protect itself from liability, which obviously inhibits the objective of transparency. The Forest City Realty agreement even includes a disclosure schedule disclaimer that states:

> Certain items and matters are listed in the Disclosure Schedule for informational purposes only and may not be required to be listed therein by the terms of this Agreement. . . . No reference to, or disclosure of, any item or matter in any Section of this Agreement or any section or subsection of the Disclosure Schedule will be construed as an admission or indication that such item or matter is material or that such item or matter is required to be referred to or disclosed in this Agreement or in the Disclosure Schedule as applicable. Without limiting the foregoing, no reference to, or disclosure of, a possible breach or violation of any Contract or Law in the Disclosure

141. Harroch, *supra* note 31.

142. *Id.*

143. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 9–10; *see* Levine, *supra* note 66.

144. *See* Levine, *supra* note 66.

145. *See id.*

146. *See* Barri Rafferty, *Three Ways to Improve Your Corporate Culture in the #MeToo Era*, WORLD ECON. F. (Jan. 7, 2019), https://www.weforum.org/agenda/2019/01/how-improve-your-corporate-culture-metoo-era-sexual-harassment/.

> Schedule will be construed as an admission or indication that a breach or violation exists or has actually occurred.[147]

This disclosure schedule disclaimer allows the seller to distance itself from liabilities by emphasizing that the disclosure schedule is intended for "informational purposes only."[148] The clause then emphasizes that any disclosure contained in the disclosure schedule is *not* "an admission or indication that such item or matter is material." [149] Therefore, the disclaimer attempts to mitigate the sting of the seller's disclosures by identifying that the seller has not actually affirmed the materiality of the disclosure.[150]

Similarly, the Verscend Technologies M&A agreement includes a disclosure letter disclaimer that states:

> [T]he . . . Disclosure Letter . . . shall only be deemed to be an exception to . . . the representations and warranties . . . [and] [t]he listing of any information on a party's Disclosure Letter shall not be deemed to constitute an admission or acknowledgment, in and of itself, solely by virtue of the inclusion of such information or any similar information in such Disclosure Letter, by such party, or to otherwise imply, that such information or any similar information is material, is required to be disclosed by such party under this Agreement or falls within relevant minimum thresholds or materiality standards set forth in this Agreement.[151]

Here, the disclosure letter disclaimer mitigates any of the disclosures made to the buyer by including language that the disclosure letter "*shall not* be deemed to constitute an admission or acknowledgment" that the information offered is material to the enforceability of the agreement.[152] The seller is benefitted because the disclosures in the disclosure letter are exceptions to the representations and warranties, and can be adequately explained in a schedule.[153] The buyer derives benefits from the disclosure letter as long as the buyer makes sure the language describes the disclosure sufficiently; otherwise, the buyer risks the exception becoming "so broad that [it] actually vitiates the related representation and warranty."[154] The language describing a threshold, such as materiality, is important because it minimizes the burden on the seller and relieves the seller from making frivolous disclosures.[155] For example, if a buyer wants the seller to disclose material

147. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 96.
148. *Id.*
149. *Id.*
150. *Id.*
151. VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132, at 68.
152. *Id.* at 68 (emphasis added).
153. *See* MCLE, *supra* note 37, § 4.9.
154. *Id.*
155. *See* Harroch, *supra* note 31.

contracts, the buyer could define "material" as "contracts over $500,000, as opposed to disclosure of any contracts."[156]

C. Material Adverse Change Clause

MAC clauses are common in M&A agreements; however, "there is significant ambiguity in the application of" MAC clauses.[157] As discussed in Part II, MAC clauses are essentially tools of renegotiation.[158] MAC clauses are used to shift liability between the buyer and seller by broadly or narrowly defining what changes or effects are material.[159] MAC clauses are difficult to draft because of each party's opposing interest in defining what constitutes a materially adverse event or change.[160] Buyers favor broadly defined MAC clauses to cast a wide net of protection, while sellers favor a narrow definition because it protects them from varying liabilities.[161] Additionally, carve-outs would be used to protect the seller against claims of adverse changes in certain circumstances.[162] These carve-outs would include situations such as changes in the economy, changes in the target company's industry, changes in regulations, or acts of terrorism.[163] The Delaware Chancery Court illustrated the present challenge when it hesitated to terminate merger agreements due to a material change in the conditions of the agreement.[164]

To be sure, in *Akorn, Inc. v. Fresenius Kabi AG*, the court made its first decision to declare that a materially adverse change had occurred in an M&A agreement; however, the court explained that the buyer's burden of proving a material change is a substantial one.[165] Vice Chancellor Travis Laster wrote the majority opinion and concluded that Fresenius Kabi AG could terminate the $4.75 billion deal to acquire Akorn.[166] The main issues, highlighted by Laster, included the precipitous drop in Akorn's "rosy projections" after the agreement had been formed, and "Akorn's alleged failure to comply with regulatory requirements for product development and quality control."[167]

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156. *Id.*

157. 3 TIMOTHY R. DONOVAN & JODI A. SIMALA, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 41:33 (2019).

158. Tsao, *supra* note 83, at 1254.

159. *See id.*

160. *See* id.

161. *See id.*

162. *See* DONOVAN & SIMALA, *supra* note 157, § 41:33.

163. *Id.*

164. *See* Tsao, *supra* note 83, at 1254.

165. Michael Deyong & Gabrielle Hodgson, *Delaware Chancery Court Finds Material Adverse Effect Permitting Buyer to Walk Away from Merger Agreement*, WHITE & CASE (Oct. 10, 2018), https://www.whitecase.com/publications/alert/delaware-chancery-court-finds-material-adverse-effect-permitting-buyer-walk-away.

166. Alison Frankel, *The Mac Wall Has Been Breached! Should Deal Lawyers Worry?*, REUTERS (Oct. 2, 2018, 4:20 PM), https://www.reuters.com/article/us-otc-akorn/the-mac-wall-has-been-breached-should-deal-lawyers-worry-idUSKCN1MC2U3.

167. *See id.*

Laster concluded that Akorn's quality control issues would have cost Fresenius an estimated $1 billion to remedy.[168] It remains unclear how Laster's landmark opinion will affect future acquirers trying to walk away from flawed deals.

In *Akorn*, the court relied on quantitative metrics and observed them over time.[169] However, because no bright-line test exists to prove a materially adverse change clause and the related burden of proof is high, it is unlikely that a Weinstein clause would function well as a MAC clause.[170] Because the Weinstein clause is intended to protect buyers from acquiring companies with issues of sexual misconduct, achieving this purpose would be difficult when the legal remedy requires such a high burden of proof.[171] Buyers would have to demonstrate that a director or executive's single-handed actions *materially* affected the acquisition.[172] The Delaware Chancery Court has established that not only does the party claiming a change have the burden of proving a material change, but the party must also prove that the effects have durational significance.[173] Therefore, a buyer making claims of a material change due to the seller's misconduct must also prove that the effects of such behavior lasted a substantial period of time.[174] The Delaware Chancery Court suggests that the effects of a significant duration should be measured in years as opposed to months.[175]

D. Examining the Benefits and Challenges of a Weinstein Clause

Weinstein clauses protect buyers and their organizational reputations after a merger or acquisition, but Weinstein clauses have additional benefits as well as numerous challenges.[176] Benefits to the buyer include transactional transparency, reduced risk of brand damage related to sexual misconduct, and the ability to maintain a safe work environment.[177] Challenges include unreported acts of sexual harassment, difficult damages calculations, and issues with seller compliance.[178] Lastly, after a disclosure is made, buyers must balance the risk of brand damage versus the potential profits of a merger or acquisition.[179]

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168. *Id.*
169. *See* Deyong & Hodgson, *supra* note 165.
170. *See id.*
171. *See id.*; McGregor, *supra* note 12.
172. *See* Deyong & Hodgson, *supra* note 165.
173. DONOVAN & SIMALA, *supra* note 157, § 41:33.
174. *See id.*
175. *See id.*
176. *See* McGregor, *supra* note 12.
177. *See id.*
178. *See id.*
179. *See* Levine, *supra* note 66.

1. Benefits

A Weinstein clause is a preventative provision that compels transparency between buyers and sellers regarding the topic of sexual misconduct.[180] Weinstein clauses are buyers' proof of their devotion to maintaining a progressive, safe work environment while focusing on company expansion.[181] By adopting a policy of transparency with consumers and employees, companies tend to experience a positive impact on their reputation.[182] While a Weinstein clause is not an impenetrable veil of protection, it is a practical step towards building a culture of transparency.[183]

The Me Too movement symbolizes the public's frustration with sexual misconduct; therefore, buyers must remain aware of how their brand can be influenced by the public's perception of their company.[184] Considering most people learn about corporate misconduct through the filter of the media, the public's perception is often skewed by what the media deems newsworthy.[185] Also, modern media platforms have made information so readily available that a simple hashtag can quickly draw negative attention to a specific business.[186] Negative news that spreads via social media has the potential to damage a company's "brands or stock prices exponentially more than a bad newspaper story."[187] Consequently, when a reputation of sexual misconduct causes consumers to "re-evaluate their perceptions of the corporation" then that corporation has experienced brand damage.[188] Accordingly, a Weinstein clause is a buyer's preventative measure that decreases the risk of brand damage stemming from a merger or acquisition.[189] Plus, if a seller failed to disclose that an incident of sexual misconduct occurred and that information would affect the value of the company, the buyer will recoup their losses.[190]

Corporate social responsibility has evolved as societal norms have changed over time; however, social activism does not have to come at the cost of financial responsibility.[191] Buyers can "enhanc[e] corporate

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180. *See id.*

181. *See id.*

182. Simon Hayward, *What Are the Business Benefits of Being More Transparent?*, GUARDIAN (July 29, 2015, 6:33 AM), https://www.theguardian.com/sustainable-business/2015/jul/29/what-are-the-business-benefits-of-being-more-transparent.

183. *See id.* (discussing the benefits of transparent leadership within a company).

184. *See About: History & Vision*, *supra* note 25 (explaining the Me Too movement's goal of expanding the conversation around sexual violence).

185. Kishanthi Parella, *Brand as Information Intermediary*, 50 CASE W. RES. J. INT'L. L. 151, 161–62 (2018).

186. Tom C.W. Lin, *Incorporating Social Activism*, 98 B. U. L. REV. 1535, 1545 (2018).

187. *Id.*

188. Parella, *supra* note 185, at 162.

189. *See* McGregor, *supra* note 12.

190. *See* 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.

191. Lin, *supra* note 186, at 1579–80.

value . . . . [b]y working on important issues that are at the forefront of society's concerns, [and] instead of focusing solely on profit, corporations could enhance their value to consumers, employees, recruits, and shareholders."[192] Through social awareness, buyers can advance the interest of their shareholders as well as society.[193] A company with a positive reputation among consumers and employees builds loyalty, which results in financial benefits.[194] Truthfully, Weinstein clauses are not the sole solution to the issue of sexual misconduct in the workplace; "however, it is one business tactic that harmonizes the concern for corporate responsibility with concern for the company's bottom line."[195]

Finally, Weinstein clauses benefit buyers by promoting safe work environments.[196] Because questions about reputation and culture are at the surface of modern M&A agreements, it is necessary for sellers to obtain unbiased evaluations of their business's cultural norms.[197] When used as a tool against sexual misconduct, a Weinstein clause seeks to achieve two goals: discouraging misconduct and encouraging companies to "beef up their internal controls against it."[198] In a 2018 survey, the Society for Human Resource Management reported that one in three executives have changed their behaviors in response to the negative effects sexual misconduct has on employees and company profits.[199] Employee morale, engagement, and productivity are the most concerning factors driving executives to change "in the wake of the [Me Too] movement."[200] Functionally, a Weinstein clause is a single provision in a document littered with complex language that shapes the whole of the agreement; however, a Weinstein clause is also a symbolic tool for companies who have adopted zero-tolerance policies.[201] Companies with zero tolerance for sexual misconduct create clarity by forming well-defined lines between acceptable and inappropriate behavior.[202]

Ultimately, any company that embraces corporate social responsibility is better equipped to quell "the concerns of their nonshareholder constituencies[—]like their employees, customers, suppliers,

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192. *Id.* at 1579.

193. *See id.* at 1540.

194. Hayward, *supra* note 182.

195. Phil Brown, *For Your Consideration: "The Weinstein Clause"*, INTELLIGIZE (Aug. 16, 2018), https://www.intelligize.com/for-your-consideration-the-weinstein-clause/.

196. *See* McGregor, *supra* note 12.

197. Sherman, *supra* note 190.

198. Brown, *supra* note 195.

199. SOC'Y FOR HUM. RESOURCE MGMT., *supra* note 14.

200. *Id.*

201. *See* Ratna Bhushan, *#MeToo Impact: Companies Tightening Policy to Make Workplaces Safer*, ECON. TIMES (Oct. 10, 2018, 6:43 AM), https://economictimes.indiatimes.com/news/company/corporate-trends/metoo-impact-companies-tightening-policy-to-make-workplaces-safer/articleshow/66142063.cms.

202. *See id.*

and communities."[203] Companies that address the concerns of nonshareholder constituents will potentially improve their image and increase their profits, albeit, this should be done in a way that respects social interest and financial interest equally.[204] The current social climate suggests that businesses that are singularly profit-focused are no longer satisfactory to the public; however, adapting to societal norms could actually produce superior financial performances.[205]

2. Challenges

Drafting a document in a complex transaction is a challenge in itself; yet, attorneys must pay meticulous attention when drafting Weinstein clauses because of several potential challenges related to this specific provision.[206] Potential challenges include unreported sexual misconduct, sellers that refuse to disclose harmful information, and damage calculations related to a breach of the clause.[207] Lastly, there is the question of how Weinstein clauses will reconcile the issue of buyers that will ignore seller misconduct because of the potential gains associated with the acquisition. If that issue persists, those buyers will essentially perpetuate the type of behavior that the clause is intended to quash.[208]

First, buyers must recognize the fact that most acts of sexual misconduct go unreported.[209] This issue seems to continue despite preventative efforts in the form of workplace policies against sexual harassment.[210] Ninety-four percent (94%) of human resource professionals say their companies have implemented policies to shield employees from sexual misconduct; however, "more than 1/3 of Americans still [claim that] their workplace *fosters* sexual harassment."[211] These numbers suggest that the problem of sexual misconduct cannot be singularly remedied by preventative rules and regulations.[212] Executives must change the unsafe culture present in their company.[213] There is not a lone reason responsible for the lack of reporting, but fear of retaliation is a major factor that contributes to many employees'

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203. *See* Lin, *supra* note 186, at 1581.
204. *See id.* at 1582.
205. *See id.* at 1597–98.
206. *See* McGregor, *supra* note 12.
207. *Id.*
208. *See id.* (discussing that a Weinstein clause may protect buyers from past sexual misconduct, but will not prevent the "toxic culture that may have enabled bad behavior to be kept quiet"). *Cf.* Parella, *supra* note 185 (explaining that the goal of deterring company wrongdoing, the brand damage should outweigh the benefit of the wrongdoing).
209. SOC'Y FOR HUM. RESOURCE MGMT., *supra* note 14.
210. *Id.*
211. *Id.*
212. *See id.*
213. *Id.*

decisions not to file a formal complaint.[214] Companies must find a way to empower and encourage their employees to speak out against harassment, otherwise, the purpose the Weinstein clause seeks to achieve will become moot.

Also, despite that Weinstein clauses are premised on the idea of transparency, sellers may try to protect their interest by withholding information.[215] By disclosing damning information, sellers risk the chance of souring business relationships, ruining other deals, and tarnishing their reputation.[216] Unfortunately, if an executive is well aware of their own misconduct, or the misconduct of other employees, it is unlikely that they would reveal that information without resistance.[217] Moreover, sellers must perform their own due diligence to learn the character of their employees and the culture in which they work on a daily basis.[218] Depending on the breadth of the disclosure, sellers could have to disclose the actions of a wide range of employees. Similar to the merger agreement between Verscend Technologies, Inc. and Cotiviti Holdings, Inc., buyers could compel sellers to disclose the misconduct of any employee who supervises at least eight subordinates.[219] It is crucial that sellers receive an "unbiased report on [their company's] culture" so they are fully aware of the extent of the disclosure they are being asked to make.[220] Thus, the effectiveness of the Weinstein clause is dependent on the candor of the seller when making disclosures; albeit, buyers may still recover monetary damages if sellers violate the Weinstein clause.[221]

Accordingly, buyers must determine how to appraise damages resulting from a public unveiling of allegations of sexual misconduct or settlements related to sexual misconduct.[222] Contrasting representations made regarding "environmental regulations, which have specific fines that the acquiring company could recoup," Weinstein clause violations do not have a formula or method to calculate damages.[223] How can a buyer quantify damages related to negative press, shareholder divesture, and potential employee termination?[224] Buyers and sellers will undoubtedly have competing interests in determining damages calculations, which is why it is critical for buyers to

214. *See* McGregor, *supra* note 12.

215. *See id.* (explaining that Weinstein clauses are intended to discover potentially harmful information related to sexual harassment during an M&A transaction).

216. *See id.*

217. *See id.*

218. *See id.*

219. VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132.

220. Sherman, *supra* note 190.

221. *See* McGregor, *supra* note 12.

222. *Id.*

223. *Id.*

224. *Id.*

perform extensive due diligence to discover these issues before they surface.[225]

Lastly, a potential situation that must be identified is when parties to the transaction choose to ignore incidents of sexual misconduct that were discovered while performing due diligence.[226] Companies evaluating an M&A transaction use due diligence to identify potential liabilities, but how is the transaction affected when the parties choose to disregard the potential liability?[227] A Weinstein clause is essentially a corporate morality clause that protects companies from bad publicity that could affect a company's value.[228] Because morality is an ambiguous concept, it is difficult to say whether a buyer's decision to move forward with a lucrative transaction, while aware of sexual misconduct in the seller's company, is absolutely justified or unjustified. Companies are beholden to their shareholders and the public, so while social activism does not have to come at the cost of financial responsibility, it is possible that financial responsibility could come at the cost of social activism.[229] One terrifying belief at the heart of many transactions intended to produce financial gain is that there is never a bad deal if enough money is made.[230]

IV. RECOMMENDATIONS

Weinstein clauses crept their way into M&A agreements in 2018, and although the future of these clauses is still unclear, this section will provide a prediction on how a Weinstein clause might look in future agreements.[231] Additionally, this section will provide suggestions on how to overcome the challenges associated with Weinstein clauses.[232]

As Weinstein clauses continue to proliferate, M&A attorneys drafting these provisions will recognize that the effectiveness of a Weinstein clause comes from the clause's operative language and the clause's placement in the M&A agreement.[233] To emphasize the inseparable relationship between society and businesses, this prediction will focus on recommending a Weinstein clause that provides the most benefit to buyers seeking to avoid brand damage and public backlash.[234]

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225. *See id.*
226. *See generally* FRANKEL & FORMAN, *supra* note 38.
227. *See id.*
228. Sherman, *supra* note 190.
229. Lin, *supra* note 186, at 1580.
230. Sherman, *supra* note 190.
231. Maier, *supra* note 11.
232. *See id.*
233. *Id.*
234. *See* Ahmed, *supra* note 9.

First, the language of the clause must be crafted carefully to effectuate the intended purpose of the clause.[235] In this case, the purpose is to protect buyers from acquiring companies with issues of sexual misconduct. The two main elements to focus on when drafting a Weinstein clause are knowledge and the breadth of the disclosure.[236] The breadth of the disclosure includes factors such as: the time frame (e.g., the seller must disclose incidents as far back as twenty years ago); what level of employees are required to disclose incidents (e.g., employees at the senior vice president level and above); and what actions must be disclosed (e.g., sexual harassment as defined by the EEOC, and any settlements related to sexual harassment).[237]

It is crucial that knowledge is defined in the agreement to avoid future disputes about what information a party was actually, or should have been, privy to.[238] Knowledge qualification is yet another exercise in risk allocation that is used to broaden or limit the scope of the representations and warranties.[239] Because this recommendation is geared towards benefiting buyers, it is preferable to have the broadest definition of knowledge.[240] Knowledge is usually defined in one of two forms: actual or constructive.[241] Actual knowledge is "direct and clear knowledge" that is proved by a subjective standard.[242] Constructive knowledge, which is proved by an objective standard, is "knowledge that one using reasonable care or diligence should have."[243] Buyers would certainly prefer the latter. Buyers favor constructive knowledge, because it places an obligation on sellers to perform adequate due diligence when identifying potential liabilities within the seller's company.[244] Thus, applying a constructive knowledge standard protects buyers from sellers who might purposefully shield themselves from discovering harmful information such as reported incidents of sexual misconduct in the company.[245]

Next, drafting attorneys must negotiate the breadth of the disclosures. The breadth will determine the time frame, what levels of employees the

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235. *See* McGregor, *supra* note 12 (explaining that meticulous, shrewd drafting of the clause's language is necessary to maximize any benefits and minimize any ambiguity).

236. *See supra* notes 61–62 and accompanying text (presenting the two types of knowledge definitions); Maier, *supra* note 11 (illustrating the various subparts that should be included in a Weinstein clause).

237. *See* VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132 (discussing the varying levels of disclosure that can result from a Weinstein clauses language).

238. *See supra* text accompanying note 62 (differentiating between actual and constructive knowledge).

239. Kyle Gann, William O'Neal & Jason Osborne, *Defining 'Knowledge' in a Purchase Agreement*, LAW360 (May 14, 2018, 1:34 PM), https://www.law360.com/articles/1043350.

240. *See supra* notes 62–63 (explaining why constructive knowledge reduces the buyer's risk in an M&A transaction).

241. Gann et al., *supra* note 239.

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.* (discussing the doctrine of willful blindness).

seller is required to disclose, and what type of misconduct would fall within the scope of a Weinstein clause.[246] The time frame essentially determines how far in the past the disclosures reach.[247] The significance of the time frame is highlighted by the case of Harvey Weinstein, considering Weinstein's accusers have cited incidents of sexual misconduct dating back as far as 1990.[248] Weinstein's case may seem like an outlier, but the epidemic of workplace sexual misconduct reaches much further back than what has been revealed in the last few years.[249] For example, former NBC CEO Leslie Moonves has accusers alleging incidents that go as far back as 1985.[250] Therefore, the most effective way for buyers to protect themselves from past incidents of sexual misconduct is to require disclosure of *all* past and present allegations of sexual misconduct.[251]

Additionally, by defining an employee threshold requirement, buyers compel sellers to reveal the misconduct, if any, of employees in particular supervisory positions.[252] Part III.A of the article describes two different Weinstein clauses with two entirely different employee threshold requirements.[253] One agreement required disclosure of incidents with employees at a level of senior vice president and above, while the other agreement required the disclosure of incidents with employees who supervise at least eight other employees.[254] Obviously, the second agreement casts a wider net to include more employees that the seller would have to disclose information about; however, this factor must be carefully considered because the size of the seller's company will dictate what level of employee representations would be appropriate.[255] If a buyer asked a seller to make representations about employees at every level, the seller would likely find the request unreasonable and burdensome.[256] Consequently, the buyer must focus less on casting a wide net and concentrate more on applying the representations to those employees in supervisory positions.[257] The culture of a company begins with the company's leadership, so it is imperative that

246. *See* MCLE, *supra* note 37 (explaining why it is important for the buyer and seller to reach an agreement on the level of disclosures required under the Weinstein clause).

247. *See* Alex Johnson & Stephanie Giambruno, *New Accuser Says She Confronted Leslie Moonves in Public After 'Gross' Encounter*, NBC NEWS (Dec. 5, 2018, 9:15 PM), https://www.nbcnews.com/news/all/new-accuser-says-she-confronted-leslie-moonves-public-after-gross-n944646.

248. Victor, *supra* note 124.

249. *See* Johnson & Giambruno, *supra* note 247.

250. *Id.*

251. *See* MCLE, *supra* note 37, § 4.2.4.

252. *See* Wittenberg-Cox, *supra* note 94; *see also* McGregor, *supra* note 12 (illustrating possible benefits of Weinstein clauses in M&A agreements).

253. *See* FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 20; VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132, at 34.

254. FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 20; VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132, at 34.

255. *See* FOREST CITY & ANTLIA MERGER AGREEMENT, *supra* note 120, at 20.

256. Harroch, *supra* note 31.

257. *See* MCLE, *supra* note 37.

buyers are aware of the patterns of behavior among the seller's management.[258]

Furthermore, when defining what types of behavior must be disclosed, buyers must provide a combination of specific actions and general descriptions that encompass a spectrum of behavior that could constitute sexual misconduct.[259] For example, the EEOC's definition of sexual harassment covers physical and verbal acts of sexual harassment, but the definition is not limited to actions that are sexual in nature.[260] A clear definition of sexual misconduct that is defined within the agreement provides the buyer with a point of reference when asking the seller to make its representations about sexual misconduct.[261]

Secondly, buyers have to determine where in the agreement that a Weinstein clause would be the most effective. As discussed in Part II, this place is the representations and warranties section of the M&A agreement.[262] The representations section asks sellers to make explicit promises regarding the condition of their company, and if the seller misrepresents the condition of its company, then the buyer may recoup damages.[263] Disclosure schedules lack the level of public transparency necessary to avoid propagating a culture of silence.[264] MAC clauses place too heavy of a burden on buyers to prove materiality.[265] With such a high standard to prove materiality, Weinstein clauses would effectively become moot.[266] Therefore, the representations and warranties section will provide a Weinstein clause the greatest chance to achieve its goal of promoting safer work environments through transparency and the discouragement of sexual misconduct.

Ultimately, buyers will derive the most benefit from a Weinstein clause if the language is drafted as follows:

> To the Knowledge of the Seller Company, since the Seller Company's establishment, no allegations of sexual misconduct have been made against any executive, director, or officer of the Seller Company or any individual employed by the Seller Company who directly, or indirectly, supervises at least eight (8) other employees of the Seller Company, and the Seller Company has not entered into any settlement agreements related to allegations of sexual misconduct by an employee, contractor, director, officer or other representative of the Seller Company.[267]

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258. Ahmed, *supra* note 9.
259. *See Sexual Harassment*, *supra* note 126.
260. *Id.*
261. *See id.*
262. *See* MCLE, *supra* note 37, § 4.5.
263. *See id.* § 4.3.2.
264. *See* Levine, *supra* note 66.
265. Tsao, *supra* note 83, at 1254.
266. *See id.*
267. *See* MCLE, *supra* note 37, § 4.2.4; VERSCEND TECHNOLOGIES & COTIVITI MERGER AGREEMENT, *supra* note 132.

The definitions section of the M&A agreement would define "knowledge" as constructive knowledge and "sexual misconduct" as: unwanted sexual advances, request for sexual favors, quid pro quo harassment, unwarranted sexual innuendos, the creation of an offensive or hostile work environment, and including but not limited to all other verbal and physical misconduct whether or not the conduct is sexual in nature.[268]

Lastly, no matter how favorably negotiated a Weinstein clause turns out, there are still obstacles that must be overcome to achieve the eventual goal of creating safer work environments.[269] Unreported acts of sexual misconduct still present what is arguably the biggest challenge buyers must surmount.[270] Sellers that are unwilling to make representations to vouch for their leadership's behavior pose an additional threat to the viability of Weinstein clauses.[271] Damages calculations related to a breach could also prove difficult because there is no easily calculable way to measure loss related to public backlash, bad press, and a tainted brand image.[272] Also, because of projected profits, buyers must decide whether to risk acquiring a target company facing allegations of sexual misconduct or forego the transaction to preserve its cultural and reputational value.

Realistically, a Weinstein clause will not solve the issue of unreported sexual misconduct in the workplace; however, there is no single solution to such an issue.[273] Those who are victimized in the workplace should feel comfortable voicing their concerns, but to get to that point, companies must move toward adopting policies of no tolerance for sexual misconduct.[274] When individuals become subjected to sexual misconduct in the workplace, they often do not report it because of the fear of being branded as a "troublemaker."[275] To increase reporting of sexual misconduct, victims must feel as though their workplace empowers them to address and resolve the issue.[276] This issue emphasizes the immeasurable value of organizations like Me Too.[277] The Me Too movement prompted a national discussion that encouraged thousands of men and women to publicly share their stories of triumph after being subjected to sexual misconduct.[278] The Me Too movement has pushed society in a direction towards empowering victims to speak out instead of muting them in a culture of silence. Weinstein clauses,

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268. *See* MCLE, *supra* note 37, § 4.9; *Sexual Harassment*, *supra* note 126.
269. *See* McGregor, *supra* note 12; Gerdeman, *supra* note 93.
270. *See* McGregor, *supra* note 12; *Sexual Harassment*, *supra* note 126.
271. *See* McGregor, *supra* note 12.
272. *See id.*
273. *See id.*
274. Sarah O'Brien, *Why Employees Say Workplace Sexual Harassment Goes Unreported*, CNBC (Jan. 19, 2018, 9:59 AM), https://www.cnbc.com/2018/01/19/how-to-handle-workplace-sexual-harassment.html.
275. *Id.*
276. *Id.*
277. *See* Creswell et al., *supra* note 96; Gerdeman, *supra* note 93; Wittenberg-Cox, *supra* note 94.
278. *See* Stevens, *supra* note 90.

the Me Too movement, and governmental action cannot, on their own, provide what is necessary to change toxic workplace environments. However, together they are all gradually inching society and businesses towards a common understanding that victims of sexual misconduct have been quieted for far too long.[279] All businesses have an obligation to educate their employees and empower everyone, not just victims, to detest and speak out against acts of sexual misconduct.[280]

Also, there is an obligation upon legislators to enact legislation aimed at protecting individuals from sexual harassment in businesses.[281] Many states have already done this, but legislators cannot stop pushing for reform until substantial changes have been realized.[282] United States Senators Harris and Murkowski introduced a piece of legislation called Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act – Part 2.[283] The name of this legislation—acronym EMPOWER—alone indicates that congressional leaders are entirely aware of the problems that persist within companies.[284] This particular legislation utilizes tax treatment to combat the underlying issue of sexual harassment by not allowing tax deductions related to claims or litigation involving sexual harassment.[285] This legislation demonstrates an effort to hinder misconduct by affecting companies' bottom lines—their money.[286]

Conversely, California Assembly member Freddie Rodriguez proposed legislation, which the California governor eventually vetoed, that would have required state agencies to produce annual reports of sexual harassment complaints received by the agency.[287] Despite being vetoed, this legislation could have been vital to providing a big picture view of how well entities are empowering their employees to speak out against sexual harassment. Fortunately, leaders such as Washington Governor Jay Inslee have provided a model of conduct regarding the implementation of legislation aimed at providing drastic change in current workplace environments.[288] Inslee signed a package of bills that will forbid nondisclosure agreements that silence victims of sexual misconduct, create committees that develop policies designed to prevent sexual harassment, and annul employment contracts that do not provide adequate employee rights to report sexual misconduct.[289]

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279. *Id.*; *see* Gerdeman, *supra* note 93; McGregor, *supra* note 12.

280. *See* Gerdeman, *supra* note 93; Wittenberg-Cox, *supra* note 94.

281. *See* ASSEMB. JUDICIARY COMM. REP., Assemb. B. 2713, 2017–2018 Reg. Sess. (Cal. 2018); La Corte, *supra* note 26.

282. *See, e.g.*, La Corte, *supra* note 26.

283. Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act, S. 2988, 115th Cong. Part 2 (2018).

284. *See id.*

285. *Id.*

286. *See id.*

287. ASSEMB. JUDICIARY COMM. REP., Assemb. B. 2713, 2017–2018 Reg. Sess. (Cal. 2018).

288. *See* La Corte, *supra* note 26.

289. *Id.*

Current efforts are indicative of a nationwide movement towards protecting employees—but the current efforts are not enough.[290] Therefore, legislators and attorneys must continue to advocate for the protection of employees until victims of harassment in the workplace are adequately empowered to report the conduct of perpetrators.

Next, there is the problem of sellers who are unwilling to make the representations requested in a Weinstein clause.[291] Fortunately, this issue is somewhat of a misnomer. If the purpose of a Weinstein clause is to protect buyers from brand damage and to promote safer work environments, then any seller that is unwilling to comply with the clause ostensibly admits to some type of unsavory incident or incidents regarding sexual misconduct in its company.[292] The buyer makes its goals clear by implementing a Weinstein clause in the agreement, so when a seller makes pleas to avoid such representations, it becomes apparent to the buyer that acquiring the seller's company could come with substantial risk.

Consequently, buyers must wrestle with the challenge of negotiating how to calculate damages.[293] Most states have laws that determine the appropriate remedy for a breach of representation, but parties may also negotiate damage calculations within the agreement.[294] A possible answer to the question of damages could come from an escrow fund. An escrow agreement allows the buyer to place a portion of the purchase price (Bloomberg says 10%) into an escrow fund for a particular period of time, until the risk of potential brand damage is minimized.[295] After a period of time has passed, if the buyer has not made a claim of breach, the funds will be distributed to the seller.[296] For example, the escrow agreement between Social Reality and Richard Steel provides that "any time prior to the Escrow Fund Distribution Date . . . [the buyer] is entitled to make a claim for indemnification under the Purchase Agreement."[297] In that agreement, the parties held the funds in the escrow account for three years, which was the time period between signing the agreement and the escrow fund distribution date.[298] This type of agreement quells the concerns of risk-averse buyers who do not want to recoup their losses based on undefined methods of damage calculation.[299]

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290. *See* O'Brien, *supra* note 274.
291. McGregor, *supra* note 12.
292. *See id.*
293. *See id.*
294. MCLE, *supra* note 37, § 4.2.4.
295. *See* Sherman, *supra* note 190.
296. *See id.*
297. *Escrow Agreement*, SEC 4 (Oct. 30, 2014), https://www.sec.gov/Archives/edgar/data/1538217/000155335014001302/scri_ex10z19.htm
298. *Id.*
299. *See* Sherman, *supra* note 190.

Still, one potential solution could come in the form of a purchase price adjustment. Purchase price adjustments are "used to reconcile [the] differences" between the initial value of the seller company and the actual value at the closing of the transaction.[300] It is worth noting that price adjustments could also work to increase the seller's value at closing, but for the purposes of this Comment, it should be assumed that price adjustment is used to measure loss of value.[301]

To be sure, while this concept is fairly straight forward, it still runs into the issue of how to assess the loss in value related to a tainted brand image.[302] Hence, price adjustments would only work if the parties agreed on some financial metric to measure the damage.[303] For example, the parties could decide to adjust the purchase price based on the difference in the seller's initial projected earnings versus the projected earnings measured at the closing of the transaction.[304] Unfortunately, adjusting the purchase price and acquiring the seller company, despite damages related to sexual misconduct, ignores the objective of promoting safe work environments.[305] Contrarily, that conclusion should not preclude the idea that buyer companies possess the power to acquire target companies and change the toxic culture that allowed sexual misconduct to flourish.

However, buyers are still faced with the challenge of balancing the protection of their brand against the anticipated profits from acquiring a seller associated with sexual misconduct.[306] In reality, there is not a clear solution to this problem. This challenge is simply a buyer's choice between obtaining profits and perpetuating an epidemic of workplace misconduct.[307] Granted, a single buyer's choice to acquire such a company will not create an epidemic of misbehavior; nevertheless, when enough businesses ignore misconduct in lieu of profits, the tides of harassment began to erode workplace safety.[308] Ultimately, buyers must shift their focus to the future and try to evolve alongside society. It is evident that there is a trend towards corporate transparency and zero tolerance for sexual misconduct, so attorneys drafting M&A agreements have to acknowledge this trend and respond accordingly.[309] It should come as no surprise if future M&A agreements include Weinstein clauses as a common practice. Therefore, as the relationship between corporate dealings and social norms becomes

300. *See* Eric J. Geppert & Robert A. Oestreicher, *Making Deals in a Down Market*, BLOOMBERG BNA (Mar. 30, 2009), https://www.bloomberglaw.com/document/XDFI6365GVGO.

301. *Id.*

302. *See id.*

303. *See id.*

304. *Id.*

305. *See* McGregor, *supra* note 12.

306. *See* Grasso et al., *supra* note 36.

307. *See* McGregor, *supra* note 12.

308. *See id.*

309. *See id.*

increasingly more harmonious, corporations are equally obligated to evaluate how their decisions impact society as well as their bottom-line.[310]

V. CONCLUSION

This Comment addresses how Weinstein clauses will affect future M&A agreements, but likewise, it is intended to emphasize the delicate relationship between businesses and people. Deliberate language, breadth of inquiry, and placement in the agreement are all factors that dictate the effectiveness of a Weinstein clause; but no factor is quite as important as the human element. When businesses make decisions that diminish the quality of their workplace environment, they are forced to look at their financial gains and ask if it was worth the cost.

Furthermore, there is still the lingering question of how sellers might insure themselves against a Weinstein clause violation. First, a variety of derivative claims can arise out of a sexual harassment claim (assault, battery, etc.); therefore, sellers may have to prepare to juggle multiple claims related to employment-practice liability.[311] Second, how will insurers evaluate a seller's policies related to workplace sexual harassment and training?[312] How would that evaluation affect the seller's coverage? Accordingly, sellers must have clear knowledge of what claims related to sexual misconduct are or are not covered by the insurer; otherwise, sellers might maintain a false sense of security regarding their coverage.[313] Lastly, sellers must recognize the possibility that a sexual harassment claim could constitute a civil rights violation, "as is the case . . . against Harvey Weinstein."[314] Sellers seeking Weinstein clause insurance could become a foreseeable reaction to widespread implementation of Weinstein clauses.

A Weinstein clause is not the answer to ending sexual assault in the workplace, but it does represent a symbolic shift in people's belief of socially-acceptable behavior. Organizations such as Me Too must continue to stay committed "to disrupt[ing all] systems that allow . . . sexual violence" to flourish.[315] Legislators must continue to enact legislation that protects employees from sexual harassment. The corporate culture of silence must end, but that cannot happen until victims are encouraged and unafraid to break the silence. Harvey Weinstein's accusers represent the type of change that can come about when victims are empowered to speak out against

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310. *See id.*

311. *See* Kevin LaCroix, *Guest Post: EPL Claims: Changing Norms and New Legislation in the #MeToo Era*, D&O DIARY (Aug. 23, 2018), https://www.dandodiary.com/2018/08/articles/employment-practices-liability-2/guest-post-epl-claims-changing-norms-new-legislation-metoo-era/.

312. *Id.*

313. *Id.*

314. *Id.*

315. *About: History & Vision*, *supra* note 25.

heinous behavior.[316] Weinstein's accusers sparked a fire within the public to stand against monstrous sexual misconduct, and their bravery will not soon be forgotten. Now, Harvey Weinstein's legacy is as the individual who prompted buyers to include seller representations in M&A agreements to ensure that executives of seller companies have not been accused of sexual assault. Thus the Weinstein clause was born.

316. *See Harvey Weinstein Biography*, *supra* note 1.