



# YOUR ASSIGNMENT, SHOULD YOU CHOOSE TO ACCEPT IT: HOW ASSIGNMENT CLAUSES CAN AFFECT M&A

---

Duane Morris®

NOVEMBER 10, 2022

# Presenters:

Christopher Eric Pushaw

Senior Counsel

Ricoh USA

[Christopher.pushaw@ricoh-usa.com](mailto:Christopher.pushaw@ricoh-usa.com)

Maria R. Granholm

Special Counsel

Duane Morris LLP

[mrgranholm@duanemorris.com](mailto:mrgranholm@duanemorris.com)

Chad J. Rubin

Partner

Duane Morris LLP

[crubin@duanemorris.com](mailto:crubin@duanemorris.com)

# Key Commercial Contract Provisions from an M&A Perspective

There are a number contractual provisions that take on enhanced importance in the context of an M&A transaction, including:

- Assignment/Change of Control Provisions
- Key Economic/Commercial Provisions
- Confidentiality Provisions

# Objectives of the Presentation

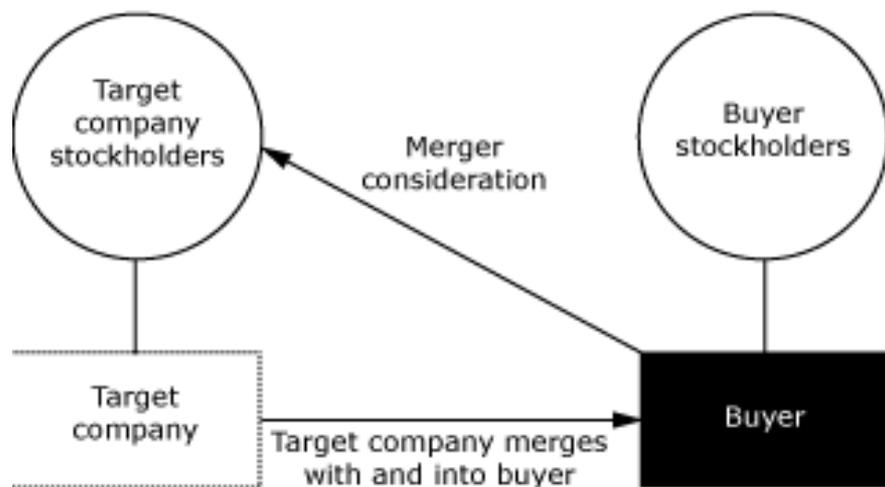
- Identify issues that arise from assignment/change of control, key economic/commercial and confidentiality provisions within day-to-day commercial contracts, which have implications for future M&A activities
- Provide practical advice and considerations for understanding, evaluating and negotiating such provisions

# Basic Types of M&A Transactions

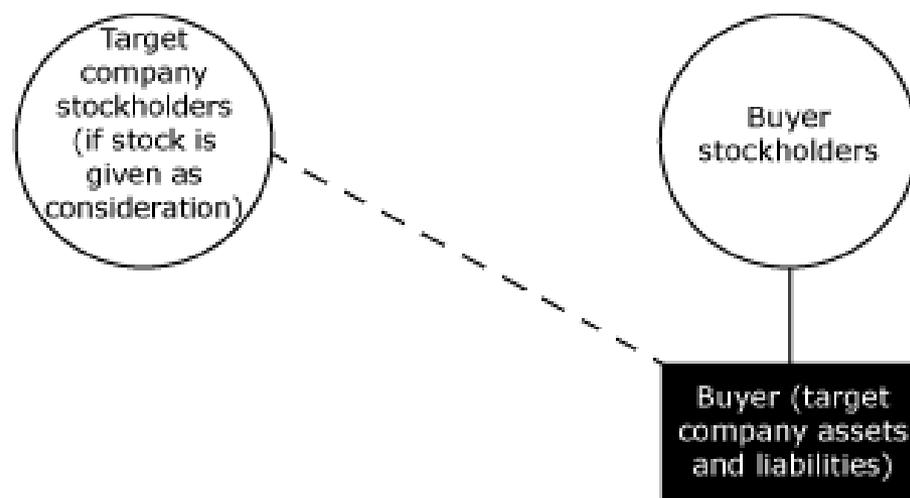
- There are 3 main types of M&A transaction structures:
  - Asset Sales
    - Buyer acquires certain assets (often including commercial contracts) and assumes certain liabilities of the target company
  - Equity Sales
    - Buyer acquires the target company's stock or other equity from the target company's owner(s)
  - Mergers
    - Two companies merge into one legal entity, with the surviving entity assuming all assets, rights and liabilities of the extinguished entity.
    - There are a number of types of mergers: forward, reverse, forward triangular, reverse triangular, etc.

# Forward Merger

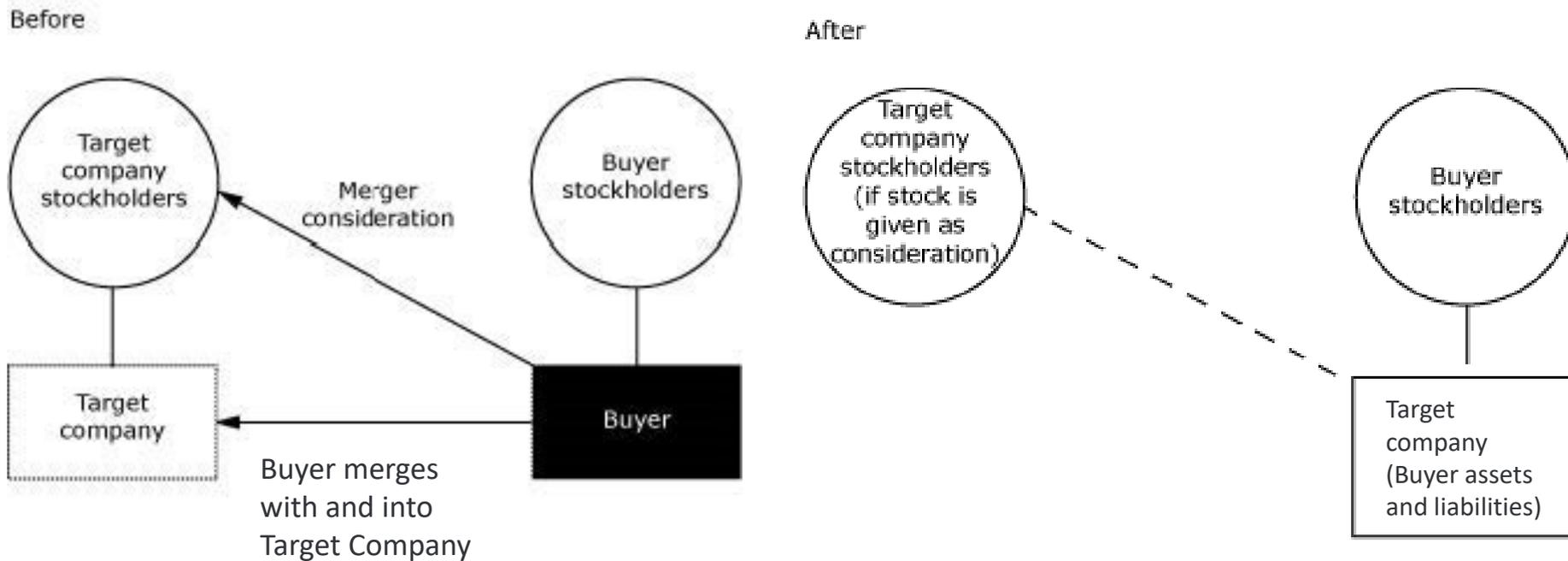
Before



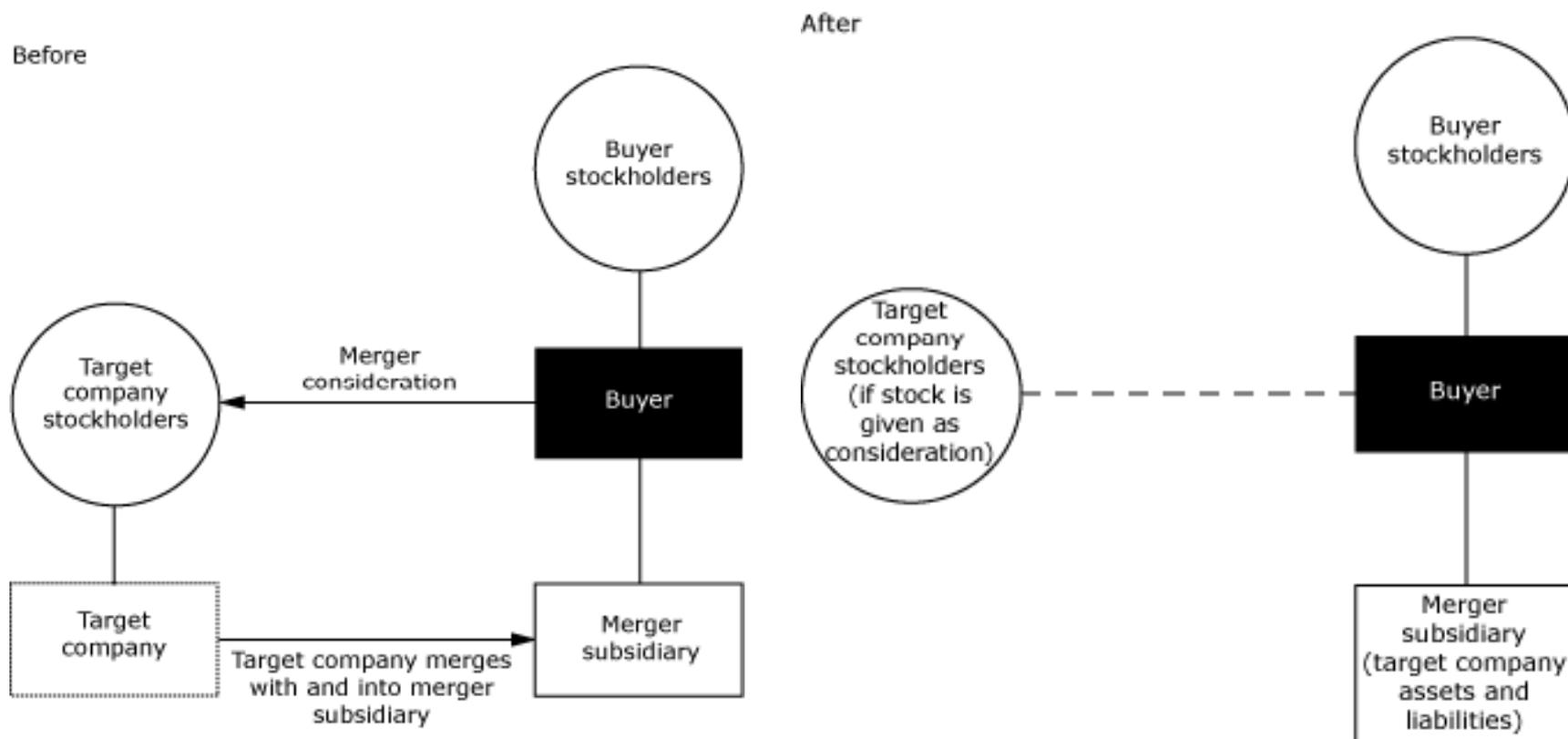
After



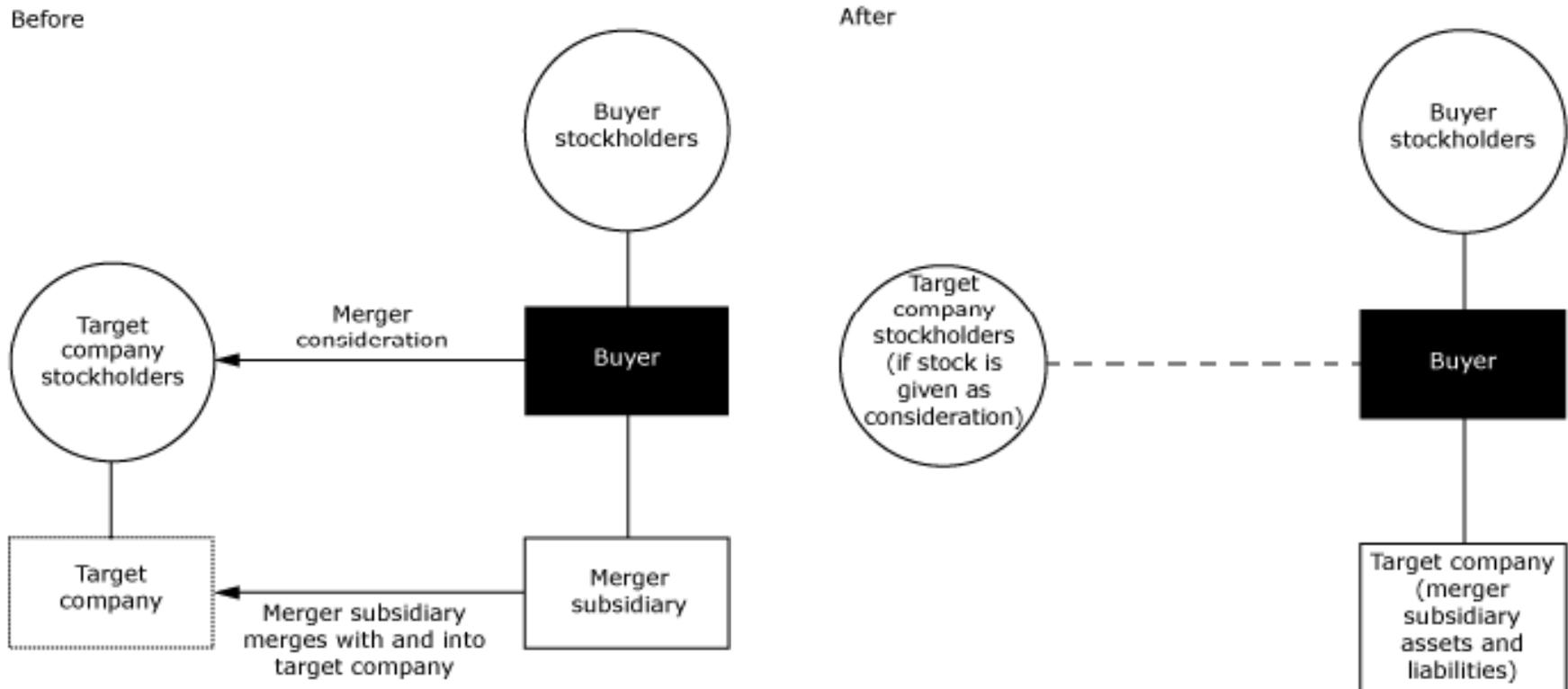
# Reverse Merger



# Forward Triangular Merger



# Reverse Triangular Merger



# Assignment/Change of Control Provisions

- Provisions vary significantly from contract to contract
- There are 3 main types of assignment/change of control provisions:
  - Prohibits an assignment of the contract by a counterparty, but is silent on change of control
  - Prohibits an assignment of the contract by a counterparty *and* a “change of control” of a counterparty
  - Prohibits an assignment of the contract by a counterparty, but with carve-outs (e.g., M&A transactions and affiliate transactions)

# Assignment/Change of Control Provisions (continued)

- Provisions do not always apply equally to counterparties and could trigger a consent or notice requirement or termination right
- State law governs the interpretation of the provisions and can vary state to state
- As a general matter, contracts are freely assignable unless the contract specifically states otherwise
  - Caveat – Transfers of nonexclusive copyright licenses or patents by the licensee are prohibited as a matter of Federal law unless the contract specifically states otherwise. Treatment of trademarks is less clear.

# Sample Anti-Assignment Provision

Assignment. Neither party may, directly or indirectly, assign, transfer or delegate any of or all of its rights or obligations under this Agreement without the prior written consent of the other party[, which consent shall not be unreasonably withheld, conditioned or delayed]. Any assignment, transfer or delegation that violates this provision shall be void.

# Sample Anti-Assignment and Change of Control Provision

Assignment/Change of Control. Neither party may, directly or indirectly, assign, transfer or delegate any of or all of its rights or obligations under this Agreement **or experience a Change of Control** without the prior written consent of the other party[, **which consent shall not be unreasonably withheld, conditioned or delayed**]. Any assignment, transfer or delegation that violates this provision shall be void.

- NTD: “Change of Control” definitions are often very complicated and detailed, but would typically include stock acquisitions and mergers above a certain ownership threshold; dissolutions/liquidations; and sales of assets. These definitions often include direct and indirect changes of control and often exclude public offerings of securities.

# Sample Anti-Assignment and Change of Control Provision with Carve-outs

Assignment. Neither party may, directly or indirectly, assign, transfer or delegate (by operation of law or otherwise) any of or all of its rights or obligations under this Agreement without the prior written consent of the other party[, which consent shall not be unreasonably withheld, conditioned or delayed]; provided that without the prior written consent of the other party, [Assignor] may assign its rights and obligations under this Agreement in full or in part to (i) any of its Affiliates, or (ii) any successor in interest to [Assignor] as a result of (a) a merger, consolidation, reorganization or similar transaction involving [Assignor], or (b) the sale, lease, exclusive license or other disposition of all or substantially all of the assets or business of Assignor[; provided further, that any such successor interest is not [LIST OF COMPETITORS]]. [NTD: Alternatively, could use a “does not compete” formulation.] Any assignment, transfer or delegation that violates this provision shall be void.

# Assignment Prohibitions: Delaware Law

- Asset Sales
  - An anti-assignment provision will apply to asset sales
- Equity Sales
  - Unless specifically addressing a change of control, an anti-assignment provision will not apply to stock or other equity sales
- Mergers
  - Unless specifically addressing a change of control, an assignment prohibition will not usually apply to a merger
    - Where an assignment provision prohibits an assignment “by operation of law,” it will apply to mergers in which the target company no longer continues to “exist” (e.g. forward and forward triangular mergers), but not to mergers in which the target company continues to “exist” (e.g. reverse and reverse triangular mergers)

# Assignment Prohibitions: Pennsylvania Law

- Same as Delaware for asset sales and equity sales
- Mergers
  - Generally, anti-assignment provisions will likely not apply, unless specifically prohibiting a change of control
  - Specific language prohibiting assignment/transfer “by operation of law” might, however, apply to all mergers

# Assignment Prohibitions: New Jersey Law

- Same as Delaware for asset sales and equity sales
- Mergers
  - Unless the anti-assignment provision specifically covers a change of control, an anti-assignment provision will not usually apply to a merger
    - Specific language prohibiting assignment/transfer “by operation of law” might, however, apply to all mergers

# Seller Considerations for Assignment/ Change of Control Provisions

- Material contracts with unfavorable assignment/change of control provisions can have the following consequences in connection with a sale transaction:
  - Delay closing, which in current market environment is risky
  - Enable counterparty to terminate in connection with transaction
  - Put purchase price at risk (purchase price reduction and/or earnout mechanism)
  - Result in buyer requiring counterparty's consent as a condition to closing
  - Require notice to the counterparty prior to signing and/or closing, which may be inconsistent with how business teams plan on messaging the transaction to the public

# Buyer Considerations for Assignment/ Change of Control Provisions

- Material contracts with unfavorable assignment/change of control provisions can have the following consequences in connection with an acquisition:
  - Delay closing, which may run counter to business objectives/needs
  - Increase risk – purchase price adjustments may not adequately protect against the risk of assignment/change of control not being approved by counterparty
  - Require notice to the counterparty prior to signing and/or closing, which may be inconsistent with how buyer's business team plans to message the transaction to the public

# Drafting Tips for Assignment/Change of Control Provisions

- Assuming counterparty insists on an anti-assignment provision, attempt to carve-out all types of sale transactions to provide maximum amount of flexibility
- Even if provisions are triggered by certain sale transactions, push for post-closing notices as opposed to pre-closing consent
- Understand concerns of counterparty in order to address concern while keeping scope of provision as narrow as possible
- If consent required, push for language requiring such consent not to be “unreasonably conditioned, withheld or delayed”

# Drafting Tips for Assignment/Change of Control Provisions

- Even if only a pre-closing notice requirement, be careful that seller may not want to send a pre-closing notice in connection with desired communication plan. However, buyer may be unwilling to be at-risk of a termination right because of a failure to provide pre-closing notice for a material contract
- Ensure that there is consistency throughout the provision, and the agreement. With longer provisions (frequent in leases), there often can be language that contradicts earlier language and makes it very difficult to reach a clear conclusion as to the applicability and requirements of the provision

# Sell-Side Pre-M&A Planning Efforts

- Identify contracts that are material to the business (whether customer, supplier, license, lease, etc.)
- Determine whether any assignment/change of control provisions are problematic and whether any particular transaction structures are more favorable than others
  - With respect to IP matters, determine whether silence in any licenses is problematic
- As part of such review, be mindful that transaction structure can change mid-transaction. Strongly recommend tracking assignment/change of control provisions in a way that is easy to revisit if structure changes

# Sell-Side Pre-M&A Planning Efforts (continued)

- Determine whether there are opportunities to revise these provisions in the ordinary course of these contracts
- Communicate any issues with these material contracts to M&A advisors (business and legal) so they can be factored into any transaction process
- For new material contracts, institute process to include seller-friendly language in these provisions

# Buy-Side M&A Considerations

- Identify contracts that are material to the business case for the transaction as soon as possible
- Identify whether any particular transaction structures are more favorable than others
- As part of such review, be mindful that transaction structure can change mid-transaction. Strongly recommend tracking assignment/change of control provisions in a way that is easy to revisit if structure changes
- Communicate any issues with these material contracts to M&A advisors (business and legal) so they can be factored into process

# Other Contract Provisions – Key Economic/Commercial Terms

- Key economic/commercial terms can also present challenges in connection with future M&A activities
  - Sellers will need to decide when and how to share key economic/commercial terms
  - Strategy often depends on nature of buyer(s) (e.g., strategic (usually later in process) vs financial (usually earlier))
  - There are antitrust considerations with respect to sharing certain information with buyers, particularly strategics
  - Commission and other similar arrangements, as well as restrictive and other similar covenants (MFN, exclusivity, non-competition, non-solicitation, etc.), are typically of keen interest to buyers, particularly conglomerates and private equity, as they will be focused on how/if such provisions impact other parts of their business

# Other Contract Provisions – Key Economic/Commercial Terms (continued)

- Key practice pointers for economic/commercial terms
  - Discuss early in process with financial and legal advisors the sharing of economically/commercially sensitive information so the sharing of information can be staged with the most sensitive information shared at the end of the process
  - When entering into new agreements/amendments, consider how economic terms could be impacted by a sale transaction and attempt to limit payment provisions and restrictive covenants to contracting company and avoid application to affiliates
  - Consult antitrust advisers early in sale process so they can attempt to identify any buyers where there will be heightened concern over sharing information and whether clean teams are necessary/appropriate

# Other Contract Provisions – Confidentiality Provisions

- Confidentiality provisions often prohibit the sharing of a contract and sometimes prohibit sharing the fact that the contract exists
- Ties into the game plan for managing buyer's request to meet with key customers and suppliers (whether pre-signing or between sign and close)
- Key practice pointers for confidentiality provisions
  - Practically, sellers often take the risk of sharing material contracts with buyers relying on NDAs, even though the NDAs often do not eliminate the risk/breach of the underlying contract
  - Identify any key customers and suppliers that could present issues in advance of sale process and consult with financial and legal advisers about a game plan for allowing meetings with same

# Other Contract Provisions – Confidentiality Provisions (continued)

- Recommend prohibiting contact between signing and closing of an M&A transaction; you do not want those conversations to turn into backdoor due diligence that buyer could use to get out of the transaction
- If contact between signing and closing is allowed, it should be “chaperoned” with a seller-approved agenda

## A reminder about the benefits of ACC membership...

- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events (Spring Fling, Fall Gala, races, etc.)
- Access to ACC resources, including:
  - ACC Newsstand (customizable updates on more than 40 practice area)
  - ACC Docket Magazine
  - InfoPAKs
  - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at [ChrisStewart@ACCglobal.com](mailto:ChrisStewart@ACCglobal.com).**



# DISCLAIMER

None of these materials is offered, and the materials should not be construed, as legal advice. Communication of information by or through this webinar and your receipt or use of such information is not intended to create an attorney-client relationship with Duane Morris or any of the firm's attorneys. The creation of the attorney-client relationship requires direct, personal contact between you and our firm through one or more attorneys and also requires an explicit agreement by the firm that confirms that an attorney-client relationship is established and the terms of that relationship. You should not act or rely upon information contained in these materials without specifically seeking professional legal advice.