

# Multiplayer View: Timely Perspectives on M&A

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This session will cover common issues involved in mergers and acquisitions (M&A) and discuss how to handle them. This high level view of M&A will include practical tips from the perspectives of both the buyer and the seller. The discussion will include transaction structures, transactional documents, integration issues, and employment-related topics.

# Typical Types of Transactions for Private Targets

**Stock Sale**

**Asset Sale**

**Merger**

# Typical Types of Transactions for Public Targets

- **Long-Form Merger**
- **Tender offer followed by a second-step merger**
  - No vote by target's stockholders
  - Intermediate-form merger (majority)
  - Short-form merger (80% in FL; 90% in DE)

# Forms of Mergers

- **Forward merger** - buyer survives
- **Forward triangular merger** - buyer's subsidiary survives
- **Reverse triangular merger** - target survives

# Forms of Consideration & Their Ramifications

## ■ Consideration

- Cash
- Securities
- Other Assets

## ■ Ramifications

- Financing Risk
- Valuation

# Types of Buyers and Sellers & Their Impact

## Buyers and Sellers

- Strategic – competitors
- Financial – private equity

## Impact

- Transaction – form and structure
- Consideration – form and structure
- Due diligence review
- Regulatory concerns

# Target's Approvals and Liabilities

	Required approval by target's stockholders	Buyer becomes responsible for target's liabilities
<b>Stock sale</b>	100%	yes
<b>Asset sale</b>	majority	no, unless
<b>Forward merger</b>	majority	yes
<b>Forward triangular merger</b>	majority	yes
<b>Reverse triangular merger</b>	majority	yes

# Acquisition Agreements

## Transaction Mechanics

- **Type of transaction**
- **Purchase price**
  - Escrows and hold-backs
  - Earn-outs, roll-over securities and seller financing
  - Adjustment for net working capital
  - Cash-free, debt-free



# Acquisition Agreements (continued)

## Representations and Warranties

- Risk Allocation
- Disclosure
- Disclosure Schedules

# Acquisition Agreements (continued)

## Pre-closing covenants

- No changes between signing and closing
- Confidentiality
- Exclusivity
- Efforts to achieve conditions precedent to closing

# Acquisition Agreements (continued)

## Conditions precedent to closing

- Obtain third-party consents
- Obtain regulatory approvals (including HSR Act)
- Perform pre-closing covenants
- Bring-down of representations and warranties

# Acquisition Agreements (continued)

## Post-closing covenants

### ■ Indemnification

- Caps, baskets and survival periods
- Regular / fundamental representations and warranties
- Representation and warranty insurance (RWI)
- Covenants
- Specific indemnities
- Escrows and hold-backs
- Earn-outs, roll-over securities and seller financing

### ■ Restrictive covenants

- Non-competition, non-solicitation and anti-raid
- Confidentiality

# Target's Contracts

	Buyer becomes responsible for target's liabilities	Consent for regular "assignment" under target's contracts	Consent for "change of control" under target's contracts
<b>Stock sale</b>	yes	no	yes
<b>Asset sale</b>	no, unless	yes	yes
<b>Forward merger</b>	yes	maybe	probably
<b>Forward triangular merger</b>	yes	maybe	probably
<b>Reverse triangular merger</b>	yes	no, generally	probably

# Target's Required Consents & Integration of Contracts

- **Licenses and authorizations** – governments
- **Ordinary course contracts** – customers and vendors
- **Material contracts**
  - Financings / liens – banks
  - Building leases – landlords
  - Intellectual property / software licenses – third-party providers

# Target's Management and Other Employees & Integration of Personnel

## ■ Arrangements before closing

- Retention / change-of-control bonuses
- Executive employment agreements
- Restrictive covenant agreements
- Equity incentive compensation awards
- Unions / collective bargaining agreements

## ■ Arrangements after closing

- Executive employment agreements
- Restrictive covenant agreements
- Equity incentive compensation awards

Feature	Unrestricted Stock Transfer	Restricted Stock	Restricted Stock Unit	Stock Option	Stock Appreciation Right	Phantom Stock
<b>Generally:</b>						
What is transferred to Key Employee and when?	Immediate transfer of unrestricted stock	Immediate transfer of restricted stock - may be sold anytime after vesting (i.e. shares are outstanding)	Actual stock issued at vesting date (i.e. shares are not yet outstanding)	Actual stock issued at exercise date	Cash payment at exercise date (i.e. cash-settled, therefore not equity)	Cash payment at payment date (i.e. not equity)
Key Employee's interests aligned with current shareholder	Yes	Yes	Yes	Yes	Yes	Yes
Vesting features	None	Required (i.e. risk of forfeiture)	Required (i.e. risk of forfeiture)	Optional	Optional	Optional
When is fair market value determination required?	Immediately	At vesting date	At vesting date	Immediately	Immediately & at payment date	At payment date
Discretion in Key Employee	NA - immediate full ownership	NA - immediate ownership and taxation date is vesting date	No - ownership and taxation date is vesting date	Yes - Key Employee has discretion to determine when to exercise	Yes - Key Employee has discretion to determine when to exercise	No - payment date must be fixed; Key Employee has no discretion
Maximum time limit	NA - immediate full ownership	NA - immediate ownership	No maximums apply	If option is ISO then maximum length of option is ten years	No maximums apply	No maximums apply
State law minority shareholder rights and shareholder agreement	Yes	Yes	Yes	Yes	No	No



Feature	Unrestricted Stock Transfer	Restricted Stock	Restricted Stock Unit	Stock Option	Stock Appreciation Right	Phantom Stock
<b>Cash Flow:</b>						
When is payment required from Key Employee?	If any is required, at stock issuance	If any is required, at stock issuance	Typically none required	At option exercise	None required	None required
Amount of cash payment required from Key Employee	Up to Company	Up to Company, typically none	Typically none	Fair market value of stock on date option granted (i.e. exercise price)	None required	None required
<b>Timing of Taxation:</b>						
When does Key Employee have taxable compensation income	Immediately if less than full fair market value paid	Discount/FMV taxable when vesting occurs (unless 83(b) election is made by Key Employee)	Value taxable when vesting occurs (no 83(b) election allowed)	If at all, spread taxable at option exercise (NQO) or date stock is sold (ISO)	Spread taxable at exercise date	Full value taxable at payment date
When does Company have tax deduction	Immediately if less than full fair market value paid	Discount/FMV deductible when vesting occurs (unless 83(b) election is made by Key Employee)	Value deductible when vesting occurs (no 83(b) election allowed)	If at all, spread deductible at option exercise (NQO) or date stock is sold (ISO)	Spread deductible at payment date	Full value deductible at payment date
Character of income to Key Employee	All future appreciation is capital gain	Only appreciation after vesting is capital gain (unless 83(b) election is made by Key Employee)	Only appreciation after vesting is capital gain	If ISO, then all appreciation is capital gain. If NQO, then only appreciation after exercise is capital gain	100% compensation income	100% compensation income
<b>Accounting Treatment (check with accountant):</b>						
	Immediate expense	Expensed over vesting period	Expensed over vesting period	Fair value expensed at date of grant	Treated as a liability	Treated as a liability

# Thank you!

If I can be of any further assistance with these issues, please contact me at:



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