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Mergers & Acquisitions 101

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Overview

In today's session, we will cover:

- Types of Transactions associated with M/A activity
- Advantages and Disadvantages of Transactions
- Steps of Transactions from Initial Contact to Closing
- Regulatory Approvals and Consents for DD Providers
- Potential Risks and Liabilities
- Post-Closing Considerations

Types of Transactions

- Acquisition of Stocks
- Acquisition of Assets
- Merger
- Consolidation

Acquisition of Stock - Advantages

- Biggest advantage of a stock purchase is simplicity
  - Fairly straightforward compared to asset purchase deals, as the buyer comes in and purchases the entire entity, its assets, and its liabilities.
    - ➢ Nothing has to be retitled
    - ➢ Buyer doesn't have to rewrite contracts
    - ➢ Existing contracts simply go along with the sale

Acquisition of Stock – Disadvantages

- In addition to all of the desired assets and liabilities of the company, buyer also assumes ownership of all the ***unwanted assets and liabilities, as well.***
  - Examples include:
    - State and federal liabilities
    - Ongoing or potential litigation
    - Audits and settlements
    - Pending or threatened investigations
    - Open MUIs

Acquisition of Assets

- Asset purchase - Purchase of the selling company's assets
  - Can include facilities, vehicles, equipment, fixtures, furniture, contracts, trade secrets, trade names, accounts payable and receivable, etc.
  - Once asset purchase is complete, the assets and liabilities that have been purchased are moved to the acquiring entity and the old entity (and any assets or liabilities it still owns) must be wound down

Acquisition of Assets – Advantages

- Can dictate what kind of liabilities willing to assume
- If there are pieces of the business do not want, these can be carved out in the purchase agreement
- Gives buyers a greater degree of flexibility

Acquisition of Assets - Disadvantages

- Can be more complex than stock purchases, as specific assets must be completely reassigned
- Contracts may have to be renegotiated
- Choice of Provider – risk that individuals may refuse to sign on with the purchasing entity
- Employment agreements may have to be rewritten
- Certain assets may have to be retitled to buyer
- DD licenses and certifications are not transferrable

Non-Profit Considerations

- Member Substitution
- Safe way to acquire control of another non-profit
- Akin to a parent-sub relationship
- Sometimes sub become part of parent after a period of time passes

Merger vs. Consolidation

- Merger - Union of two entities, with one entity retaining its corporate existence and absorbing the other entity
  - The other entity ceases to exist
- Consolidation – Entirely new entity formed combining both entities

Structuring the Deal

- Plan upfront
  - Different types of entity structures can pose different challenges (i.e., for-profit entity purchasing a non-profit entity rules)
  - Non-profits governed by federal and state law
  - Seek assistance from experts and legal counsel

Steps of a Transaction

- Initial Contact and Executing NDAs
- Letter of Intent
- Due Diligence
- Determine Financing Requirements
- Identification of Required Consents and Approvals
- Identification of Risks
- Purchase Agreement
- Pre-Close Planning
- Closing

Initial Contact and NDA

- After initial contacts, Non-Disclosure Agreement (NDA) entered into between the parties
  - Can share information and discuss deal specifics
  - Preliminary due diligence

Executing Letter of Intent

- Letter of Intent (LOI) or Memorandum of Understanding (MOU)/Term Sheet
  - Typically entered into next after exchange of information, conversations between parties, investigation of major assets, assessment of major risks, etc.
  - Sets forth deal in broader terms, can include: assumptions regarding the transaction, conditions to closing, and period of exclusivity

Commencing Due Diligence

- After LOI signed, usually conduct in-depth investigation of seller's assets; includes:
  - Review of business being acquired
  - Legal and accounting advisors typically involved
  - Scope usually very broad; especially in an asset transaction

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Due Diligence Request List

- Typically prepared by buyer (or buyer's counsel) and varies depending on assets being acquired, but typically includes requests pertaining to:
  - Corporate matters
  - Contracts and agreements
  - Property
  - Indebtedness
  - Employee benefits
  - Personnel

Due Diligence Request List (cont'd)

- Intellectual Property
- Litigation
- Environmental matters
- Regulatory matters
- Industry-specific concerns

Determination of Financing Requirements

- If transaction is subject to buyer's receipt of third-party financing, the requirements of the acquiring company's lenders will need to be determined as soon as possible
  - Acquirer will need to understand any representations, warranties or other requirements regarding the target company or assets required by the lenders in their loan agreement with the acquirer
  - Can incorporate requirements into diligence list and purchase agreement

Identification of Required Consents and Approvals

- Determine as soon as possible the list of consents and approvals that will be required and the process for obtaining consent/approvals
  - County board consents
  - State consents/applications
  - Federal consents/applications
  - Individual consents

Identification of Key Risks

- Due diligence list identifies key areas of risk and liabilities for buyer
- Important to determine who will be assessing and resolving risks and to devise a timetable and process for resolution
- Industry-specific risks should be identified early (i.e., survey/licensure issues, federal/state violations, claims/investigations, audits, settlements, employee issues, etc.)

Drafting and Negotiating the Acquisition Agreement

- During due diligence process, parties begin working on the definitive acquisition agreement (i.e., asset purchase agreement, stock purchase agreement, merger agreement, etc.)
- Usually initial draft prepared by buyer's counsel
- Negotiated between the parties

Monitoring Deal Progress

- Closing checklist - details all tasks that need to be completed and individuals responsible for each task
  - Keeps team organized and communicates the status of the transaction to all team members
- Regular status meetings

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Pre-Close Planning

- Involves advance coordination, especially in asset purchase transactions
  - Employees will have to be terminated and hired by buyer
  - Certificates of title need transferred
  - Contracts/leases need to assigned
  - Copyrights, trademarks, domain names assignment
  - Consent of individuals and regulatory bodies

Closing

- Some transactions sign and close simultaneously
- Others have period between signing and closing in order to:
  - obtain state or federal approvals, client consents
  - clean up problems with assets/liabilities
  - make employment offers, etc.

Potential Post-Close Considerations

- Regulatory notices and applications timely filed
- Development application approval; new license(s) issued
- New certifications obtained (if needed)
- Individual 30-day notices by seller
- Vendor contracts assigned or entered into
- BAAs (HIPAA) entered into as needed
- Transition of employees and management
- Incorporation of policies and procedures
- Employee training

QUESTIONS

THANK YOU!

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