

Key Issues in M&A Transactions

Ethical and Practical Considerations



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Overview



- Ethical Issues
- Structure of Transactions
- Confidentiality/Letters of Intent
- Diligence/Data Rooms
- Key Provisions
- Special Circumstances
- Post-Closing Issues

[Section 1]



Ethical Issues

Ethical Issues



- Who is the Client?
 - Owners, Directors, Officers
 - Interested Party Transactions
 - Employment Arrangements
- Confidentiality with Board Members (E.R. 1.6)
 - “Don’t Tell the Other Directors”
 - “Don’t Tell the CEO”

Ethical Issues



- Communications with Other Parties and Their Advisors
- Candor/Zeal
- Attorney Client Communications
- Dealing with Personal Motivations/Duties

[Section 2]



Structure of the Transaction

Key Drivers



- Liability Considerations
- Tax Considerations
 - Step Up in Basis (338(h)(10) Elections)
 - Preservation of S-Corp Status
- Financing Issues
- Other Factors
 - Bankruptcy
 - Family Members

[Section 3]



Confidentiality and Letters of Intent

Confidentiality Agreements

- Mutual or One-Way
- Standstill Provisions
- Restrictions on Solicitation
- Dispute Resolution

Letters of Intent



- To LOI or Not to LOI?
- Seller Issues
 - Terms/Structure/Financing
- Buyer Issues
 - Indemnity Limits
 - Financing Terms
 - Retained Assets
 - Employment Arrangements

[Section 4]



Data Rooms and Diligence

Virtual Data Rooms



- Providers Include
 - RR Donnelly (Formerly Bowne)
 - Datarooms.com
 - ShareFile.com
 - V-Rooms.com

Other Diligence Issues



- Access to Employees/Customers/Vendors
- Buyer/Financing Source(s)
- Diligence on the Buyer

{ Section 5 }



Key Provisions in Purchase Agreements

Purchase Price Issues

- Cash at Closing
 - Determination of Amount
- Creative Alternatives to Bridge the Gap
- Holdbacks/Escrows
- Buyer Equity
 - Valuation
 - Exit Considerations
 - Dilution
 - Equity Owners' Agreements/Restrictions

Earn Outs



- Determination
- GAAP/Historical Practices
- Parent Overhead
- Extraordinary Transactions
- Term
- Caps/Collars
- Cliff or Pro Rata Performance

Seller Financing



- Term
- Interest Rate
- Security and Guaranty's
- Subordination
- Default Rights

Carve Backs



- Working Capital Adjustments
 - GAAP/Historical
 - Cash-on-Hand
 - Delayed Accounts Receivable
 - Interactions with Baskets/Caps
- Adjustments for Other Business Terms
 - Sales
 - Loss of Customers

Representations and Warranties



- Knowledge and Materiality
- Disclosure Schedules
 - Cross References

Indemnity Issues



- Survival Periods
 - R&W's Only?
 - Exceptions
- Baskets/Caps
 - Exceptions
- Exclusive Remedies?
- Materiality Qualifiers

Conditions to Close

- Financing
- Board/Shareholder Approval
- Regulatory Approvals
- Employment Agreements
- Material Adverse Changes
- Drop Dead Dates

Deal Protection/Break Fees

- Good Faith Deposits
- Fiduciary Outs
- Threshold for an Out
- Rights to Match
- Reverse Break Fees

Covenants



- Operation of the Business
- Compensation/Employment
- No Shop

Future Employment



- Employment/Consulting Agreements
 - Licensed Persons/Entities
 - Salary, Bonus, Perqs, Severance
 - WARN Act
 - Benefit Plans/Transition Issues
- Non-Compete/Non-Solicit Agreements
 - Governing Law
 - Public Policy
 - Arizona “Blue Pencil” Rule
 - Purchase Price Allocation Issues

“Boilerplate”



- Alternative Dispute Resolution
- Governing Law/Jurisdiction
- Assignments
- Brokers (Whose Broker is It?)

[Section 6]



Special Circumstances

Special Circumstances



- Bankruptcy/Receivership/The “Zone”
- Interested Party Transactions
- Public Companies
- Antitrust Concerns
- Unrepresented Parties
- Regulated Industries
- Foreign Parties
- Hostile Transactions

[Section 7]



Post-Closing Considerations

Integration Issues



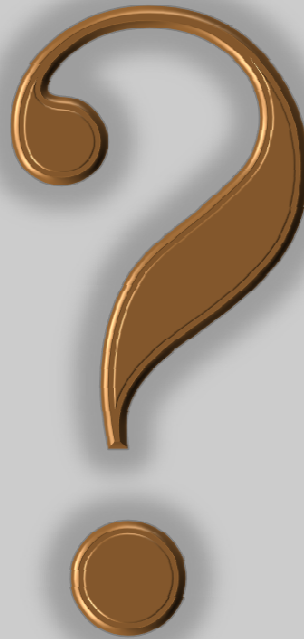
- Start Planning Early
- Payroll
- Benefits
- Computer Systems
- Accounting Systems
- Marketing Programs
- Compensation Programs
- Morale Issues

Post-Closing Disputes



- Claims Procedures
- Business Considerations

Questions and Answers



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Mr. Lieberman is Chair of the firm's Corporate, Securities and Finance Department. He has extensive experience in a broad range of business law issues, including securities, corporate governance, mergers and acquisitions, finance and banking, employment, executive compensation, bankruptcy and corporate restructuring, litigation and legislation. Mr. Lieberman is listed in *Best Lawyers in America*® 2007-2010 published by Woodward/White, Inc. in three categories: Corporate Governance and Compliance, Mergers and Acquisitions, and Securities.

He has served as in-house General Counsel and outside counsel to a variety of companies, ranging in size from start-ups to Fortune 500 companies. Mr. Lieberman has counseled boards and senior management on issues pertinent to growing companies as well as those experiencing a wide variety of crisis situations.

Mr. Lieberman represents companies in securities and other regulatory compliance, capital market transactions, contract negotiations, company policy and plan development, and ethical compliance. He was General Counsel to an international commercial finance company. He served as counsel to the company in its finance and treasury operations, negotiated debt agreements and offerings in excess of \$7 billion.

In litigation and dispute resolution matters, Mr. Lieberman has broad experience in arbitrations, mediations, settlement negotiations, litigation, early case assessments and internal investigations. He counsels clients in evaluating the merits and risks of potentially litigious situations and tailors his dispute resolution strategies to the needs of his client, so that the matter may be resolved more efficiently and favorably.

In addition to his law degree, Mr. Lieberman is a Certified Insolvency and Restructuring Advisor, awarded by the Association of Insolvency and Restructuring Advisors.