Knox McLaughlin Gornall & Sennett, P.C.
Erie • Pittsburgh • Jamestown, NY
814-459-2800 • www.kmgslaw.com

Mergers & Acquisitions Process Overview: Part 5

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In Part 1 of this Mergers & Acquisitions Process Overview Series we discussed the triggers for buyers and sellers and the process by which they come together. In Part 2 we discussed the letter of intent, and in Part 3 we discussed the due diligence process. In Part 4, we discussed the acquisition agreement content and negotiation. **In this Part 5 we will conclude the M&A Series with a discussion of ancillary closing documents and post-closing techniques for successfully transitioning the seller's business.**

Ancillary Closing Documents

In addition to the acquisition agreement (typically, the asset purchase agreement or stock purchase agreement), the parties will execute and deliver related documents at closing, and these may include:

- Escrow Agreement. If part of the purchase consideration is being held by a custodian this will identify the amount of escrow, the custodian's investment authority, the time and manner in which distributions may be made for payment of indemnification claims and the time for payment to the owners/seller;
- Employment Agreements for the Owners;
- Employment Agreements for Key Employees;
- Bill of Sale (and title transfer documents);
- Assignment of Contracts;
- Assignment of Intellectual Property;
- Lease of Real Property. If real estate is being conveyed, deed and title transfer documents will be provided;
- Seller's Certificate. This is an attestation by an authorized officer attesting to the identity of the seller's officers and their authority to act on behalf of the seller and attesting to the accuracy of the

representations and warranties at the time of closing;

- Third Party Payoff Letters and payment instructions (as may be necessary to satisfy any bank or lender);
- In a stock sale, resignations of the seller's officers and directors;
- Subscription Agreement. If buyer equity is being issued as part of the purchase consideration, the subscription agreement reflects the terms by which the equity is being issued and should include the operating agreement or other buyer documents that govern the rights, benefits, features and restrictions applicable to the equity being issued; and
- Other closing deliverables, such as evidence of the seller's extended reporting (tail) insurance coverage.

Post-Closing Considerations

Reducing the risk associated with a decline of business value will always be important to the buyer from an economic perspective and the seller from a reputational and legacy standpoint, and when there is a conditional deferred payment of a portion of the purchase price (an earn-out payment).

Sellers and buyers may utilize the following to protect the business after the closing:

- Employment Agreements. The buyer will typically require employment agreements with key employees and the owners as a condition to close and when an earn-out is involved the owners will want to insure their continued employment to achieve the payout targets;
- Retention Bonus Arrangements. Sellers may want to carve out a portion of the deferred purchase price as an incentive for employees to remain with the buyer during the earn-out period;
- Pre-Closing Communications. The pre-closing communication of the transaction to the seller's employees is critical. The owner will want to keep the transaction confidential until there is certainty that the closing will occur. Making the announcement too early without details creates an atmosphere of anxiety. Waiting too long puts pressure on those employees who are being asked to sign new employment agreements with the buyer. Making an announcement to the seller's employees without a comprehensive analysis and comparison of the compensation and benefits available from the buyer will create a negative reaction among the seller's employees. A well planned and coordinated presentation to seller's employees with time for questions and answers with both buyer and seller goes a long way toward employee satisfaction and retention; and
- Understanding Post-Closing Roles and Responsibilities. Prior to the closing make sure that the appropriate seller and buyer personnel understand their roles to maintain the continuity of the business operations. Once the deal is announced to the seller's employees, communications between the buyer representatives and their seller counterparts will reduce uncertainty and smooth the transition.

Conclusion

This Mergers & Acquisition Series is intended to provide owners with a broad understanding of the sequence of events that encompass a transaction. We hope that it provides insight and has answered some of your questions.

If you are considering a purchase or sale we would be happy to work with you in the process. Please contact Bill Helbling or call us at 814-459-2800.



William B. Helbling

William B. Helbling concentrates his practice in the areas of business, tax and securities law, banking and commercial lending, and intellectual property & technology. He has a special emphasis on mergers and acquisitions.

whelbling@kmgslaw.com • 814-923-4903

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