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M&A ACADEMY: DUE DILIGENCE, DATA ROOMS, AND DISCLOSURE SCHEDULES

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What We Plan to Cover Today

- Preparation and Process
- Due Diligence
- Disclosure Schedules

Preparation and Process

Be Prepared for the Call from the Buyer

- Maintain central repository for all company documents
- Organize, collect, and maintain all contracts
- Clean up and verify capitalization (particularly options, warrants, and any other securities)
- Gather all board of director and shareholder minutes, including all board packet and shareholder communications
- Have ready all [un]audited financial statements
- *Note for international transactions: This is a key lead time item—gather all subsidiary information and major contracts

Preparation and Process

Once Negotiations Are Underway

- Buyer typically offers up a relatively standard list of requested documents
- Appoint one extremely organized person to manage incoming requests, communicate with appropriate internal teams, and coordinate external responses
- Be internally prepared with messaging on any problematic items before they are presented to the other side; there should not be any surprises—find them yourself first!
- Don't presume a public/public deal is easier than a public/private deal

Preparation and Process

How to Best Organize/Share Contracts

- 1. Work with business team and counsel to prioritize material or critical information for buyer**
 - More than 30/60/90-day notice to terminate, sole source contracts, key in-licenses, etc.
- 2. Group contracts in logical sets based on type using a form diligence request**
 - Licensing/Intellectual Property
 - Sales/Contractors
 - Third-Party Vendors
 - Leases, Mortgages, and Other Real Property
 - Credit and Other Financing Arrangements

Preparation and Process

How to Best Organize/Share Contracts (cont.)

- 3. Work with business team to discuss any commercially sensitive information that will not be provided up front or will be provided pursuant to special procedures**
 - E.g., sensitive commercial agreements or those with strict restrictions on confidential information
- 4. Address any antitrust issues raised by sharing contracts and bids with competitors**
- 5. *Note for international transactions:** Consider whether foreign contracts need to be translated or if local counsel needs to review

Due Diligence

Setting Up a Data Room/Site

1. Pick a vendor that is appropriate for the size of the deal

- Be aware that there are many providers; not all may be appropriate
 - Consider both security and product functionality
 - E.g., Merrill, Intralinks, Dropbox, Box.net

2. Search capabilities of data room

- Ensure that searching is enabled and efficient
- Consider printing enablement

Due Diligence

Setting Up a Data Room/Site (cont.)

3. Managing uploads

- Appoint a single account administrator at the company and/or counsel who manages uploads—again, organization is key here
- Enable email alerts regarding new uploads

4. Legal vs. business due diligence

- Need adequate communication across all diligence teams to ensure everything is looked at by appropriate parties
- Issues lists and diligence trackers are often used to keep a full record of what was reviewed and any follow-up diligence necessary
- Beware of misfiled materials (e.g., is license in IP or contract folders)

Due Diligence

Don't Provide (Without a Game Plan)...

1. Demographics about employees

- If necessary, include in folder with privacy settings (be aware of, and confirm, state law privacy requirements)

2. Board minutes that discuss current deal or other deals

- Redact minutes but indicate what is being withheld

3. Confidential contracts

- If necessary, prepare anonymous summaries or redact certain provisions

Due Diligence

Don't Provide (Without a Game Plan)... (cont.)

4. Competitively sensitive information

- Consider antitrust issues around providing certain types of information to competitors

5. Attorney/client privileged documents

- Consult counsel on these materials

6. Diligence logs and issues trackers

- Sharing issues lists with the other side should be approached with caution

Disclosure Schedules

Why Do Disclosure Schedules Matter?

1. Key to signing—all too often ignored until later in process

- Aim to prevent any surprises for buyer
- Socialize sensitive issues with management

2. They may determine whether you close or end up renegotiating

3. Postclosing indemnification

4. ***Note for international transactions:** in US-style international transactions, mere reference to the datasite will not suffice; detailed disclosure schedules are likely going to be expected

Disclosure Schedules

Preparing Schedules

- 1. At a minimum, all business people within “knowledge” definition need the current representations, warranties, and schedules (schedule must not simply be left to the lawyers)**
- 2. What needs to be listed on disclosure schedules? The answer lies in the representations and warranties and those will be a moving target!**
- 3. Cross-referencing approach (use defined terms for items that need to be referenced in multiple places)**
- 4. Information must be responsive to representations and warranties in the agreement—target what is required**

Disclosure Schedules

Key Takeaways

1. Be ready for the call; do not wait to get organized
2. Designate clear leads on the internal and external teams
3. Set up systems to organize production and tracking of diligence materials
4. Your panelists today are biased, BUT disclosure schedules may be the most important part of the deal!

Biographies



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Dinesh Melwani represents domestic and international clients in an array of transactions, ranging from general corporate and M&A to complex project financing matters. Dinesh's practice spans the energy, technology, and pharmaceutical and life sciences sectors, where he serves as a strategic advisor to his clients.

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