



THE MORGAN LEWIS M&A ACADEMY

M&A Academy – Q&A for October 24, 2017 Session Choosing an Acquisition Structure and Structuring a Deal

Seller Duty with Respect to Target Communications?

Q: What are the buyer's obligations, if any, with respect to seller's obligation to disclose the terms of the deal to its shareholders?

A: We are not aware of any U.S. jurisdictions that impose obligations on a Buyer to make sure that a Seller's communications to its shareholders are accurate. However, we can think of several reasons why a Buyer would want to make sure that the terms of the deal are being accurately disclosed to the Target shareholders.

First, to the extent that the Target and its shareholders get into pre-closing disputes over the terms of the deal, closing could be delayed. In addition, in a deal involving a public Target plaintiff lawyers often initiate litigation challenging the accuracy of the disclosure in the Target's proxy statement, which can also complicate getting to a closing, among other things. In addition, the Buyer often gets pulled into this litigation as a defendant. Second (and worse) if there are disputes, then the Buyer may acquire a Target company that is the subject of disputes and/or litigation pending at the time of closing or that arise after closing, with associated indemnification claims against Target directors and officers that the Buyer may have to cover financially. So, there are a lot of good reasons for Buyers to care about the accuracy of a Target's disclosure to its shareholders.

Choosing Between a Forward Merger and Reverse Merger

Q: What is the decision criteria for determining whether a Reverse or Forward Merger is more advantageous?

A: The biggest decision factor is typically the tax implications, and often the tax treatment for a forward merger and reverse merger are very different. In addition,

if a forward merger is chosen for tax purposes, this means the Target corporation will be merged into a merger subsidiary, and will no longer exist. This could have significant ramifications under some of the Target company's existing license or other agreements and under its benefit plans or with respect to other existing rights and obligations.

Our general experience is that, if there are no tax drivers one way or the other, most corporate lawyers prefer to use reverse triangular mergers to avoid any issues such as those described above.

Avoiding Successor Liability

Q: Can you identify some issues to consider for a buyer of assets to avoid successor liability?

A: This is an issue that must be addressed on a topic-by-topic basis. For example, the analysis for successor liability in the area of product liability and ways to avoid or mitigate will be very different than other areas such as environmental liability or certain benefit or pension issues. So, our advice is to identify the specific concerns in a specific deal and then think through ways to address those issues by structuring, through insurance, indemnities or otherwise.

Section 338(h)(10) Elections

Q: For the tax section, can you touch on a 338 election?

A: This is an election parties can use in a stock acquisition to have it treated for tax purposes as if the target entity sold all its assets instead in a taxable transaction. Among other things, this allows the Buyer to get a "stepped up" tax basis in the acquired assets, which will increase the depreciation or amortization benefits available to the Buyer post-acquisition. So, even though this acquisition involves the transfer of stock, it provides the Buyer with many of the tax benefits of an asset deal.

Please note that this is very general advice, and you should consult with a tax advisor if you need more detailed information.

Section 1202 and Investments in Qualified Small Business Stock

Q: Perhaps outside of the scope of this discussion, but could you give a brief summary on 1202 avoidance of tax for certain small C-Corps. No big deal if you run out of time...

For taxpayers other than corporations, IRC Section 1202 excludes from gross income at least 50% of the gains recognized on the sale or exchange of qualified small business stock (QSBS) that is held for more than five years. There are quite a few requirements to take advantage of this exemption, so you should consult with a tax advisor or one of the many on-line resources available for more details.

Contractual Workaround to Address Consents Not Obtained

In considering third party consents to assignment, I'd be interested in your view on language in an APA stating that the seller will hold contracts in trust until necessary consents are obtained. Does that work?

A: This is a very common feature in asset purchase agreements addressing any contracts that require a consent to assign, and where the consent has not been obtained – in general the provision provides for the following: (i) the contract will not be assigned until the consent has been obtained; (ii) the Seller will hold the contract for the benefit of the Buyer; and (iii) the parties will work to structure lawful arrangements such that the Buyer gets the economic benefits and burdens of the contract. Our expectation is that a properly worded provision should work, but for any deal the parties have to think through how the provision is being used and how key contracts are worded, to make sure that the parties are not using this provision in a way that violates the anti-assignment provisions of a particular contract.

T-Mobile and Sprint

Q: What type of acquisitions between T-Mobile and Sprint? I would like to know your view.

A: According to news about the T-Mobile and Sprint transaction, the parties were contemplating a merger.