

Morgan Lewis

webcast

Plan Sponsor Basics

Webinar 5 of 6

# Mergers, Acquisitions, and Other Corporate Transactions

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# Topics To Be Covered

- Types of Transactions
- Diligence
- Acquisition Agreement Considerations
- Defined Benefit Plan/Multiemployer Plan Considerations
- Closing Actions
- Post-Closing Considerations



# Types of Transactions

# Types of Transactions

- Stock Deal
- Spin-Off
- Asset Deal

# Which Side of the Transaction?

- Buyer
  - Public company
  - Private company
  - Private equity firm
- Seller
  - Public company
  - Private company
  - Private equity firm
- Merger of Equals



# Diligence

# Diligence

- Types of Plans
  - Qualified Retirement Plans
  - Multiemployer Pension Plans
  - Health and Welfare Plans
    - *Retiree Medical*
    - *Payroll Practices (e.g., accrued vacation)*
  - Nonqualified Plans
  - Equity Compensation
  - Employment Agreements/Severance Agreements
  - Change-in-Control Arrangements

# Diligence (cont'd.)

- Qualified Retirement Plans
  - Defined Contribution Plans
    - *401(k)*
    - *Profit Sharing*
    - *Money Purchase*
    - *ESOP*
  - Defined Benefit Plans
    - *Traditional*
    - *Cash Balance*



## Diligence (cont'd.)

- Plan Documents
  - Amendments
- Trust Agreement
- Summary Plan Description
  - Summary Material Modification
- Most Recent IRS Favorable Determination Letter
- Third-Party Agreements
- Actuarial Reports

## Diligence (cont'd.)

- Forms 5500
- IRS/DOL Audit Letters
- Corrections under EPCRS
  - Self-Correction
  - VCP
- Collective Bargaining Agreements
- Board/Committee Resolutions Relating to Plans
- Employee Manuals/Handbooks
- Other

# Diligence (cont'd.)

- Types of employees
  - Any union employees
- Locations
- Foreign employees
  - Foreign plans

# Diligence (cont'd.)

- Individually Designed Plans
- Prototype
  - Standardized
    - *Eligibility issue for control group*
  - Nonstandardized



# Acquisition Agreement Considerations

# Representations and Warranties

- List of Qualified Plans
- Disclosure of Material Plan Documents
- Compliance with ERISA and the Code
- Loss of Tax Exemption
- Status of Current Favorable Determination Letter

# Representations and Warranties (cont'd.)

- Late Payments
- Compliance Issues
- Prohibited Transactions/Breach of Fiduciary Duties
- No Participant Claims (other than ordinary course)
- Governmental Audits
- Improper Characterization of Contingent Workers

# Representations and Warranties (cont'd.)

- **Defined Benefit Plan**
  - Funding deficiencies/waivers of funding requirements
  - Liability to the PBGC/payment of premiums
  - Reportable events
  - Value of assets compared to liabilities
- **Multiemployer Plans**
  - Required contributions
  - Withdrawal liability



# Representations and Warranties (cont'd.)

- ERISA Affiliates
- Foreign Plans
- Materiality, Knowledge, and Disclosure Qualifiers
  - Notice to buyer of known liabilities
  - Allocation of all financial responsibility

# Covenants

- Continuation of Plans
  - Maintenance of plans following closing
  - Termination of plans
  - Third-party agreements
- Assumption of Plans
  - Remaining employees
  - Maintenance of plans following closing
  - Multiple employer plan considerations
  - Termination of plans
  - Third-party agreements
- Freeze Plans
- Replication of Plans

## Covenants (cont'd.)

- Eligibility for Buyer Plans
- Credit for Service with Seller
- Credit for Deductibles and Co-Pays
- Responsibility for COBRA
- Termination of Seller Plans
- Asset Deal—exclusion of all liabilities
- Post-Signing/Pre-Closing Covenants

# Covenants (cont'd.)

- Participant Loans
  - Type of transaction
  - When due
  - Rollovers

# Other Transaction Agreement Considerations

- Indemnification
- Purchase Price Adjustments
- Definitions/Exhibits



# Defined Benefit Plan/ Multiemployer Plan Considerations

# Defined Benefit Plan Issues

- Key Diligence Issue: Funded Status of the Plan
- Controlled Group Liability
- Responsibility for Unfunded Liabilities?
  - Buyer assumes plan and all liabilities
  - Buyer assumes only assets and liabilities for transferring employees
  - Buyer makes no commitments with respect to defined benefit plans
- Plan Funding and Termination Issues
- Transactions with Purpose to Evade Liability
- Reportable Events
- Potential Purchase Price Adjustment

# Multiemployer Plan Basics

- Sponsored and Maintained by Union
- Collective Bargaining Agreement Sets Employer Contribution Obligation
- Potential Major Issues:
  - Withdrawal liability
  - Controlled group liability
  - Escalating costs due to faster funding requirements
- Sale of Asset Exception
- Potential Successor Liability



# Multiemployer Plan Withdrawal Liability

- General Rules
- Sale of Asset Exception
  - Buyer's obligation to contribute substantially the same as Seller
  - Buyer must post a bond equal to Seller's contribution
  - Buyer picks up five-year contribution history of Seller
  - Seller must agree to be secondarily liable if Buyer withdraws
- Successor Liability

# Multiemployer Plan Due Diligence Considerations

- Collective Bargaining Agreements
- Contribution History
- Withdrawal Liability Estimates
- Actuarial and Financial Reports
- Correspondence from Multiemployer Fund

# Multiemployer Plan Purchase Agreement Considerations

- Representations and Warranties
- Post-Closing Covenants
- Purchase Price Adjustments



# Closing Actions

# Closing Actions

- Board/Committee Resolutions
- Notification to Participants/Beneficiaries
- Third-Party Administrators
- Payroll Considerations



# Post-Closing Considerations

# Post-Closing Considerations

- Seller Considerations
  - Transition Services
  - Continued Benefit Plan Participation
  - Transfer of Seller Plans
  - Transfer of Seller Plan Assets
  - Partial Termination of Seller Plans
  - Full Vesting
  - Determination Letter Filing

# Post-Closing Considerations (cont'd.)

- Buyer Considerations
  - Employee Communication
  - Enrollment in Buyer Plans
  - Satisfy “Comparability” Standard
    - *Substantially similar in the aggregate*
    - *Substantially similar to similarly situated EEs*



# Post-Closing Considerations (cont'd.)

- Buyer Considerations (cont'd.)
  - Plan Amendments
    - *Participation*
    - *Service Credit*
    - *Loan Rollover*
    - *Merge Plans*
    - *Freeze Plans*
    - *Terminate Plans*
  - Service Provider Agreements

# Post-Closing Considerations (cont'd.)

- Other Legal Considerations
  - Determination Letter Filing
    - *IRS Form 5310*
    - *IRS Form 5500*
  - Compliance Issues
    - *Whether to correct*
    - *EPCRS*
    - *VCP*

# Post-Closing Considerations (cont'd.)

- Other Legal Considerations (cont'd.)
  - Notice Obligations
    - *General Employee Notice*
    - *Safe Harbor*
    - *PBGC*
    - *Termination (Notice to Interested Parties)*
  - Anticutback Rules
  - Nondiscrimination Issues
  - Audit Risk

# Next Webinar

- Please join us for the final installment in our Plan Sponsor Basics series...
  - **“Fiduciary Issues for Retirement Plan Sponsors”**
    - *October 15, 2013 at 12:00 pm ET*



# Questions?

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