

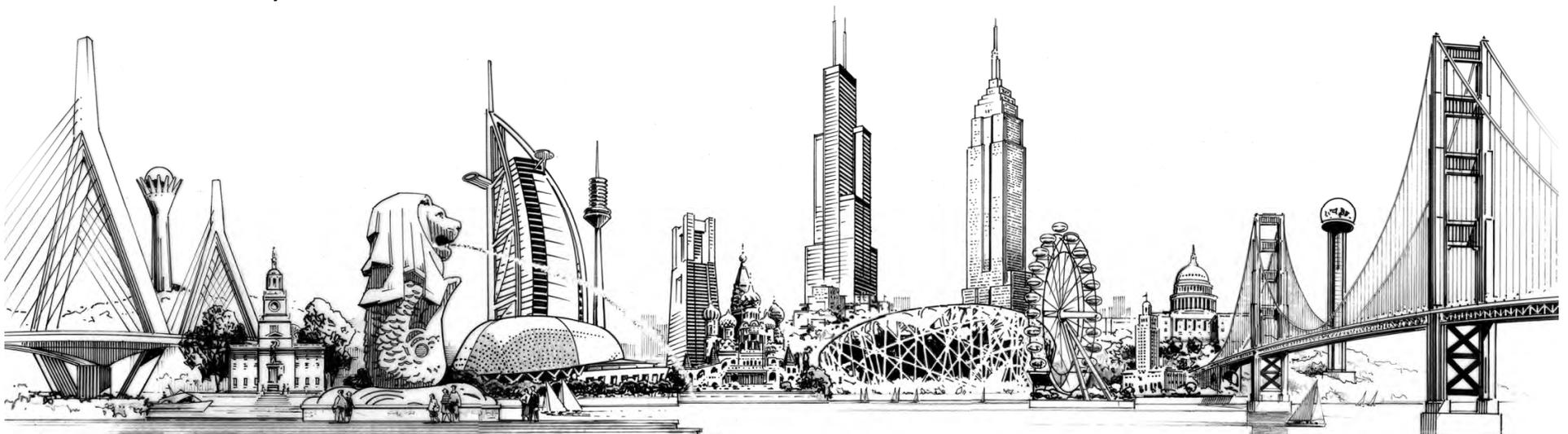
Morgan Lewis

M&A ACADEMY

DUE DILIGENCE, DATA ROOMS, AND DISCLOSURE SCHEDULES

Presenters: Will Perkins & Erin Morley

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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 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 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 a defined term 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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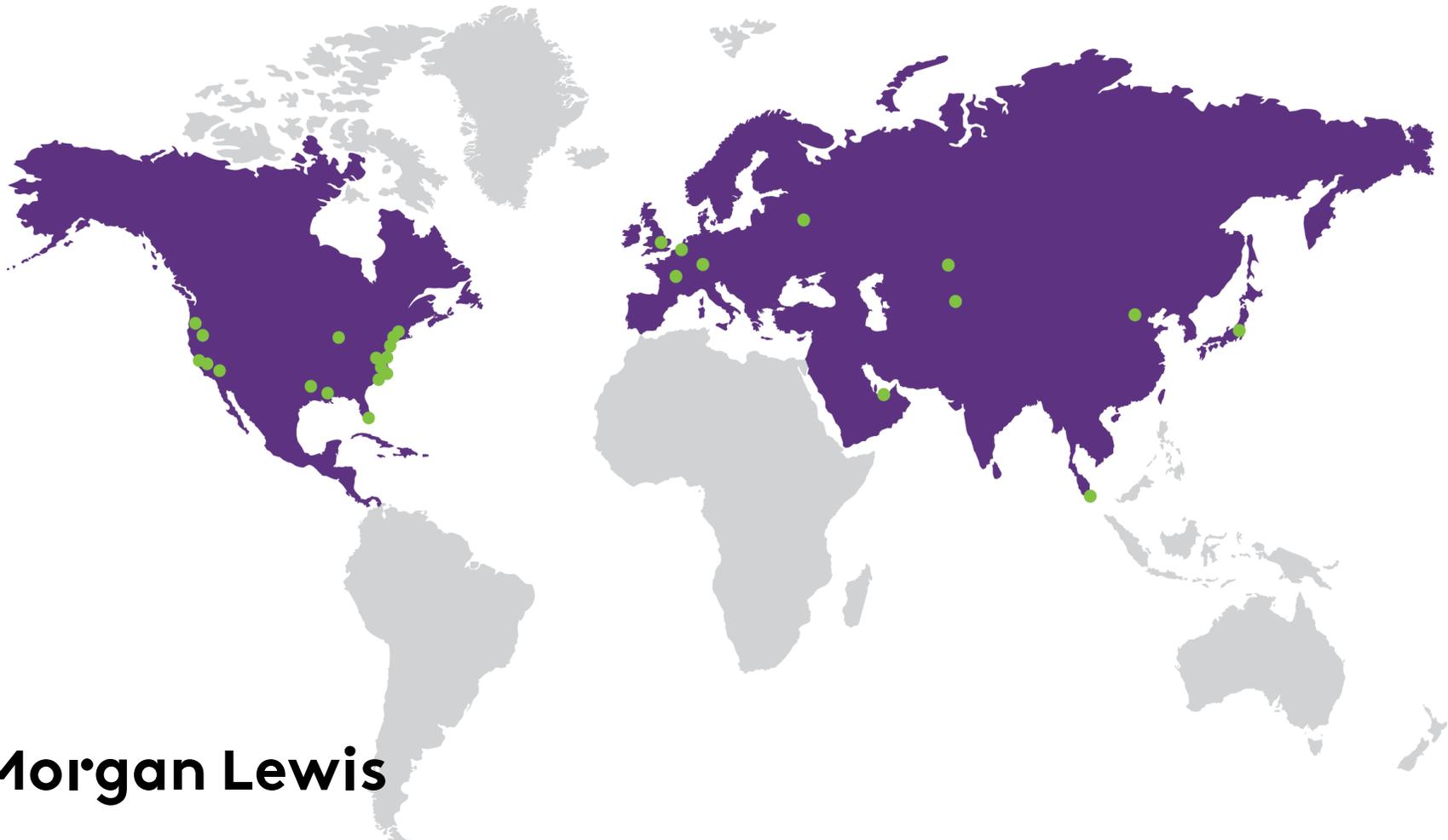
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