

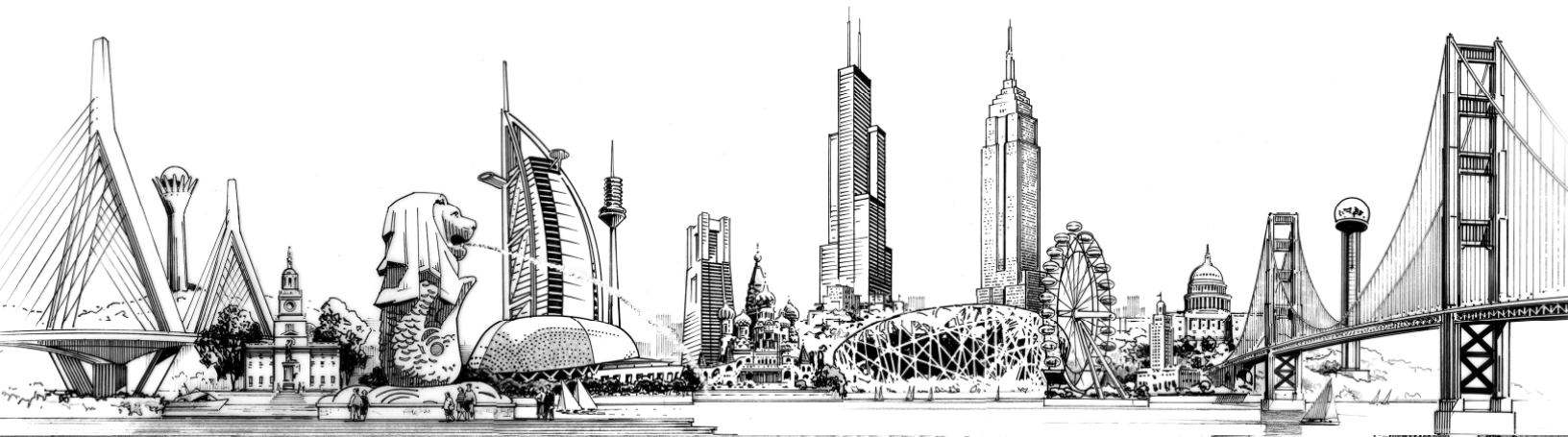
# Morgan Lewis

## **2015 – 2016 MORGAN LEWIS M&A ACADEMY**

### **ANATOMY OF AN ACQUISITION AGREEMENT [OCTOBER 27, 2015]**

Presenters: Andrew White and Kristen Ferris

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## Anatomy of an Acquisition Agreement [October 27, 2015]

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### Enforceability of Recitals

**Q: Re "enforceability" of recitals: I had been under the impression that most states afford a rebuttal presumption that the facts recited are true; is that not the case?**

**A:** The laws of most jurisdictions have held that recitals in and of themselves are not enforceable agreements. However, as a practical tip for the unwary, in the case of an ambiguity relative to an operative agreement provision, the facts presented in the recitals can be used to support, and serve as evidence of, one party's position on such provision. Hence, while typically not enforceable per se, they do remain important, should not be hastily glossed over and must be consistent with the other provisions of the agreement.

### Break-Up Fees

**Q: Excluding processes associated with a bankruptcy, how prevalent are break-up fees in both private and public transactions? Has the trend for them been increasing or decreasing as of late?**

**A:** Break-up fees in private transactions are rare, and that has always been the case. In public transactions, break-up fees are very common. There has been a recent increase in reverse break-up fees, in particular for antitrust failure.

### Timing - Signing & Closing

**Q: Who usually requests (buyer, seller, both), and under what circumstances, does sign and close happen in parallel? Who wins under this situation?**

**A:** In most transactions, if a simultaneous sign & close is feasible, typically both parties would request a simultaneous sign & close as it eliminates transaction risk during any interim period. From the selling parties' perspective, they want certainty that their deal will close and not be bound by constraints in how to operate the business for any interim period between signing and closing. From the buyer's perspective, it wants assurances that the business it thinks it is buying as of signing will be the same business it is buying as of closing - any events during the intervening period could impact the target company. It is not always possible, however, for legal or practical reasons, which is why it is important to evaluate the facts and circumstances in each deal to assess whether the transaction can be signed and closed on the same day, or if third party, stockholder consents or other practical timing implications could prevent a simultaneous sign & close. In our experience the issue -- a simultaneous sign & close versus a sign & subsequent close -- is not usually a point of dispute.

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## Expiration of Confidentiality Obligations

**Q: Why allow the confidentiality obligations to ever expire? Would that not mean the recipient then has the right to disclose your confidential information? Outside of information that would become stale over a period of time, such expiry seems risky.**

**A:** Confidentiality obligations can run indefinitely or for a stated period of time. The disclosing party (or, in our M&A case, the buyer of a business or assets) typically prefers the indefinite period. The party with the obligation, however, would typically argue for a defined period of time so that it knows it has an end to its obligations and responsibilities to the other party. In all deals, the circumstances will dictate the negotiation of time - it can ultimately depend on the type of information and how quickly the information changes. As you note, information can become stale or obsolete fairly quickly, such as pricing arrangements, so the obligation may not need to run indefinitely.

## Governing Law re: confidentiality agreements

**Q: Can you provide examples where a particular state's governing law came back to bite one of the parties to a confidentiality agreement? Wondering if there are particular states with laws to be concerned about.**

**A:** Certain states allow for what is commonly referred to as "blue penciling" of what courts determine to be overly broad restrictive covenants which include confidentiality obligations. The inclination of a court to strike what it considers to be an overly broad confidentiality covenant may also differ depending upon the context in which the confidentiality obligation is made (i.e. more likely in an employment agreement scenario versus an acquisition agreement one). While we have not encountered this in an M&A context, what is most important to note is that while those states may utilize the tool of "blue penciling," even in those cases there will typically remain enforceable parts of the confidentiality obligations.

## Stock Deal & 338(h)(10) election

**Q: If the seller prefers a stock deal, does the buyer have the option of selecting a 338 election whereby the transaction is treated as an asset sale and realize future tax benefits?**

**A:** Yes; in certain circumstances a buyer may be able to treat the stock sale as an asset sale by making a joint Section 338(h)(10) election with the selling parties. There are certain factors that must be satisfied in order to make the election: (1) the buyer must be a corporate entity (c-corp or s-corp); (2) the purchase must be of at least 80% of a US target corporate entity (c-corp or s-corp) - if c-corp, seller must be corporate entity that owns at least 80% of the target corporate entity; and (3) buyer and selling parties cannot be related. (Note too that if the buyer is not a corporation, a similar election may be available under Section 336(e).) There are other qualifying aspects to this approach - our M&A Academy presentation on Tuesday, January 19th, focuses on Tax Issues in M&A Transactions so we'd encourage you to attend that presentation to learn more on the topic.

**Q: Can you circulate a sample or template agreement(s)?**

**A:** Not knowing any specifics about the particular M&A transaction, we are not sure whether circulating a generic acquisition agreement template would ultimately prove very useful. That said, we

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would certainly be willing to connect with you to assess whether it may make sense to try to craft such a template for you.

## **Closing Conditions - Governmental Injunctions v. Individual Plaintiff**

**Q: How successful are you when representing a seller to limit the closing condition re no litigation seeking to enjoin the transaction to governmental versus individual plaintiffs?**

**A:** Our experience relative to this issue is a little bit varied. We've seen many acquisition agreements which have limited the condition to injunctions from governmental parties, while others are more inclusive to also include those from private parties. Certainly both buyers and sellers need to be particularly mindful in due diligence as to whether there are potential third party lawsuits which could seek to derail a deal.

We hope that you find the foregoing Q&A to be helpful. If you have any other questions on the anatomy of an acquisition agreement please contact:

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