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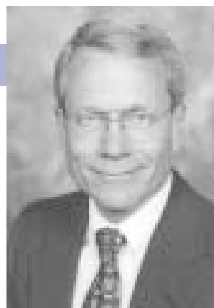
Acredula is the Latin word for "owl," connoting wisdom. This newsletter is intended as wise counsel for boards and executives.

Understanding Business Terms and Deal Process Is Vital for Mergers or Acquisitions

Editor's Note

This month's concluding segment of our two-part series on merger and acquisition strategies focuses on the principal business terms that are negotiated as part of any merger or acquisition, the documents that evidence those terms as negotiated, and the typical "process" of the deal. Understanding these elements is essential for pursuing or defending against any merger or acquisition.

Perhaps the best way for both management and their board members to understand the principal business terms and the process of any deal that they may confront is to participate in a mock merger or acquisition training session. A training session is even more valuable if it includes the organization's legal, investment banking, public relations, auditing and employee retention firms.



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Acredula can help design and facilitate such a training session. The session would involve participants in the process of making an offer as well as responding to an unsolicited offer. It would cover various business terms to consider and the ways to arrive at those terms and then evidence the deal.

For more information, please contact John Beavers at 614-227-2361, jbeavers@bricker.com, or at 100 South Third Street, Columbus, Ohio 43215.

Creating a Merger and Acquisition Strategy Is Essential for Success

Part II: Evidencing the Deal and Navigating the Deal Process

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Last month's segment of this two-part series focused on the preliminary steps to creating merger and acquisition strategies and defining principal business terms. In addition to continuing our focus on business terms, this installment provides guidelines for evidencing the deal and for navigating the process of the deal.

Principal Business Terms

Valuation of the Consideration Given

The consideration commonly given in acquiring a

business is stock or property other than cash. An equally critical business term is the valuation of such consideration other than cash. Often, such consideration is expressed in one of the three ways:

- ***As a fixed dollar amount of securities***. For example, the consideration is expressed as $50 million of the acquirer's capital stock. This expression favors the business being acquired if the market price of the acquirer's capital stock decreases and favors the acquirer if the market price of its capital stock increases before the closing. A disadvantage of this consideration expression to the business being acquired is that it will not share in any increase in the market price of the acquirer's capital stock resulting from a favorable reaction to the acquisition's announcement. However, this expression is favored by a business being acquired if it believes that the earnings per share of the acquirer will decrease, causing a decrease in the market price of the acquirer's capital stock before the closing.

- ***As a fixed number of shares***. For example, the consideration is expressed as five million shares of the acquirer's capital stock. This expression favors the business being acquired if the market price of the a cquirer's capital stock increases and favors the acquirer if the market price of its capital stock decreases before the closing. An advantage of this consideration expression to the business being acquired is that it will share in any increase in the market price of the acquirer's capital stock resulting from favorable a reaction to the acquisition's announcement. This expression may cause problems if the business being acquired has preferred stock that will receive a liquidation preference of a fixed dollar amount before any distribution to the common stockholders. If the market price of the acquirer's capital stock decreases, there may not be sufficient value remaining to attract the affirmative vote of the common stockholders.

- ***As a percentage interest of the resulting entity***. For example, the consideration is the number of shares of the new entity that results in the acquired business owners holding 45 percent of the number of shares that the combined entity will have outstanding due to the acquisition. The percentage interest is based upon each constituent entity's contribution to the future operations of the resulting entity rather than the market price of either constituent entity's capital stock. In theory, neither constituent entity is as concerned with the market price of its or the other entity's capital stock as it is with the future performance of the new entity. For this reason, this expression is used most frequently with a merger of equals or a consolidation resulting in a new entity. In practice, however, a significant divergence in the market price of the capital stock of the entities before the closing may result in difficulty obtaining the necessary shareholder vote.

Adjustments Negotiated to the Consideration

Often, negotiated adjustments reduce the unwanted effects of a change in market prices prior to the closing. Some common adjustments are:

- ***Earn-out adjustment***. If the transaction is not required to be treated as a "pooling" of interests for accounting purposes, the business being acquired may want to negotiate for a post-closing addition to the expressed consideration, if certain earning levels are achieved after the closing. Also, the acquirer may want to offer such a future earn-out adjustment rather than agree to a more costly current expressed consideration. Problems associated with the negotiation of an earn-out adjustment include whether it should be based upon the earnings of the segment consisting of the business being acquired or the earnings of the entire acquirer. Basing the adjustment on a segment consisting of the business being acquired will require agreement as to a separate accounting of that segment's operations for the earn-out period. Basing the adjustment on the earning of the entire acquirer may avoid separate accounting, but may not be reflective of the acquired business' contribution to the acquirer.
- ***The collar***. The collar is a range or window of the market price of the acquirer's capital stock in which the consideration, whether expressed as a fixed dollar amount or fixed number of securities, is applicable. If the market price goes above or below the range, either the consideration is automatically recalculated or the acquisition can be terminated. For example, the expressed consideration (such as $50 million or five million shares of the acquirer's capital stock) is applicable as long as the market price of the acquirer's capital stock is within the range or window of $25 to $30 per share at closing. If the market price is above or below that range, typically the consideration is automatically adjusted pursuant to the agreed terms or the appropriate constituent entity can terminate the transaction.
- ***Net worth adjustment***. If either constituent entity

expects a positive change in its net worth that is not attributable to the announced transaction, that entity may want to negotiate an adjustment to the expressed consideration pursuant to agreed terms, if the net worth so changes. This is most often an adjustment negotiated by the business being acquired if there is a positive change in the working capital of the business, such as receipt of a substantial purchase order or realization of a written-off receivable, the work for which was completed prior to the transaction's announcement. At times, this is an adjustment negotiated by the acquirer, such as when there is a possibility of another acquisition occurring before the transaction in question.

Treatment of Stock Options and Warrants

Although not a critical business term if addressed initially, determining whether the expressed consideration represents all outstanding stock and outstanding options and warrants to purchase stock, or represents only the outstanding stock of the business being acquired can become a stumbling block if not addressed. Most acquirers expect the consideration to represent all outstanding stock, as well as options and warrants to purchase stock, and the business being acquired will need to calculate what each holder is entitled to receive on a dilutive basis, taking into account those options and warrants as if exercised.

Management of acquired businesses needs to consider options and warrants that are "under water" (those with exercise prices greater than the value of the consideration being received as a result of the acquisition). One solution is for the acquirer to assume these options or warrants or substitute comparable options or warrants. Often, however, the acquirer will want these options and warrants extinguished at, or prior to, the closing. In some cases, the options and warrants will not automatically expire by their own terms. The business being acquired will have to offer some form of contractual consideration to the holders of these options or warrants in order to obtain their agreement to extinguish them. If so, this will generally reduce the consideration being received by outstanding stockholders.

Exclusivity, Non-Solicitation, and Break-Up Fee Provisions

A potential problem to consider is whether the transaction is priced, or the consideration is expressed, before due diligence occurs. Typically, a business being acquired will want pricing to be offered and the consideration to be expressed before it will open its confidential business, financial, technology, and other proprietary information to the acquirer. In exchange, the acquirer will negotiate for an exclusivity period during which the business being acquired will not solicit competing offers. Either constituent entity may negotiate for a break-up fee as liquidated damages if the transaction is not consummated because of another constituent.

- ***Exclusivity and non-solicitation provisions***. An acquirer will not want to incur the expenses of negotiation and due diligence only to have the other business use the acquirer's offer to start a bidding process. Typically, an acquirer will require the business being acquired to use its best efforts to cooperate exclusively with the acquirer, ceasing all negotiations with others and agreeing not to solicit competing offers. Terms to negotiate include the length of the exclusivity and non-solicitation period and the right of the business being acquired to respond to unsolicited inquiries or offers. The business being acquired should seek the advice of legal counsel regarding its fiduciary obligations to shareholders before agreeing to a "no talk" provision that would prevent it from responding to an unsolicited inquiry that could result in a competing offer to shareholders.
- ***Break-up fees***. Either constituent entity (most often the acquirer) may negotiate for a break-up fee as liquidated damages if the transaction is not consummated because of another constituent. The acquired business may fear that it will suffer such damages, like lost opportunities if the transaction is announced and not consummated, that it may not survive without some form of liquidated damages. Likewise, the acquirer may want to impose such liquidated damages in order to deter competing offers or a bidding war.

Risk of Loss Provisions

Provisions regarding pre- and post-closing risks of loss are not discussed until the negotiation of a definitive agreement, unless the transaction is intended by the acquired business to be "as is," such that the acquirer assumes any pre-closing or post-closing risk of loss incurred by the business to be acquired. Typically, representations are made about the business being acquired that must also be true at closing, so that the risk of any loss incurred prior to the closing is assumed wholly by the initial business owners. Sometimes, especially if the business being acquired is publicly held and has a history of reporting its operations with audited finan-

cial statements, the transaction may be "as is" with respect to liabilities that surface after the closing. However, if the business being acquired is closely held or does not have a history of reporting its operations or audited financial statements, the representations and warranties will survive the closing so that the acquirer has recourse if a loss is incurred contrary to those representations and warranties.

There are a number of terms to be negotiated regarding this recourse. An acquirer would have recourse both in contract and for tort if a loss is incurred contrary to a representation or warranty that survives the closing. However, absent any provisions facilitating that recourse, the acquirer would have the burden of initiating and then prosecuting legal proceedings against the appropriate parties in a suitable venue and jurisdiction, at the acquirer's expense. To facilitate its recourse, an acquirer generally will negotiate for the following:

- ***Indemnification***. Either the entity or the owners of the business being acquired agree to indemnify the acquirer not only against any loss that is incurred contrary to any representation or warranty, but also against any expenses incurred by the acquirer in dealing with such losses. The acquirer can then proceed against the entity or owners of the business being acquired without having to initiate such legal proceedings.
- ***Escrow***. A portion of the consideration to be paid for the business being acquired, or other property of the entity or owners of that business, will be deposited and held in escrow against which the acquirer may proceed to recover any indemnified losses and expenses without having to proceed against the entity or owners. If the acquirer wants to treat the transaction as a "pooling" of interests for accounting purposes, the escrow may not include more than 10 percent of the capital stock issued as consideration in the transaction.

There are a number of limitations on these indemnification and escrow provisions that the business being acquired may negotiate. These include:

- ***Basket clause***. A basket clause requires that the aggregate losses incurred must exceed a certain "basket" or threshold amount before the acquirer may seek indemnification. The assumption underlying a basket clause is that every business incurs, in its ordinary course, certain unintended losses. Until the aggregate of those losses exceeds what would be considered ordinary under the circumstances, there should not be liability to the entity or owners of the business being acquired.
- ***Cap***. A cap is a limit on the maximum amount of indemnification that may be sought. The assumption underlying a cap is that the exposure to the entity or owners of the business being acquired should not exceed the maximum exposure that the entity or owners would have incurred if the business had been liquidated rather than acquired. At a minimum, where there is joint and several liability for indemnification, it will be capped at the amount actually received by the indemnifying party.
- ***Time limit***. Almost every indemnification or escrow provision limits the time during which the acquirer may seek indemnification or proceed against the escrowed assets. The reason for a time limit is that, at some point, the prior owners should be able to put potential liability behind them.

A business being acquired will want pricing offered and the consideration expressed before opening its confidential business, financial, technology and other proprietary information to the acquirer.

Registration or Registration Rights

If all or any portion of the consideration for the transaction consists of securities, another fundamental business term to consider is whether the securities will be restricted or "lettered" stock when issued to the acquired business or its owners. Restricted or lettered securities do not offer liquidity to the acquired business' owners unless accompanied by registration rights. At a minimum, the business being acquired will want to negotiate for "piggyback" registration rights, which entitle their shareholders to join a registration if one is initiated by the issuer or other security holders. More valuable are "demand" registration rights which entitle their shareholders to demand registration.

Human Resource Issues

At some point, representatives of both the business being acquired and the acquirer will need to discuss who will be retained and what will happen to those who will not. This is an important issue to both sides, as the business being acquired will want to retain everyone to ensure a smooth

transition during the acquisition process, especially if the acquisition is not consummated. This should be important to the potential acquirer because it often needs everyone's institutional knowledge in order to effect a successful transition, and because it is better to evaluate performance before judging who to retain or discharge.

The stress of a potential acquisition can lower morale. First, there is often an increase in workload when providing information for the acquisition process and responding to the potential acquirer's due diligence requests. Second, there is uncertainty as to whether jobs will continue if the business is acquired or can continue if the business is not. Third, if the acquisition becomes public knowledge, the best people will be deluged by employment offers from competitors. As a result, when announcing the due diligence process with a potential acquirer, many businesses will offer those employees a retention bonus if they stay through the process.

It is important that any issues discussed and agreed to between business representatives are expressly covered in the definitive agreement.

Important issues that must be dealt with include resolution of differences between the acquirer's and the acquired company's employment terms, compensation plans, qualified retirement and deferred compensation plans, stock option and equity plans, non-competition and other employee restrictions, and employee policies. These are usually dealt with after other principal business terms have been resolved.

Evidencing the Deal

Once there is an agreement on the principal business terms, the next step is evidencing that accord and working out the deal's details. Generally, a letter of intent or commitment evidencing the principal business terms precedes negotiation and preparation of a definitive agreement detailing those terms.

Letter of Intent

A letter of intent is normally a short, three-to-five page outline of the proposed acquisition's principal business terms. Its primary purpose is to assure accord on the principal business terms before time and resources become committed to due diligence and negotiation of a more definitive agreement. A letter is legally binding to the extent that it includes any confidentiality covenant, non-solicitation obligation or a break-up fee. Except for such provisions, a letter of intent is not usually detailed enough to otherwise legally bind any party to the proposed acquisition. For this reason, it is important to proceed to the definitive agreement.

At times, a party that has publicly traded securities may avoid executing a letter of intent so as not to trigger a public disclosure requirement. More typically, however, parties with publicly traded securities will impose restrictions on other parties preventing an unwanted early disclosure of the transaction.

Definitive Agreement

The definitive agreement will generally have a name to reflect the structure of the transaction. An agreement is called an "asset purchase agreement" if the transaction is structured as a purchase of assets; a "stock purchase" agreement if it is structured as a purchase of stock; or an "agreement and plan of reorganization" if it is structured as a form of a merger. However, the provisions for any of these definitive agreements follow the same traditional form:

- Description of the transaction, detailing most of the principal business terms in the letter of intent, including what is being acquired, the consideration being paid, and when and how it will be paid, and when the transaction will close;
- Representations and warranties on behalf of both the business being acquired and the acquirer;
- Covenants or promises of what is to be done prior to closing on behalf of both the business being acquired and the acquirer;
- Conditions that must be satisfied before the business being acquired and the acquirer are obligated to close;
- Termination provisions detailing circumstances and consequences of abandoning the proposed acquisition;
- Indemnification and escrow provisions protecting one party if it does not receive what it bargained for;
- Miscellaneous, but important, provisions regarding giving of notices, governing law, resolutions of disputes, and construction of the agreement.

A common clause often overlooked by the acquirer's business representatives and the business being acquired is the provision that the definitive agreement supersedes and replaces all prior agreements, whether oral or in writing, regarding the transaction. Accordingly, it is important that any issues discussed and agreed to between the business representatives are expressly covered or referenced in the definitive agreement.

Initially, the business representatives will want to focus on two sets of provisions. The first provision focuses on the transaction description and details the agreed upon principal business terms. The second provision focuses on the conditions to closing, which control if and when the transaction will close.

There will likely be additional agreements attached as exhibits or appendices. These include forms of employment agreements, non-competition and other employee restrictive covenants, and escrow agreements for any closing into escrow, as well as security for any indemnification.

The 'Process' of the Deal

The deal "process" begins with a letter of intent or accord as to the principal business terms of the transaction. A number of activities generally go on concurrently after there is accord on the principal business terms. In order to establish some order over what could otherwise result in chaos, identifying each party's designated representatives and a schedule of who will do what and when is one of the process' first steps.

List of Participants

The list of participants is simply a list of each party's representatives who need to know what is happening, including:

- Management teams;
- Legal counsel;
- Auditing firms;
- Business brokers or investment bankers; and
- Other advisers.

The list should include mailing and email addresses and telephone and fax numbers for communicating with each person listed. It should also include the home addresses and telephone numbers of key representatives in case of emergencies.

Time and Responsibility Schedule

Typically, the time and responsibility schedule is prepared by the acquirer. However, if time is of the essence to the acquired business, especially if it is subject to restrictive non-solicitation and break-up provisions, it may propose the schedule. The schedule should list each anticipated step in the transaction's process, the party and its representatives responsible for each step and a proposed date for completion of the steps.

Steps commonly included are:

- Exchanging documents for due diligence;
- Preparing and circulating the definitive agreement;
- Preparing and circulating Hart-Scott-Rodino filings;
- Scheduling any on-site due diligence visits, including review of records by auditors;
- Preparing and circulating any disclosure documents or reports to shareholders;
- Preparing and circulating the first draft of any fairness opinions;
- Holding board meetings to review the definitive agreement and related matters, such as fairness opinions;
- Executing and delivering the definitive agreement;
- Calling a meeting of shareholders or other owners whose approval is required; and
- Scheduling the closing.

Public Disclosure

Often, neither the business being acquired nor the acquirer desires to make an early public disclosure of a proposed transaction. Other than Hart-Scott-Rodino filings, there is no required time at which disclosure to the public has to be made, unless any party is aware that someone who has knowledge of the transaction is trading securities. For this reason, parties with publicly traded securities will impose restrictions on all participants. These restrictions prohibit disclosure, except to those who have a need to know and an obligation to maintain the confidence of what is disclosed, and trading or tipping others to trade in that party's securities.

Government Filings and Consents

The number and nature of governmental filings and consents depends upon the structure of the transactions as well as the jurisdictions involved. Two of the most common are:

- ***Hart-Scott-Rodino filings***. One of the early determinations that legal counsel for both parties must make is whether a pre-merger filing is required with the Federal Trade Commission and the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act. This filing is required if the acquirer has assets or annual net sales of at least $100 million, the business being acquired has more than $10 million of assets or sales, and the acquirer is paying consideration of more than $50 million for the transaction. The filing, if required, also requires a minimum $45,000 filing fee and the parties must wait 30 days after the filing before the transaction can close. During that period, the Federal Trade Commission or the Department of Justice will determine if the effect of the proposed acquisition is likely to be anti-competitive. During this waiting period, the acquirer and business being acquired must maintain their separate operations. Either the Federal Trade Commission or the Department of Justice may request additional information if there is a preliminary conclusion that the transaction may be anti-competitive. If there is a "second request," the closing may be substantially delayed or the acquirer may be required to divest itself of certain assets to obtain approval for the transaction.
- ***Securities filings***. If any part of the consideration being paid in the transaction consists of securities, the acquirer will need to comply with the registration requirements under both federal and state securities laws. The method of compliance which is least expensive to the acquirer is to structure the issuance to fall within an available exemption, if any, from registration under the federal securities laws; however, this typically results in restricted or "lettered" stock being issued, which is of the least value to the owners of the business being acquired. If the acquirer can structure the issuance to fall within either the accredited investor or private offering, the exemption can avoid filings under state securities or "blue sky" laws. In order for the securities issued as consideration not to be restricted or "lettered," the acquirer will need to register the issuance with the Securities and Exchange Commission. The expense of a registration is substantially more than the expense of an exemption, if available. Another possible method is to invoke a fairness hearing under an applicable state securities or blue sky law and rely on a related exemption under section 3(a)(10) of the Securities Act of 1933. Unlike the other exemptions or the registration process, which focus solely on whether there is adequate disclosure, a fairness hearing requires a substantive determination as to the fairness of the transactions in addition to the adequacy of disclosure. In absence of registration or a 3(a)(10) exemption, the business being acquired will likely want to negotiate for registration rights as one of its fundamental business terms.

Director Authorizations and Shareholder Approvals

Board of the business being acquired. Generally, unless the transactions are structured as an offer to the shareholders or other owners of the business being acquired, the acquired business' board of directors, shareholders and other owners are required to approve the transaction. Typically, the acquired entity's board must authorize the definitive agreement before it is executed and often, if there is much intervening time or any material intervening event, the board will authorize going forward with the transaction immediately prior to the closing. A board of directors has a fiduciary obligation to try to negotiate the best deal for its shareholders. The board has a fiduciary duty under most state laws to exercise the skill and prudence customary under the circumstance in a manner believed to be in the best interest of the entity. Accordingly, the board will want to assure that due diligence has been done. It will usually delegate this to management and oversee management's investigation and reports. Often, the board is required by state law or federal securities laws to determine that the transaction is fair to the acquired entity's shareholders. A board will often consult an investment banker for its opinion regarding the "fairness" of the proposed transaction.

Shareholders of the business being acquired. If the transactions are structured as an offer to the shareholders or other owners of the business being acquired, then each shareholder or owner has its own, separate decision whether or not to sell. This is often referred to as a "tender offer." Typically, any other disposition, whether in the form of a merger of a sale of assets and even a sale of the stock of a subsidiary, requires approval of the acquired business' shareholders or other owners. Sometimes a supra-majority vote of the shareholders is required. Obtaining shareholder or other owner approval requires detailed disclosure to shareholders in the form of a proxy statement.

Board of the acquirer. Unless the acquisition is *de minimis*, the acquirer's board must authorize the definitive agree-

ment. If a vote of the acquirer's shareholders or other owners is required, or if there is much intervening time or any material intervening event, the board may subsequently authorize the transaction before it is closed.

Shareholders of the acquirer. In absence of a merger directly into the acquirer (which is infrequent except for a merger of equals) or an issuance of a substantial consideration amounting to substantially all of the assets or a substantial amount of equity, approval of the acquirer's shareholders is often not required.

Closing

The closing generally takes place at the offices of legal counsel to facilitate last minute document changes. The closing consists of the execution and delivery of the definitive agreement and all ancillary agreements and documents, as well as delivery of the consideration for the transaction.

Post-Closing Restrictions

A number of rules must be observed following the closing, including:

- ***Rule 145 resale restrictions***. In any transaction, in which the consideration is shares or securities, persons who are "affiliates" within the meaning of federal securities after the transaction may only resell their securities in compliance with Rule 144. Rule 144 generally requires that the issuer make available information to the public regarding the securities and that the securities may be resold only in unsolicited brokers' transactions subject to volume limitations.
- ***Pooling lockups***. For transactions designated as "pooling" for accounting purposes, affiliates of both the acquirer and the acquired business may not sell or resell securities for a lockup period, which begins 30 days before the closing of the transaction and lasts until at least 30 days of combined post-closing financial results are published.
- ***Federal tax continuity of interest rules***. For transactions structured as a tax-free reorganization for federal income tax purposes, the holders who received acquirer securities in the transaction must continue to maintain their interest in at least a majority of the securities issued.
- ***Rule 16(b) limitations***. The transaction will be treated as a "purchase" for Section 16(b) under the Securities Exchange Act of 1934 for affiliates of the acquiring business who become officers, directors, or 10-percent shareholders of an acquirer with publicly traded securities. As a result, these affiliates may not sell the securities received for at least six months after the closing because an earlier sale will require them to disgorge any profit on the sale.

Conclusion

Recent trends in business have turned toward mergers or acquisitions, as the most likely for obtaining liquidity for the acquired business' owners. The most successful mergers and acquisitions begin with planning and protecting and require an early understanding of the fundamental business terms. To assure all of this as well as a process that works smoothly, any business seeking to make an acquisition or to be acquired should involve its legal counsel, auditing firm, and business broker or investment banker early in the process.

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