

20 Considerations

Preparing for an M&A Transaction

1. **PURCHASE PRICE.** What will the total purchase price be (including value of assumed indebtedness and other liabilities of target)?
2. **CONSIDERATION.** What type of consideration will be paid (e.g., cash, stock, seller financing)?
3. **STOCK AS PURCHASE PRICE.** If stock is to be received in the deal, will it be registered/freely tradeable? If not, the parties will need to find a Securities Act exemption for the issuance, and the stock may not be liquid (consider post-closing registration rights agreements).
4. **ADJUSTMENTS TO PURCHASE PRICE.** Will the purchase price be subject to adjustment based on one or more closing date financial metrics (e.g., working capital, net assets, balance sheet, trailing revenues or EBITDA, etc.)?
5. **EARN-OUTS.** If an “earn-out” (i.e., post-closing, performance-based contingent payments) will be part of the purchase price, what are the details? If an “earn-out” is involved, consider whether covenants favoring the seller will be needed that would give protections with respect to operations of acquired business during the earn-out period. Earn-outs are a frequent source of litigation after closing.
6. **LIQUIDATION PREFERENCES.** For venture-backed companies, understand how the purchase price (including escrow and contingent payments) will be allocated among stockholders based on preferred liquidation preference provisions. If common stock is “under water”, consider how to incentivize common stockholders and/or management.
7. **STOCK OPTIONS.** How will the target’s stock options be treated in the transaction? Does assumption of stock options count against the total purchase price? Do stock options have vesting acceleration provisions? Will the buyer need to reincentivize target employees?
8. **TAX.** Will the transaction be taxable (and if so, at what rates) or can it be structured in a tax-deferred manner? Also consider carryover of target tax attributes such as asset basis and NOLs, and whether a “338(h)(10)” election might be made to step up target’s asset basis. Early, effective tax planning is a necessity.
9. **ESCROW.** What are the post-closing indemnification escrow or holdback arrangements (e.g., % of consideration to be held, duration of obligations)? Which seller constituencies should fund the escrow/holdback?
10. **INDEMNITY LIMITS.** Will there be any limitations on post-closing indemnification obligations (e.g., dollar limit (“cap”), basket (“deductible” vs. “threshold”), survival period)?



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11. **EMPLOYMENT ISSUES.** Will the buyer require noncompete agreements from sellers and/or key employees; will the buyer or target key employees require employment agreements post-closing? If restructurings are contemplated, counsel should be consulted early in the process
12. **“PARACHUTE PAYMENTS”.** Consider whether there may be any 280G “parachute payment” tax issues for change-of-control related payments.
13. **APPROVALS.** What third-party approvals will be needed to consummate the transaction (e.g., Board of Directors, stockholders (including preferred stock veto rights), lenders, anti-assignment and change of control clauses in key contracts, appraisal/dissenter issues)? Who will have leverage, and who will try to use it?
14. **GETTING TO CLOSING.** What certainty is there that once a deal is signed, the parties will be able to complete it? Look closely at conditions to closing (e.g., accuracy of representations, financing contingencies (including ability of buyer to arrange necessary financing), material adverse change (“MAC”), stockholder approvals, regulatory approvals).
15. **FEES.** Who bears the target’s transaction costs (e.g., legal, accounting, broker)?
16. **DUE DILIGENCE.** What level of due diligence is expected? The seller will want to engage in due diligence on the buyer if the purchase price involves stock.
17. **DEAL-PROTECTION MEASURES.** Will the buyer require any deal-protection measures (e.g., break-up fees, voting agreements, no-shops)? If the buyer insists on moving quickly, should the target require a post-signing “go-shop” provision? Consider fiduciary duties of the seller’s Board of Directors.
18. **REGULATORY APPROVALS.** Will the transaction require DOJ/FTC antitrust approval (Hart-Scott-Rodino) or other regulatory approvals (e.g., SEC, FCC, agencies)? If government contracts are involved, consider whether novation rules apply.
19. **CONSOLIDATION ISSUES.** Understand the costs of combining the enterprises (e.g., employee terminations, severance issues, continuation of benefit plans, office closures, vendor relationships, etc.); who should bear these costs?
20. **INVESTMENT BANKERS.** Should an investment banker be involved (e.g., auction/market canvass, fairness opinion)?

This fact sheet is intended as a general introduction to the transaction process and is not intended to provide legal advice as to any specific transaction; it will not be deemed to create an attorney/client relationship between Cooley LLP and the reader and you may not rely upon any of the statements contained herein for purposes of any specific transaction. Each transaction is unique, and will involve complex legal issues that can only be properly analyzed by an attorney who is retained by you to provide you with legal advice specific to the facts and circumstances pertaining to that transaction.

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