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Acquisition Agreement – What's Important

Acquisition agreements are long and often complex documents, and while nothing in a legally binding document for the purchase and sale of a business can ever be dismissed as unimportant, some provisions require more attention than they are sometimes given. For example, indemnification provisions can be difficult to read and are often inaccurately described as "standard." However, taking this approach will likely lead to unexpected and damaging post-closing repercussions. Closing conditions can appear to be deceptively simple, but failing to carefully consider all possible outcomes and their consequences can literally mean the difference between a transaction that closes and one that does not. Finally, purchase agreement schedules, especially those relating to representations and warranties, are often treated as a transaction stepchild, relegated to junior attorneys working with inexperienced clients. In fact, the information contained in the schedules is the heart of the purchase agreement.

Negotiation Dynamics: Keys to a Successful Deal. Dealbreakers?

The keys to successful negotiation lie in preparation, transparency, and flexibility. Both parties need to enter the process with a clear understanding of their goals and deal-breaker issues. Establishing trust early, through open communication and realistic expectations, can help lay the groundwork for compromise.

It is also critically important to engage advisors who can tactfully advocate while at the same time preserving the relationship between the parties. Common dealbreakers include valuation gaps, unresolved liabilities, cultural incompatibility, and rigid post-closing terms. Early identification and candid discussion of these issues can prevent wasted time and failed transactions.

What Makes a Successful M&A Transaction

Successful M&A transactions require more than just financial alignment. They hinge on strategic fit, cultural compatibility, and execution discipline. Clear communication, early integration planning, and realistic synergy assessments drive post-deal value. Identifying and addressing third-party issues at the outset of a transaction can avoid last minute disasters. Finally, engaging experienced advisors and maintaining trust among stakeholders, especially employees, can ensure smoother transitions and minimize disruptions.

Areas of Concern & How to Address Them

M&A transactions present many areas of concern that require proactive identification and strategic mitigation. Financial risks top the list, including hidden liabilities, overstated revenues, and deteriorating cash flows that may not surface until after closing. These demand comprehensive financial review, including third-party quality of earnings reports, and detailed representations and warranties in the purchase agreement. Other areas of concern include unresolved litigation, unclear intellectual property ownership, employee retention risks, and cultural misalignment. To address them, sellers should conduct thorough internal due diligence before going to market and, where possible, resolve outstanding disputes, properly document intellectual property ownership, and implement compensation programs with financial incentives that motivate key employees to remain with the business after a sale. Buyers should develop integration plans early on. Transparent documentation, proactive issue-spotting, and open communication reduce risk and foster confidence between parties. The importance of buyer due diligence cannot be overstated.

You Have Been Approached to Sell: What Now?

If approached with an acquisition offer, the first step of a potential seller is to engage trusted legal and financial advisors to assess the proposal. The advisors will then lead the seller through a confidential internal review of the company's financials, operations, and key contracts. Understanding seller valuation baselines and objectives, helps lead to successful negotiations. Importantly, sellers should not rush the process. They must take their time to evaluate strategic implications, employee, customer, and vendor impacts, and alternative options. A well-prepared seller that has taken the steps to prepare for an exit, and has taken these steps well before being presented with a proposed term sheet, is far more likely to achieve favorable terms.