Doing a Deal from the Inside Out

Preparing a Deal from the Seller's Perspective

Second in a Series

By B. Scott Burton

The first article in this series emphasized the need to build an integrated buy-side team of outside and inside counsel early on in a transaction to

- Ensure that adequate and knowledgeable resources are "at the ready" during the transaction process;
- Allow team members to develop their individual roles in the collaborative mission;
- Advise the client with respect to structuring the transaction in accordance with strategic imperatives; and
- Ensure that the client is nimble enough to execute as much of the transaction as possible on the terms.

These needs are even more pronounced when the client intends to engage in sale transactions. Advance planning by the seller gives substantial advantage in managing the sale process and concluding a successful negotiation. Effective collaboration between inside and outside counsel can be a tremendous asset in this endeavor.

Early Preparation and Education

Preparing for the sale of a business or business unit entails a plethora of legal issues that are best identified and dealt with up front. However, because many clients underestimate the scope of the lawyer's job in successfully completing a transaction, lawyers often are brought in late in the process. Alas, many think of the lawyer's job as "papering the deal" after the parties have settled the financial and other basic terms (and sometimes even after confidentiality agreements, banker engagement letters or letters of intent have been executed). By waiting to engage lawyers until these key terms have been decided, the seller forgoes a valuable opportunity to shape the transaction.

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So how does one "prepare to prepare" and educate the internal business client about the role of counsel in the sale process? Unfortunately, there are few shortcuts. The good news is that inside counsel usually can be successful in educating the business client by presenting an internal seminar. Many outside counsel will assist (often at no charge) in presenting seminars for the internal lawyers and business leaders on the nuts and bolts of the mergers and acquisitions process. A successful seminar benefits all involved:

- Inside counsel gains more detailed knowledge about deals and the capabilities of outside counsel;
- Outside counsel learns more about the client's business and the personalities populating the business;
- Business leaders are provided with an educational opportunity on transaction issues;
- Inside and outside counsel demonstrate to the business client that they are invested in the client's success; and
- Inside and outside counsel are given an early exercise in collaboration.

Transaction Mapping

Once a decision to sell a business has been made, the successful marketing and eventual sale of that business will, in large part, turn on the structure of the transaction and available information about the business to be sold. Thoughtful inside/outside counsel collaboration can be critical to produce a superior effort. Outside counsel brings experience with similar transactions to mapping out the structure of the proposed sale, identifying issues with respect to such structures and assisting in developing solutions, identifying tasks and providing resources to complete those tasks that are not handled in-house. Concurrently, inside counsel excels at monitoring compliance with the business goals and identifying precedent transactions.

Together, inside and outside counsel can work to plan and identify the structure of the proposed sale, the attributes of the sales process that will influence the seller during the process, the internal resources that will be impacted (for example, human resources, information technology, sourcing), the expected timing, and steps to closing. Working in concert, a viable transaction map can be designed to assist management in both executing the deal process and in setting expectations for other constituencies such as the board of directors.

Additional Areas of Collaboration

To increase efficiency, deal management and knowledge management, inside and outside counsel should consider working together on the actions listed below.

- Work out the terms of confidentiality agreements and proposed responses to buyers. Issues to be discussed may include: what is considered confidential information; how long the protections should last; if there should be employee solicitation restrictions and, if so, what should those terms be; and how should the buyer's advisors be covered.
- Negotiate the terms of various engagement letters for investment bankers, accountants and other advisors.
- Put in place retention packages for key personnel in the target or the seller.
- Review "deal books" and other materials prepared to market the target for accuracy and potential legal issues (e.g., issues that could impact any antitrust concerns).
- Prepare and review materials to keep the board and/or other constituencies.
- Negotiate the transaction agreements, and the schedules, exhibits, etc., that are necessary in connection with these agreements.

Presale Self-Diligence

In this author's view, few things are as crucial to the seller as comprehensive sell-side due diligence. Nothing evaporates a seller's leverage and credibility than a "surprise" discovered by the potential buyer. Such information may influence transaction structure, and negative information can significantly erode economic value and waste resources. It is axiomatic that the more the seller knows about the target being sold, the greater advantage the seller possesses. Nevertheless, data rooms often become depositories of information that many sellers first review at the same time as potential buyers. It can be difficult to convince a client to incur the time and expense of a pre-review. But if counsel has previously discussed this issue with the client (perhaps in an internal seminar as discussed above), the client can make an educated decision about data review.

The seller self-assessment process is an exercise where the value of an effective collaboration between inside and outside counsel will almost certainly be realized. When properly executed, this process

- Provides a detailed assessment of the target's condition.
- Diagnoses and corrects problems that can be readily cured.
- Assesses problems that are not readily cured that may be discovered and be of significance to the potential purchaser. (Often, even if a particular issue is not easily remedied, assessing it early and proposing possible solutions for the buyer preempts future areas of potential friction and preserves the seller's credibility.)

- Allows for possible changes in the transaction structure, when compelled by the findings, before such items interrupt the negotiations with a buyer.
- Identifies personnel, contractual relationships, assets or processes that may be crucial to the target or that need to be retained by the buyer post closing.
- Provides an assessment of the services needed and the resources that may be required to provide those services in cases where transition services, integration services or other post-closing relationships with the buyer will continue after closing.

The self-assessment process and (presumably concurrent) transaction structure efforts act as simultaneous equations to produce a successful deal formula. The self-assessment process maximizes the collective efforts of counsel by melding the abundant resources and industry-specific deal experience provided by outside counsel with inside counsel's deep knowledge of the selling organization, the target, the business goals and importantly, the people accountable for those business goals. From the seller's perspective, effective self-assessment collaboration provides a foundation on which to build a strong deal negotiation and execution team. With the organizational knowledge and tactical issues provided by the process, the seller's team can effectively put the target in the best light and be prepared for battle with the buyer.

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Controlling the Process

The seller's process is a huge undertaking for an entire business. However, assuming a situation where the bid for the target is not a sudden pressurized initiative by an uninvited buyer, the seller can control the process, at least at the early stages. Undertaking efforts to maximize collaboration at the earliest stages maximizes the chances for the seller's success. In essence, early collaboration becomes an important practice and preparation for the "big game."

The next article in this series will discuss the tricks and traps of transition services.

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