

Morgan Lewis

together

M&A Basics:
Pension, Savings, and Welfare Plan Issues

Webinar 2 of 3

Presenters:

Althea Day

Matthew Hawes

Randall McGeorge

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Topics to Be Covered

- M&A 101 Review
- Diligence
- Acquisition Agreement Considerations
- Defined Benefit Plan/Multiemployer Plan Considerations
- Pre- and Post-Closing Actions and Considerations

M&A 101 Review: Types of Transactions and Other Preliminary Considerations

Preliminary Considerations

- Who has the leverage?
 - Competitive bid
 - Purchaser is the only game in town
 - Limited exclusivity arrangement
- Precedential considerations
 - Forms of diligence memo
 - Purchase agreement language
- Timing issues and cost considerations

Types of Transactions

- Stock Deal
 - Entire entity
 - Acquisition of subsidiary of larger ongoing entity
- Asset Deal
 - Business deal with respect to employees and benefits

Which Side of the Transaction?

- Buyer
 - Public company
 - Private company
 - Private equity firm
- Seller
 - Public company
 - Private company
 - Private equity firm
- Merger of Equals/Joint Venture

Diligence

Diligence

- Types of Plans (Relating to the Focus of This Presentation)
 - Defined Contribution Tax-Qualified Retirement Plans
 - Multiemployer Pension Plans and Defined Benefit Plans
 - Health and Welfare Plans
 - *Retiree Medical*
 - *Payroll Practices (e.g., accrued vacation)*
- Other Plans (Beyond the Scope of This Presentation)
 - Nonqualified Plans
 - Equity Compensation Plans and Award Agreements
 - Employment Agreements/Severance Agreements
 - Change in Control Arrangements

Diligence (cont'd)

- Plan Documents
 - Amendments
- Trust Agreement
- Summary Plan Description (SPD)
 - Summary Material Modification
- Most Recent IRS Favorable Determination Letter
- Third-Party Agreements
- Actuarial Reports and Withdrawal Liability Estimates

Diligence (cont'd)

- Forms 5500
- IRS/DOL Audit Letters
- Corrections Under EPCRS
 - Self-Correction
 - VCP
- Collective Bargaining Agreements
- Board/Committee Resolutions Relating to Plans
- Employee Manuals/Handbooks

Diligence (cont'd)

- Types of Employees
 - Any Union Employees
 - Leased Employees
- Locations
- Foreign Employees
 - Foreign Plans

Diligence (cont'd)

- Individually Designed Plans
- Prototype
 - Standardized
 - *Eligibility issue for control group*
 - Nonstandardized

Diligence (cont'd)

- Employer Stock Considerations
 - Stock-drop litigation and risks associated therewith
 - Voting issues in connection with the transaction
 - Target owned by ESOP
- Health Plan Considerations
 - Affordable Care Act compliance
 - Form 5500 for “each” health plan/“wrap” plan considerations
 - “Plan” documentation and SPD requirements
 - Compliance with COBRA – controlled group liability

Acquisition Agreement Considerations

Representations and Warranties

- List of Plans
- Disclosure of Material Documents
- Compliance with Law, ERISA, the Code, and Plan Terms
- Status of Current Favorable Determination Letter
- No Loss of Tax Exemption
- Correction Programs: EPCRS or DOL VFCP
- COBRA, ACA, and Health Plan Issues
- Funded Status of Nonqualified Retirement Plans
- Plans May Be Amended Freely

Representations and Warranties (cont'd)

- No Late Payments
- No Prohibited Transactions/Breach of Fiduciary Duties
- No Participant Claims (other than ordinary course)
- No Governmental Audits
- Proper Characterization of Contingent Workers
- Disclosure of Change of Control Triggers
- No 280G Issues
- 409A Compliance
- Options All Granted at Fair Market Value/No Backdating
- No Company Stock

Representations and Warranties (cont'd)

- Less Fulsome Representations in Asset Purchases
- ERISA Affiliates
- Foreign Plans
- Special Representations for Defined Benefit and Multiemployer Plans (discussed in separate topic)
- Materiality, Knowledge Qualifiers
 - Notice to buyer of known liabilities
 - Allocation of all financial responsibility

Covenants

- Continuation/Assumption of Plans
 - Termination of plans
 - Merger of plans
 - Third-party agreements
- Replication of Plans and Benefits
- Hiring of Employees
- Assumption Provisions for Nonqualified Plans, Retiree Medical Plans, and Cafeteria Plans

Covenants (cont'd)

- Eligibility for Buyer Plans
- Credit for Service with Seller
- Credit for Deductibles and Co-pays
- Responsibility for COBRA
- Termination of Seller Plans
- Asset Deal – Exclusion of Specified Liabilities
- No Third-Party Beneficiaries
- Buyer Free to Amend Plans/Terminate Employees
- Tax-Qualified Plan Contributions

Defined Benefit Plan/ Multiemployer Plan Considerations

Defined Benefit Plans Due Diligence Issues

- Key Diligence Issue: Funded Status of the Plan
- Controlled Group Liability
- Plan Funding, Annual Contribution, and Termination Issues
- Liability to the PBGC/Payment of Premiums
- Transactions with Purpose to Evade Liability
- Reportable Events
- Potential Purchase Price Adjustment?

Defined Benefit Plan Purchase Agreement Considerations

- Representations and Warranties
 - All required contributions timely made
 - No unreported reportable events
 - Value of plan assets compared to liabilities (consider termination vs. ongoing basis)
 - No liability triggered in connection with the transaction
- Covenants: Responsibility for Unfunded Liabilities?
 - Buyer assumes plan and all liabilities
 - Buyer assumes only assets and liabilities for transferring employees
 - Buyer makes no commitments with respect to defined benefit plans

Multiemployer Plan Basics

- Sponsored and Maintained by Union
- Collective Bargaining Agreement Sets Employer Contribution Obligation
- Potential Major Issues:
 - Withdrawal liability
 - Controlled group liability
 - Escalating costs due to funding requirements
- Sale of Asset Exception
- Potential Successor Liability

Multiemployer Plan Withdrawal Liability

- General Rules
- Sale of Asset Exception
 - Buyer's obligation to contribute substantially the same as Seller
 - Buyer must post a bond equal to Seller's contribution
 - Buyer picks up five-year contribution history of Seller
 - Seller must agree to be secondarily liable if Buyer withdraws
- Successor Liability

Multiemployer Plan Due Diligence Considerations

- Collective Bargaining Agreements
- Contribution History
- Withdrawal Liability Estimates
- Funding Reports
- Correspondence from Multiemployer Fund

Multiemployer Plan Purchase Agreement Considerations

- Representations and Warranties
 - Complete list of applicable multiemployer plans
 - Contingent withdrawal liabilities do not exist or exceed specific dollar thresholds
 - Timely contributions to all multiemployer plans
- Post-Closing Covenants Relating to 4204
 - Buyer obligated to timely notify fund and satisfy bonding requirements or an exception thereto
- Purchase Price Adjustments?

Pre- and Post-Closing Actions and Considerations

Pre- and Post-Closing Considerations

- Seller Considerations
 - Transition Services – Continued Benefit Plan Participation
 - Transfer of Seller Plans
 - Transfer of Seller Plan Assets
 - Partial Termination of Seller Plans
 - Full Vesting
 - Determination Letter Filing
 - COBRA Event Considerations/Obligations

Pre- and Post-Closing Considerations (cont'd)

- Buyer Considerations
 - Employee Communication
 - Enrollment in Buyer Plans
 - Drafting of New Plan Documents
 - Satisfy Any Applicable “Comparability” Standard from Purchase Agreement
 - *Substantially similar in the aggregate*
 - *Substantially similar to similarly situated employees*

Pre- and Post-Closing Considerations (cont'd)

- Buyer Considerations (cont'd)

- Plan Amendments

- *Participation*
 - *Service credit*
 - *Loan rollover*
 - *Merge plans*
 - *Freeze plans*
 - *Terminate plans*

- Service Provider Agreements

Pre- and Post-Closing Considerations (cont'd)

- Other Legal Considerations
 - Determination Letter Filing
 - Compliance Issues
 - *Whether to correct*
 - *EPCRS*
 - *VCP*

Pre- and Post-Closing Considerations (cont'd)

- Other Legal Considerations (cont'd)
 - Notice Obligations
 - *General employee notice*
 - *PBGC*
 - *Termination (notice to interested parties)*
 - Anticutback Rules
 - Nondiscrimination Issues

Questions?

Upcoming Webinar

Join us for the next webinar in our M&A Basics series:

Equity Compensation Plans

February 26, 2015 | 12–1 pm ET

Register at <https://morganlewis.webex.com/>

Presenters

Althea R. Day

Partner, Washington, DC

+1.202.739.5366

aday@morganlewis.com

Matthew H. Hawes

Associate, Pittsburgh

+1.412.560.7740

mhawes@morganlewis.com

Randall C. McGeorge

Of Counsel, Pittsburgh

+1.412.560.7410

rmcgeorge@morganlewis.com

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