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## Getting M&A Deals Done: Legal Risks and Effective Strategies

Managing Changes and Mitigating Risks Between Signing the Acquisition Agreement and Closing

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THURSDAY, AUGUST 8, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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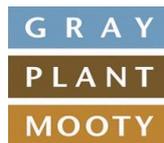
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# Getting the Deal Done: Managing Issues Between Signing and Closing

Mark D. Williamson



B. Scott Burton



August 8, 2013

# Agenda

- Deferred Closings
- Changes in the Business between Signing and Closing
- Satisfying Closing Conditions
- Third Party Consents
- Transitioning Employees
- Terminating the Agreement
- Closing the Deal
- Q&A

# Deferred Closings

- Simultaneous Signing and Closing vs. Deferred Closing
- Why Deferred Closings?
  - Regulatory approvals/HSR
  - Stockholder approval
  - Securities and Exchange Commission filings
  - Third party consents
  - Financing
  - Integration issues
  - Complex closing mechanics

# Deferred Closings

- **Risks with Deferred Closings**

- More complex acquisition agreement – must include closing conditions, pre-closing covenants, termination provisions
- Changes in the business between signing and closing
- Inability to obtain approvals and consents

- **Benefits of Deferred Closings**

- Reduces risk of prematurely “going public” about transaction
- May increase likelihood of closing
- May give additional time for integration of target

# Changes in the Business between Signing and Closing

- Risk of Loss
  - As practical matter, buyer usually assumes more of the risk
  - Can allocate risk through purchase agreement
- Risk Allocation Provisions
  - “Material Adverse Effects” clause
  - Purchase price adjustment
  - Representations and warranties
  - Covenants
    - Interim operating covenants
  - Closing conditions
  - Indemnification rights
  - Termination rights

# Changes in the Business between Signing and Closing

- Material Adverse Effect (“MAE”)
  - Use
    - As a condition to closing
    - As a qualifier to representations and warranties
  - Very high standard
    - Offers little protection to the buyer
  - Definition of MAE often subject to heavy negotiation
    - “Could have” vs. “would have”
    - “Prospects”?
    - Carve-outs?
    - Specific financial milestones?
  - “Scraping” the MAE for indemnification? For bring down?

# Changes in the Business between Signing and Closing

- Representations and Warranties
  - Updating disclosure schedules
    - Amends schedule or not?
    - Undisclosed pre-closing matter vs. new event
  - Impact upon indemnification claims
- Inventory Inspection/Other Due Diligence
  - Access to the business
  - Access to the buyer

# Changes in the Business between Signing and Closing

- Purchase Price Adjustments
  - Working capital
  - Cash or debt adjustments
  - Accounts receivable collectability
- Impact of Interim Operating Covenants
  - Issues for seller
  - Issues for buyer
  - Integration and gun jumping
  - Remedies for breach

# Changes in the Business between Signing and Closing

- **Seller Discovery of Breach**
  - Magnitude of breach
  - Contractual obligation to disclose
  - Practical decision to disclose vs. not disclose
  - Buyer's potential response
  - Termination right
  - Ability to cure
- **Buyer Discovery of Breach**
  - Anti-sandbagging provisions/laws
  - Negotiating "Knowledge" definition

# Changes in the Business between Signing and Closing

- **Benefits/Risks of Non-disclosure – for Seller**
  - Potential benefit – preservation of transaction price
  - Potential benefit – may never be discovered
  - Risk – increase liability for intentional breach
  - Risk – personal liability for officers
  - Risk – buyer discovers breach directly
- **Benefits/Risks of Disclosure – for Seller**
  - Benefit – maintain integrity, build credibility
  - Potential benefit – ability to insist on waiver of breach at closing
  - Potential benefit – contractual/implicit waiver of breach
  - Risk – buyer exercises right to terminate agreement
  - Risk – buyer renegotiates agreement, including reduction of purchase price

# Satisfying Closing Conditions

- Absolute vs. “Best Efforts” Covenants
- Bring-down of Representations and Warranties
  - Standard
  - Double materiality
- Delivery of Consents/Approvals
  - Governmental and third party
  - Shareholder approval
  - Securities filings/clearance
  - HSR
- Financing Contingency?
  - Consider additional financing covenants, with earlier timeline
  - Complex financing creates more risk

# Satisfying Closing Conditions

- Waiver of Closing Conditions
  - Express
  - Implied
- Bills of Sale, Assignments, Other Transfer Documentation
- Closing Certificates
- Legal Opinions
  - What do they really do?
  - What are the risks?
  - Does anyone get them anymore?
- Amendments to Purchase Agreement

# Satisfying Closing Conditions

- **Ancillary Agreements**
  - Negotiation and drafting
  - Exhibits
- **Transition Services Agreement**
  - Term sheet at signing versus full agreement
  - Integration plans
  - Consider reverse transition services
- **Other Relationship Agreements**
  - Joint ventures with sellers
  - Supply/distribution agreements
  - IP licenses
- **Use of Side Letters**

# Third Party Consents

- **Best Practices for Obtaining Consents**
  - Minimize number of third party consents
    - Develop list of “Required Consents”
    - Pre-deal planning
    - Deal structuring: asset vs. stock/merger
  - Identify who is responsible for obtaining consents
    - Business people/lawyers?
    - Joint/unilateral approach?
    - One party should have ultimate responsibility
  - Consents conditioned on:
    - Payment of fees
    - Renegotiation of terms/extensions
    - Minimum volume commitments
  - Form of consent
  - Active management of process
- **Confidentiality Concerns**

# Third Party Consents

- **Governmental Consents**
  - HSR
  - Gun jumping
  - Other regulatory
- **Perils of Not Obtaining Consents**
  - Is it even possible (e.g., regulatory consent)?
  - What does it mean?
    - Material consents vs. non-material consents
    - Provision that seller will keep contract/permit and assign right to buyer?
    - Transfer anyway?
  - Who bears risk?

# Transitioning Employees

- **Employment Policies**
  - Target's policies versus those of buyer
  - Integration
- **Benefits Issues**
  - Retirement plans
  - Health and welfare benefits
  - Holiday/vacation/PTO
- **Employment Agreements**
  - To lock up key personnel
  - Consider obtaining at signing, effective at closing
- **Non-competition Agreements**
  - From the seller
  - From employees
- **“Stay in Place” Bonuses**

# Terminating the Agreement

- Bases for Termination
  - Mutual consent
  - Material default or breach
  - Nonfulfillment of conditions
  - “Drop Dead” date
  - Other negotiated provisions
    - MAE
    - Due diligence
    - Financing
- What Survives Termination

# Terminating the Agreement

- Damages
  - Negotiate specific remedies for termination
  - Typically differentiate between fault or no-fault termination
  - Specific performance?
  - Consequential damages?
  - Impact of indemnification
  - Impact of exclusive remedy sections
- Use of Break-up Fees/Reverse Break-up Fees
- Deposit
- Return/Destruction of Confidential Information

# Closing the Deal

- Expedite Period between Signing and Closing
  - Avoid post-signing let down
  - Keep momentum/sense of urgency
- Use Comprehensive Closing Agenda/Checklists
  - The what, when, who and how of getting deal to close
- Use Closing Statements/Flow of Funds Memorandum
- Closing Deliveries
  - Money
  - Certificates
  - Signatures
- Complications of Closing on Other Than Month End/Beginning

# Speaker Information

## Mark D. Williamson, Principal, Gray Plant Mooty, Minneapolis, MN

- Mark practices in the areas of business, corporate, and securities law, with a focus on mergers and acquisitions. He serves as Co-Chair of the firm's Mergers & Acquisition Team and the Corporate Practice Group. He has experience representing both public and private companies and private equity funds in various corporate transactions, including mergers, acquisitions, public and private offerings, tender offers, and debt financings.

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