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Structuring Earnouts in M&A Transactions: Effective Approaches to Bridging the Valuation Gap

Drafting Provisions that Protect Buyers and Sellers and Reduce Post-Closing Disputes

THURSDAY, MAY 10, 2018

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Today's faculty features:

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Negotiating Earnouts in M&A Transactions: Effective Approaches to Bridging the Valuation Gap

May 10, 2018

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General

- An earnout is a deal pricing mechanism where a portion of the acquisition price is contingent on post-closing results of the target business
- Most commonly used in deals valued <$250 million
- Calculation relies upon defined targets or benchmarks, which may be financial and/or operational
- Benchmarks are usually one or more of revenues, NI or EBITDA
- Earnout period is typically anywhere from one to three years

General

- Used to help narrow gap when parties cannot agree on deal value
  - Rewards Seller if its projections prove accurate
  - Protects Buyers from overpaying
- Valuation gaps often arise in situations such as:
  - entrepreneurial stage companies, where entrepreneurs often have an inflated perception of value of business and limited operating history
  - companies financially dependent on new product lines or technologies that have not been proven in market
  - turnaround acquisitions
  - information is not an accurate measure of the value of business
  - hot market sectors where differences in valuation may be heightened

Earnout Trends

- Most common in life sciences, medical device and pharmaceutical deals (75%)*
- Less common, but not infrequent in other industries (23%)*
  - Earnouts in non-life sciences deals in 2017 increased significantly to 23% (from 13% in 2014), while the size (relative to the closing payment) and length of earnouts decreased. Several key earnout terms (buyer covenants, accelerations, and offsets), trended in a seller-favorable direction. This indicates that sellers were able to command higher prices at closing and better earnouts.
- Frequent in distressed/turnaround situations

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*2018 SRS|Acquiom LLC M&A Deal Terms Study;
2017 SRS | Acquiom LLC Life Sciences Study

Earnout Trends

- Payout Trends (Life Sciences only)
  - 55% of the earnout missed
  - 36% of the earnout paid
  - Remainder based on delays

Benefits to the Parties

- Buyer Benefits
  - Reduces risk of overpayment
  - Helps close a deal where value is uncertain
  - Partial financing mechanism
    - Allows Buyer to pay for acquisition out of future profits
  - Lays foundation for management performance incentives (and potentially aligns interests)
  - Mitigates risk of management fraud
  - Provides security/remedy for indemnity enforcement

Benefits to the Parties

- Seller Benefits
  - Increases probability of closing a fully valued transaction
  - Provides potential for greater consideration than could be realized in a fixed price transaction
  - In distressed situations, may be the only way to realize value for stockholders
  - Allows for exit without forfeiting ability to share in future growth of the company

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Disadvantages with Earnouts

- Time, resources and cost required to negotiate and draft effective earnout provisions, and to calculate the earnout
- Potentially conflicting goals between the parties on how business should be operated post-closing
- Potential for future disputes about the contingent payment
- Necessity of maintaining ongoing relationship between parties

Earnout Amount Metrics

- Earnout Metrics
  - Financial - Net Revenue, Net Income, EBIT, EBITDA, free cash flow
  - Non- financial product developments or other milestones
- Financial Thresholds – clear metrics are absolutely key
  - Revenue based – preferred by Sellers – OK for Buyer where operating costs are stable/fixed and thus predictable
  - Income based – preferred by Buyer, especially if Seller involved in post-closing operations
  - Key to focus on sustaining long term growth of business, so that earnout is not driving short-term cost cutting measures (quality of materials; marketing; advertising, etc.) at the expense of the long-term

Earnout Details

- Form of consideration (cash, stock, other)
- One earnout period or multiple earnout periods
- Per period or cumulative
- All or none, or graduated
  - Lump sum or sliding scale
- Floors on minimum earnout
- Caps on maximum earnout
- Handling of changes in business and contingent events
- What is security for earnout payments

Earnout Computation

- Accounting/Metrics/Information Considerations for Financial Metrics
- Buyer keeps separate books and records for business during the earnout period, and that they are available to Seller for review
- Separate audit rights
- GAAP may not be the best measure for earnout payments, since it is always in flux. Parties may want to agree on non-GAAP metrics to determine the earnout and incorporate those into the purchase agreement.
- Typical issues:
  - Exclusion of transaction expenses from calculations
  - Address non-cash items, such as heightened depreciation expenses that may arise as result of step-up in basis
  - Which overhead expenses will be allocated to the business
  - Whether executive compensation is included as a cost
  - Whether indebtedness incurred as a result of the deal should be included
  - Treatment of inter-company transactions as if at arm's length
  - Treatment of reserves and provisions for losses and bad debts

Examples of Definitional Clauses

- "Revenue" means those gross cash receipts of the Business for the applicable 12-month period (as opposed to revenue recognized on Purchaser's income statement for financial reporting purposes) including any future customers of the Business [but solely to the extent such gross cash receipts exceed $_____for that particular year]

- "Revenue" means those gross cash receipts of the Purchaser for the applicable 12-month (as opposed to revenue recognized on Purchaser's income statement for financial reporting purposes), derived from Purchaser's provision of manufacturing and production services rendered to those customers generated by the Business as the same shall be agreed to by Purchaser and Seller

Examples of Definitional Clauses

- For purposes of this Agreement, “EBITDA” of the Acquired Companies for any fiscal year shall mean their consolidated earnings from operations before interest, taxes, depreciation and amortization, calculated as if they were being operated as a single separate and independent corporation. EBITDA shall be determined in accordance with U.S. generally accepted accounting principles (GAAP) as consistently applied by Seller as determined by the firm of independent certified public accountants engaged by Buyer for purposes of its own audit (“Buyer’s Accountants”). In determining such EBITDA:
- (a) EBITDA shall be computed without regard to “extraordinary items” of gain or loss as that term shall be defined in GAAP;
- (b) EBITDA shall not include any gains, losses or profits realized from the sale of any assets other than in the ordinary course of business;
- (c) No deduction shall be made for any management fees, general overhead expenses or other intercompany charges, of whatever kind or nature, charged by Buyer to the Acquired Companies, except that Buyer may charge interest on any loans or advances made by Buyer to the Acquired Companies in connection with its business operations at a rate of %;
- (d) No deduction shall be made for legal or accounting fees and expenses arising out of this Agreement or the Purchase Agreement;
- (e) The purchase and sales prices of goods and services sold by the Acquired Companies to Buyer or its affiliates or purchased by the Acquired Companies from Buyer or its affiliates shall be adjusted to reflect the amounts that the Acquired Companies would have realized or paid if dealing with an independent party in an arm’s-length commercial transaction; and
- (f) [Include other desired adjustments to EBITDA].

Trends on Metrics

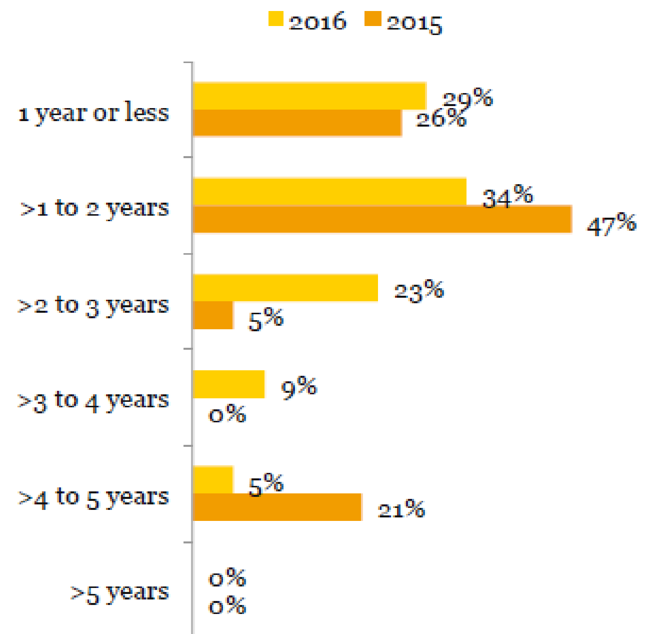
- Earnout Metrics*:
  - Revenue : 51% (74% in 2015)
  - Earnings/EBITDA: 33% (39% in 2015)
  - Other (unit sales, product launches, divestiture of assets): 39% (13% in 2015)

  - Life Sciences Deals Metrics:
    - Regulatory filing/approval
    - Initiation and successful completion of study
    - Royalty/License revenues
    - Sales – unit, cumulative and annual sales are separate metrics

*2018 SRS|Acquiom LLC M&A Deal Terms Study

Term of Earnout

- Median earnout potential as % of closing proceeds has ranged from 23% to 49% since 2011 - 2016
- Length of earnout period
  - Median: 13 months (2017)
  - Life sciences deals have longer term – 4-5 years not uncommon



*2018 SRS|Acquiom LLC M&A Deal Terms Study

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Seller Considerations

- Seller retains as much control over post-closing operations
  - Buyer guarantees use of corporate assets, budgets, hiring authority, marketing and education of sales force
  - Parties agree on a formal business plan, with targets and allocation of funds to meet those targets
  - Veto protection for major business decisions, such as incurring additional debt, expanding operations, cutting products or product lines, and hiring and firing key employees.
  - Buyer and Seller each provide appropriate incentives for key team members to be retained post closing to maximize earnout
    - Seller can implement "double trigger" acceleration on options/stock (as opposed to full "single trigger" vesting on closing
    - Buyer can provide additional incentives, such as Buyer equity, bonuses, profit sharing, etc.
    - Seller can also provide special incentives, such as a management carveout, to retain key employees post-closing
  - Buyer subject to penalties if these are not met. Penalties can be structured as liquidated damages to avoid expensive litigation.

Seller Considerations

- Seller obtains a security interest in target company
- Seller requires Buyer to put potential earn-out payments into Escrow
- Transferability of Earnout
- Reporting and Information Rights
    - Buyer to provide regular updates (1-4 times per year) , and an opportunity for sellers to discuss the update with buyer. Examples:
        - Milestone committee with 50/50 representation, quarterly meetings and formalities, including potential tie- breaking by Buyer's senior management
        - A development plan is due from Buyer to Seller representatives within X months of closing, and reasonably detailed written reports twice a year thereafter
        - Until a particular milestone is met, seller representative sits on a steering committee for non-binding advice
        - Update meetings to include named seller representatives

Examples of Clauses

- Acceleration Events. Upon the occurrence of an Acceleration Event and the Seller providing written notice of the same to the Purchaser, any of the following which remain unearned and unpaid as of the date of such notice shall become immediately due and payable…

- "Acceleration Event" means: (i) Purchaser fails to materially comply with any covenant set forth in Section 5 of this Annex I following written notice of such non-compliance (which notice shall include the Seller's basis for such claim, including specific instances of non-compliance) delivered by the Seller to Purchaser, and such non-compliance is not cured by Purchaser within a period of thirty (30) days after receipt by Purchaser of such notice; or (ii) (A) Purchaser makes an assignment for the benefit of its creditors, (B) there is commenced by or against Purchaser any proceeding relating to Purchaser under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, receivership, dissolution, or liquidation law or statute, of any jurisdiction, whether now or subsequently in effect, and such proceeding remains undismissed for a period of sixty (60) days or Purchaser by any act indicates its consent to, approval of, or acquiescence in, such proceeding, or (C) a receiver or trustee is appointed for Purchaser or for all or substantially all of its property or assets, and the receivership or trusteeship remains undischarged for a period of sixty (60) days.

- Operations. During all **Earnout** Years: (i) Purchaser shall maintain separate books and records for the Business and shall provide quarterly statements of Gross Revenue and Net Revenue, and the calculation thereof, to the Seller within sixty (60) of the end of a calendar quarter; and (ii) Purchaser shall operate the Business in good faith to maximize the revenue related to the sale of Purchaser Business Products to the extent it is commercially reasonable for the Business to do so.

Covenants

- Covenants with respect to earnouts*
  - Buyer covenant to operate business post closing in accordance with Seller's past practices (10%) (2014: 13%)
  - Buyer covenant to run business to "maximize earn-out" (6%) (2014: 20%)
  - Acceleration of earnout on change of control of earnout assets (31%) (2014: 13%)
  - Termination without cause of Seller founders/key employees
  - Life Sciences deals include covenants to continue study and use commercially reasonable or good faith efforts

*2018 SRS|Acquiom LLC M&A Deal Terms Study

Covenants

- Other provisions (less common)
  - Earnout is not a security
  - Disclaimer of fiduciary relationship

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Installment Sales, Earnouts and Escrows

Negotiating Earnouts in M&A Transactions: Effective Approaches to Bridging the Valuation Gap

May 10, 2018

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Installment Sale Basics

- Applies to gain on most forms of taxable dispositions – stock sale, asset sale, taxable mergers, stock sale with §338(h)(10) election, stock disposition with §336(e) election
- General Requirements:
  - Seller receives debt obligation from Buyer
  - Note is not payable on demand or readily tradable obligation
  - Note can be secured by a "standby letter of credit"
  - Seller must affirmatively elect-out
- Exclusions from installment sale treatment:
  - Inventory
  - Depreciation recapture income (asset sale or sale of partnership interest)
- Disposition of installment note generally triggers acceleration of deferred gain (§453B)

§453A Interest Charge/Anti-Pledging Rule

- To the extent taxpayer holds installment notes with an aggregate face amount over $5MM, interest is charged on the portion of the deferred tax liability associated with the excess over $5MM
- Interest rate is the underpayment rate at year end
- Traps for the unwary:
  - Applies to deferred tax liability as of the last day of the taxable year even if the installment sale occurred on such day
  - Percentage in excess of $5MM stays constant even if subsequent principal payments cause total to fall below $5MM
- Pledging installment note as collateral for a loan is treated as a payment triggering gain to the extent of the net loan proceeds
  - Subsequent actual payments from Buyer not taxable until such amounts equal the previous loan proceeds treated as payments; i.e., government can't double-dip.

The Tax Treatment of Earnouts

- Purchase of ongoing business (stock or asset purchase)
- Post-closing increase to purchase price based upon performance of business
- Mechanic for buyers and sellers with different expectations as to target company value to come to a common ground
  - Set base purchase price at level that buyer is comfortable it is not overpaying
  - Additional purchase price if target business achieves set milestones; gives the seller extra consideration if the business performs as seller anticipates
- Both sides may view this equally as a beneficial arrangement

The Tax Treatment of Earnouts

Installment Sale Treatment

- At most base level, earnouts can constitute simply a form of installment sale for tax purposes
- Subject to contingent proceeds provisions of installment sale rules
  - If subject to a maximum dollar amount, apply installment sale rules assuming cap will be met at earliest time; results in deferral of basis recovery; loss for remaining unrecovered basis?
  - If not subject to a dollar cap, but subject to an outside time limit, seller to recover basis ratably over fixed time period (stand-alone losses for final period)
  - If no cap and no outside time limit, question as to whether there is a true sale for tax purposes (if there is, recover basis over 15 years) (similar loss issue for outer periods)

The Tax Treatment of Earnouts

Installment Sale Treatment (cont'd)

- Taxpayer can use "income forecast" method if assets qualified for income forecast depreciation (e.g., film or television industry) or cost depletion (e.g., natural resources)
- Can seek a ruling for alternative recovery method
- Open transaction method will apply only in "rare and unusual circumstances"
- Subject to other rules applicable to installment sales generally
  - Treatment of contingencies somewhat uncertain when applying §453A interest charge rule; see TAM 9853002 and FSA 199941001.
    - See LAFA 20080101F for potential application of "look back" rule. CCA 201121020; PLR 200728039 (same)
  - Imputed interest (possibly OID if involves debt instrument)
  - Imputed interest calculated when principal payment is fixed; such fixed amount is discounted back to issue date based on AFR

The Tax Treatment of Earnouts

Installment Sale Treatment (cont'd)

  - Imputed interest generally deductible by Buyer and reduces Seller's capital gain – Seller should consider this when modeling after-tax return on investment; low AFRs make this less important of a factor
- Seller can elect out of installment sale treatment but that might not be advisable
- In an asset deal, may want to consider allocating installment sale consideration to "qualifying" assets
  - Maximize benefit of installment sale treatment
  - Authority: Monaghan v. Commissioner, 40 T.C. 680 (1963); IRS viewed this approach unfavorably in PLR 200004040
- Note: tax-deferred reorganizations with contingent proceeds such as an earnout may involve special issues; See Rev. Proc. 84-42

Escrows

- Transactions often require part of the purchase price to be placed in an escrow account to secure seller's obligation to indemnify buyer for pre-closing liabilities and breaches of representations and warranties.
- IRS has informally indicated that such arrangements generally will not invalidate use of §453 installment method; PLR 8629038; PLR 8645029; PLR 200521007; PLR 200746004; IRS Publication 537 "Installment Sales"
  - Potential issues on escrow used to fund potential earnout obligation
- Prop. Reg. §1.468B-8 addresses "contingent-at-closing escrow" and treats income generated by escrowed funds as taxable to buyer.

Escrows (cont'd)

- Escrow Agreement should address following topics:
  - Economic terms applicable to earnings on escrow funds: paid to one of the parties annually or become part of the escrow fund and paid in accordance with indemnity provisions in acquisition agreement
  - Tax reporting – who is issued the Form 1099 for earnings on escrow funds and whether the escrow agent/buyer is going to treat any portion of the escrow funds distributed to sellers as interest pursuant to the imputed interest rules discussed above
  - If buyer agrees to report earnings (in order to bolster seller's installment sale position) and earnings are to become part of the escrow fund, buyer may request a tax distribution from the earnings to cover the tax liability associated therewith

Escrows (cont'd)

- Seller may take the position that no tax distribution is needed because buyer's tax benefit associated with the imputed interest component of the escrow funds was not a "negotiated for" benefit and should approximate or exceed any tax cost associated with earnings on escrow funds

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Disputed Issues in Earnouts

May 10, 2018

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Disputed Issues

- Common Earnout Dispute Reasons
  - Disputes over post-closing accounting methodologies
    - Earnout provision does not clearly define how earnout thresholds are calculated
    - Earnout provision does not account for treatment of certain expenses and revenues
- *LaPoint v. AmeriSourceBergen Corp. (Del. Ch. 2007)*
  - Deal included two year earnout based on EBITDA targets
  - Merger Agreement required that Buyer "exclusively and actively" provide Seller's products and services, act in "good faith" during earnout period and not "impede" Seller stockholder's ability to achieve earnout.
  - Court rejects these provisions as unspecific and "aspirational" and that nothing in the agreement obligated Buyer to enter into an unprofitable transaction, which Sellers claimed would be increased likelihood of earnout

Earnout

Duty to Maximize Earnout

- *Airborne Health,Inc. and Weil, Gotshal & Manges LLP v. Squid Soap, LP, C.A. No. 4410-VCL (Del. Ch. Nov. 23, 2009)*
  - Buyer acquired business for $1M at closing and $26.5M potential earnout
  - Agreement required Buyer to return assets to Seller if it did not spend $1M on marketing and $5M in sales in first earnout year
  - After acquisition, Buyer's business suffered significant unrelated problems and earnout targets were not met
  - Seller sued Buyer for breach of merger agreement and implied covenant of good faith and fair dealing
  - Court found that Buyer cannot arbitrarily or in bad faith reduce expenses, but here actions were not in bad faith due to corporate crisis
  - Lack of express covenant to spend the $1M (as opposed to clawback) could have been drafted by the parties

Earnout

Duty to Maximize Earnout

- *Sonoran Scanners, Inc. v. Perkinelmer, Inc., No. 09-1089 (1st Cir. Oct. 29, 2009).)*
  - Court relies on 1917 Justice Cardoze opinion in *Wood v. Lucy, Lady Duff-Gordon* to hold that Buyer was bound by an implied covenant to use reasonable efforts to develop and promote the Seller’s technology that was the subject of the earnout, akin to an exclusive licensing arrangement

- Buyers may want to disclaim these obligations in the Purchase Agreement expressly
  - negate any obligation of the buyer to operate the target's business in a certain manner, such as an acknowledgement that the buyer has the right to operate the target's business as it sees fit and that it is under no obligation to cause the earnout to be achieved
  - One potential compromise may be for the buyer to agree to a provision that it will not take any action or omit to take any action with the sole intent of reducing or eliminating the earnout payment

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Earnout
Definitional Disputes

- *Instrument Industries Trust v. Danaher Corporation (20 Mass.L.Rptr.250 (2005)*
  - Dispute between Buyer and Seller over an earnout acceleration provision
  - Seller would be entitled to receive the maximum remaining earnout upon the occurrence of certain events, including if "all or any portion of the Business is merged or consolidated without Seller's consent"
  - After closing, Buyer was acquired and then later combined several lines of business with the business acquired from Seller
  - In year 3 of the earnout, when the Business did not meet its earnout targets, Seller claimed that it was entitled to the earnout acceleration on the grounds that Buyer's combination of the different businesses constituted a "merger" or "consolidation" within the meaning of the acceleration clause
  - Court disagreed, finding the language ambiguous and refusing to hold as a matter of law that the clause was triggered. While the term “Business” was defined, “merge” and “consolidated” were not, and general meaning of those words was not sufficient

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THE TAX TREATMENT OF EARNOUTS: CAPITAL GAIN VS. COMPENSATION

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THE TAX TREATMENT OF EARNOUTS: CAPITAL GAIN VS. COMPENSATION

- What are Earnouts?
  - Purchase of ongoing business (stock or asset purchase)
  - Post-closing increase to purchase price based upon performance of business
  - Mechanic for buyers and sellers with different expectations as to target company value to come to a common ground
    - Set base purchase price at level that buyer is comfortable it is not overpaying
    - Additional purchase price if target business achieves set milestones; gives the seller extra consideration if the business performs as seller anticipates
  - Both sides may view this equally as a beneficial arrangement

EARNOUTS: CAPITAL GAIN VS. COMPENSATION

- Purchase Price vs. Compensation for Services
  - Earnouts can blur the lines between purchase price and payments for services
  - Can be a way to effectively tie seller to remain with company post closing
    - Even if not required to remain employed, realistic expectation may be that targets will only be hit if seller remains active
    - Likely not enough to cause compensation treatment, but may be a concern if have only a single seller/employee
  - Compensation issue arises most often when seller is required to remain employed during earnout period in order to receive payment
    - See Lane Processing Trust, CA-8, 25 F.3d 662 (1994)

EARNOUTS: CAPITAL GAIN VS. COMPENSATION

- Purchase Price vs. Compensation for Services (cont'd)
  - If seller is required to remain employed in order to receive earnout (even if targets are met), should raise concern that may be compensation
    - Higher tax rate to seller; payroll taxes; withholding/reporting
    - Current deduction for buyer/target
  - If there are other non-employee sellers who will receive the earnout regardless, may be evidence that is not compensatory
  - Is the payment of the earnout proportional to target ownership, or some other standard?
  - Is the employee adequately compensated for his/her services?
  - Can a target valuation support treatment as purchase price?

EARNOUTS: CAPITAL GAIN VS. COMPENSATION

- Purchase Price vs. Compensation for Services (cont'd)
  - No clear answers here, but is an issue that must be addressed
  - Buyers will generally want to be conservative to avoid potential penalties for failure to report/withhold
    - Make sure agreement provides buyer with the right to withhold
    - Benefit of immediate deduction to buyer may support increase to overall consideration to make seller whole
  - Generally best to have sellers and buyers agree to treatment, to avoid inconsistencies

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