



SALE OF THE BUSINESS: LEGAL ISSUES FROM THE SELLER'S SIDE

E. Scot Dixon

Thomas J. McCaffrey

Arthur M. Nathan

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Setting precedent.

PURCHASER'S REASONS FOR ACQUIRING A BUSINESS

Financial Reasons

Non-Financial Reasons

FINANCIAL REASONS

- To avoid internal development risks/expense
- To acquire fixed assets; to avoid start up expenses in a new field or industry
- To effect more rapid growth
- To improve profit levels
- To increase the market value of its stock

Financial Reasons (Cont'd)

- To qualify for certain contracts
- To take advantage of a target corporation's tax attributes

NON-FINANCIAL REASONS

- To change the direction of its business
- To diversify in order to enter new or more profitable businesses
- To expand or change its product or service line
- To effect a minimum market penetration; obtaining an established customer base

Non-Financial Reasons (Cont'd)

- To improve research & development capabilities
- To achieve economies of scale by combining complementary businesses
- To utilize or secure talented management
- To expand vertically, e.g., by protecting a source of raw materials or by assuring outlets of finished products

Non-Financial Reasons (Cont'd)

- To utilize or secure facilities or manufacturing capabilities
- As a defensive move to block potential competitors from entering a market
- To obtain intellectual property protection
- To obtain special skills

SELLER'S REASONS FOR SELLING

- Personal reasons
- Business reasons

Personal Reasons For Selling

- Owners may want to retire
- Owners may desire liquid assets or may wish to diversify for financial or estate planning purposes
- Owners may dislike each other or disagree about future operations of business
- Owners may have concern about their ability to compete or future direction of business

Business Reasons For Selling

- Need for additional financing which business cannot obtain on its own
- Need for better or additional management to lead in the future
- Inability to meet competition

OVERCOMING THE SELLER'S SECOND THOUGHTS ABOUT SELLING

- This is the Seller's "Baby"
- Non-economic problems and issues
- What are the psychological and emotional issues

5 QUESTIONS FOR BUYERS

- Can the Buyer make a significant contribution to the Seller's Business? Management, technology, marketing?
- What experience or expertise do the Buyer and Seller have in common?
- Will the Buyer's managers be comfortable with the target's business arrangements? Products? Markets? Customers?

5 Questions for Buyers (Cont'd)

- Does the target need additional management and will the Buyer be able to provide it? (1 to 2 years after acquisition?)
- Will the management of target be given sufficient opportunities for advancement?

ACQUISITION STRATEGY FOR SELLER

- What are the Seller's strong and weak points?
- Formulate written criteria to determine if a prospective buyer is suitable.

EVALUATING THE POTENTIAL BUYER

- Why this buyer instead of another buyer?
- What is the buyer's financial condition and outlook?
- Why is the buyer interested in the acquisition?
- In prior transactions, how has the buyer done in integrating the acquisitions?

Evaluating the Potential Buyer (Cont'd)

- What will happen to the Seller's management team after the acquisition?
- Will the Seller be represented on the buyer's board of directors (if the Seller retains an ownership interest after the sale)?
- Does the buyer have a positive public image?
- Purchase Price?

THE 3 OVERRIDING PRINCIPLES – The Nathan 3

- Attitude of the Seller
- Consideration – Purchase Price?
Form of Consideration?
Contingent or Fixed?
- Insuring that the Seller keeps the consideration after the transaction closes and does not have to return it to the Buyer

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Who We Are

Haynes and Boone Today

Fastest-growing large firm in the U.S over the past 3 decades

430+ Lawyers

- *50% In Business Transactions
(corporate/securities, finance, real estate, etc.)*
- *50% In Business Litigation
(including intellectual property and labor litigation)*

A diverse and broad client base

- *Over 100 Fortune 500 companies*
- *No client represents more than 5% of revenues*

Haynes and Boone Today

- Aviation
- Energy/Power
- Finance
- Franchise
- Healthcare
- Real Estate
- Retail
- Technology
- Antitrust
- Appellate
- Business Litigation
- Bankruptcy
- Business Reorganization
- Corporate/Securities
- Corporate Governance
- Employee Benefits
- Executive Compensation
- Environmental
- Government Contracts
- Immigration
- Insurance Coverage
- Intellectual Property Contracts
- Intellectual Property Litigation
- International
- Investment Funds/Private Equity
- Labor and Employment Litigation
- Media Law
- Mergers and Acquisitions
- Securities Litigation
- Tax, Business and Estate Planning
- Venture Capital
- White Collar Criminal Defense

Local Access...Global Reach

9 Offices in major regional markets

- *Washington, D.C., Mexico, New York, Texas*

Premier cross-border capabilities

- *Matters involving more than 100 countries in past 5 years*
- *Lawyers fluent in 13 languages*
- *Cutting-edge capabilities in emerging areas of law, and in serving seven key regions of the world*
- *Founding member of TechLaw and World Services Group, international networks of prestigious lawyers and professional service providers*

One of the leading business law firms practicing in Latin America, with one of the most active and fastest-growing practices among U.S.-based firms in Mexico

Latin Lawyer 250: Latin America's Leading Business Law Firms, 2003

Commitment to Better Service

#1 firm nationally for use of technology in delivering legal services

AmLaw Tech Magazine, 2004

- ClientConnect® extranet for time, document and project management, and electronic access to closing files for all matters
- Digital courtroom
- Electronic briefs on CDROM
- Virtual data rooms for due diligence
- Remote-accessible network for worldwide collaboration 24/7 (access to all desktop technology, email, client documents and research tools)
- Video conferencing

Commitment to People

Recognized leader in diversity

- Thomas L. Sager Award winner for sustained commitment to hiring, retention and promotion of minority and women attorneys

Minority Corporate Counsel Association, 2002

- One of “20 Best Law Firms for Diversity”

Vault.com. 2004

- 1st in Texas and 51st among 250 largest U.S. law firms in percentage of minority lawyers

Minority Law Journal Diversity Scorecard, 2004

- Minority Scholars Program offering financial support and mentoring to outstanding first-year minority law students

SMU and UT

- Minority Clerkship Program

University of Houston / Houston Bar Association

What Others Say About Us

What Others Say About Us

One of the best corporate law firms in America

Corporate Board Member Magazine, 2001-2004

One of the top U.S. law firms in 11 categories of superior client service based on survey of Fortune 1000 GC staffs

The BTI Client Service A-Team, 2004

27 Attorneys among “The Best Lawyers in America®” in 12 specialty areas of law

2003-2004

One of the “20 Best Law Firms to Work For”

Vault.com, 2004

What Others Say About Us

One of 32 law firms recommended by world's largest investment banks and financial services firms to their peers

BTI Client Service Performance and Market Dynamics, 2004

One of 22 firms listed as "IP America's Dream Team" by Fortune 250 companies

American Lawyer, September 2002

Named as one of the top 8 law firms in the U.S. and the No. 1 firm in Texas for Insolvency/Corporate Recovery work

Chambers USA, 2004-2005

No. 1 firm in Texas for Corporate Real Estate work

Chambers USA, 2004-2005

How We Work

How We Work

We are one firm.

- *Clients belong to the firm, not to the individual.*
- *We adapt to meet specific needs.*
- *We assign our best lawyers to the job at every step.*

We are client centric.

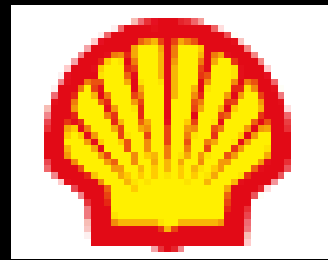
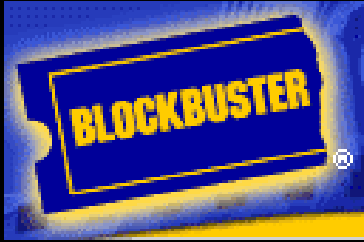
- *Our compensation system encourages collaborative exchange of expertise.*
- *Our focus stays on teamwork -- among ourselves and with our clients.*

Our Commitment to You

Haynes and Boone Client Service Policy

- We listen to our client.
- We make ourselves available and responsive to our client.
- We understand our client's business objectives and expectations.
- We communicate clear, practical advice to our client.
- We create workable solutions for our client.
- We are cost-conscious in handling client matters.
- We care about our client.

Who We've Worked With



**Enough About Us,
This Is About You...**

M&A MARKET IS IMPROVING

- **Nearly 90% of tax and finance executives and other senior professionals said that their company expects to complete at least one merger or acquisition in 2005, according to a recent survey conducted by accounting firm KPMG.¹**
- **Last year, when about 70% of respondents to KPMG's prior survey responded in the affirmative, there were 30,590 completed mergers and acquisitions worldwide, according to the firm, which cited Thomson Financial data.¹**

¹ 3/9/05 Article in CFO.com "Return of the Dealmakers"

ISSUES OF CONCERN TO BUYERS

- 56% of respondents cited “hidden liabilities” in acquired businesses as the biggest M&A tax challenge, followed by compliance with changing tax law (17%), integration with their tax department (14%), and prior acquisition planning (13%).¹

¹ 3/9/05 Article in CFO.com “Return of the Dealmakers”

ISSUES OF CONCERN TO SELLERS

- **What we will discuss today.**

Things to do before the “Letter of Intent” Phase (the planning phase)

- Get accounting and legal professionals involved early
- Organize minute books and Corporate and Partnership Records
- Get a due diligence “book” together

Conversion of Corporation

- Consider Converting a corporation into a limited partnership for state franchise tax purposes
 - In Texas, corporations and LLCs pay franchise tax, but partnerships do not (yet)
 - Franchise Tax is essentially a corporate income tax
 - Consequently, an “asset sale” by a state law corporation can result in extra “level” of tax at the State level
 - Convert using the procedures in the TBCA from corporation to a limited partnership for state law purposes
 - File Articles of Conversion with Secretary of State
 - Adopt New Organizational Documents
 - File “Check the Box” Form for Federal Tax Purposes as a Corporation (Form 8832)

Conversion of Corporation (cont.)

- If done properly, the result should be that the conversion is a Tax-Free reorganization under Section 368(a)(1)(F) of the Internal Revenue Code, but for Texas state law purposes, the entity is no longer a corporation and thus no longer subject to Franchise Tax

Different Schools of Thought on the Purpose of the Letter of Intent or “LOI”

- Anxious or motivated seller? Mere existence of an LOI can help create momentum if prospective buyer is waffling
- Seller who is not under pressure to sell can take its time and can gain a lot from a well-drafted LOI

The Deal Negotiation/Letter of Intent Phase

A. TAKE THE LOI SERIOUSLY

- 1. A well drafted, detailed LOI can save a great deal of time, attorney's fees, and exasperation at the "Definitive Agreement" stage*
- 2. If afraid of "scaring off" a prospective buyer with an attorney-prepared LOI, have the attorney "ghostwrite" it or prepare jointly to keep a "businesslike" flavor to language*

B. ADVANTAGES OF A WELL-DRAFTED LOI

- 1. Provides an additional level of assurance that negotiations will be successful before incurring the expense of negotiating an acquisition agreement*
- 2. Provides both parties with access to confidential information to help them determine if they wish to consummate the deal*
- 3. Can memorialize most of the significant terms of the understanding (including representations and warranties)*
- 4. Creates a "moral" commitment to use good faith best efforts to consummate the transaction in accordance with the agreed upon terms*
- 5. Ambiguous LOI can lead to litigation*

C. BINDING OR NON-BINDING

1. *It is very important that the parties make clear their intent as to which parts of the letter of intent are binding and which parts are non-binding (see Texaco v. Pennzoil).*
2. *Making an LOI Non-Binding is often seen as a “Buyer’s Issue” but not necessarily (provides flexibility to both sides if a deal just cannot get done). What happens to a seller if the buyer disputes the non-binding nature and asserts that the LOI is binding?*
3. *Non-binding provisions (should be explicitly marked as non-binding):*
 - a) Deal-specific terms such as the consideration
 - b) Representations and warranties to be made
 - c) Any special accounting or tax provisions

4. *Binding provisions will generally be:*

- a) Confidentiality of due diligence information ("return or burn")
- b) Exclusive bargaining (try to avoid if Seller)
- c) Break-up fees
- d) Seller's agreement to maintain the conduct of the selling company's business pending the execution of the definitive agreement (also try to avoid if Seller)

D. CONFIDENTIALITY

REMEMBER, do not release due diligence information such as financial information, customer lists, etc. without a binding confidentiality agreement or a binding confidentiality provision in the LOI (keep in mind that the prospective buyer is often also a competitor)

STRUCTURING THE DEAL

(Get more for the company + Keep more of what you get)

- Structuring transaction to accomplish the parties' goals considering tax, corporate, securities, accounting & other considerations
- Form of consideration; bargaining power of the parties; financial requirements; motivations

TRANSACTION STRUCTURES

Three basic forms:

- Merger
- Acquisition of Target stock
- Acquisition of Target Assets

CATEGORIES FROM A TAX PERSPECTIVE

- Taxable transactions
- Tax deferred transactions
- Partially taxable & partially tax deferred transactions

TAXABLE TRANSACTIONS

- Purchase of Stock
- Purchase of Assets
- in exchange for cash *or* other property, such as debt instruments
- or in exchange for cash *and* other property
- and/or with an earn out or other contingent consideration

Acquisition of Target Stock for Cash and/or Debt

- Buyer becomes a shareholder of target
- Target Shareholders who sell stock will realize & recognize gain if proceeds exceed their cost basis for their shares
- Capital gain treatment for individual sellers taxed at favorable rates
- Installment sale
- Target's basis in assets carries over – no step up

Acquisition of Target Assets for Cash and/or Debt or both

- Taxable transaction to target
- Will corporation be liquidated?
- Taxable transaction to shareholders on distribution of net assets by target to shareholders – 2 levels of tax
- Is the target corporation a C corporation or S corporation?
- Allocation of Purchase Price
- Consideration to Sellers in another capacity

Taxable Asset Purchases

- Buyer entitled to cost basis (i.e., stepped-up) to reflect purchase price.
- Intangibles such as goodwill, going concern value, etc. can qualify for 15-year amortization.

Stock Purchase Deemed a Sale of Target Assets

- Internal Revenue Code Section 338
- Purchase of an 80% or more interest in the stock of target within 12 months or less, may elect within specified time period to treat target as having sold all of its assets for their fair market value in a single transaction
- Target must recognize gain or loss on the hypothetical asset sale

338 Election

- Target will have a cost basis in its asset and none of its former tax attributes since target is treated as a new corporation
- Transaction is taxable to Sellers as if the transaction was a sale of assets although for corporate law purposes the transaction is a stock sale.
- Election is usually uneconomic unless (h)(10) treatment is available

338(h)(10) Election

- If target is being acquired from an affiliated group or if target is an S corporation, 338(h)(10) election allows the Selling group to elect to recognize the gain inherent in the underlying target assets instead of recognizing gain on the sale of the target stock.
- Seller can shelter asset gain with its NOLs, if any, and Buyer would take a cost (i.e., stepped up) basis in the target assets at no additional tax cost.

338(h)(10) Election (Cont'd)

- There may be a pricing benefit to the Sellers if Buyer has the advantage of a basis step up and can amortize additional assets.
- Seller may be able to recognize a loss but Buyer may be faced with the problem of accelerated recognition of income because of the basis step-down.

Structure

- In public transactions, because target has many shareholders, a stock purchase is usually accomplished by a reverse subsidiary merger (i.e., a newly formed subsidiary of Buyer merges with and into target, with target surviving), with target's shareholders receiving cash and/or notes, and with Buyer receiving target stock pursuant to the merger so that target becomes a wholly-owned subsidiary of Buyer.

Structure (Cont'd)

- An asset purchase may be accomplished by a "forward subsidiary merger" (i.e., target merges with an into newly formed subsidiary ("S") of Buyer, with S surviving, and with target's shareholders receiving cash and/or notes, so that S is a wholly-owned subsidiary of Buyer). S holds all of target's assets. *NOTE: DOUBLE TAX* so not efficient from Seller's perspective.

Tax Deferred Acquisitions

- Must conform to specific technical requirements in Internal Revenue Code Section 368.
- Must conform to rules created by courts, i.e., continuity of interest, continuity of business enterprise and business purpose.
- Continuity of interest requires target shareholders as a group to maintain a continuing proprietary interest in target, usually through retention of an ownership interest in Buyer.

Continuity of Interest

- Generally, continuity of interest is satisfied if the consideration is at least 40% stock.
- As a general rule, there is no requirement that the target shareholders hold the Buyer stock for a minimum period of time after the closing to satisfy the continuity of interest test, so long as they receive a sufficient amount of Buyer stock in the transaction and do not, directly or indirectly, transfer the stock back to Buyer (or a related party) for cash or other property.

Continuity of Business Enterprise

- Requires that Buyer must continue target's historic business after the reorganization or use a significant portion of Target's historic business assets in a business.
- Regulations indicate that a "significant portion" for this purpose could be satisfied by as little as 1/3 of target's historic assets.

Business Purpose

- The reorganization must be undertaken for significant business purposes that outweigh its Federal income tax benefits.

Preferred Stock

- Certain preferred stock is not treated as stock and is considered “other property” or “boot.” – Non-Qualified Preferred Stock
- Internal Revenue Code Section 351(g)

Types of Acquisitive Tax Deferred Reorganizations

- A Reorganization - Merger
- B Reorganization – Stock for Stock
- C Reorganization – Stock for Assets
- Reverse Triangular Merger
- Forward Triangular Merger

“A” Reorganization - Merger

- Statutory merger or consolidation of target into Buyer – “A” Reorganization
- Most flexible in terms of type of consideration allowable because Buyer can pay target shareholders up to approximately 50% to 60% in cash or other non-qualifying property and the balance in any class of Buyer stock.

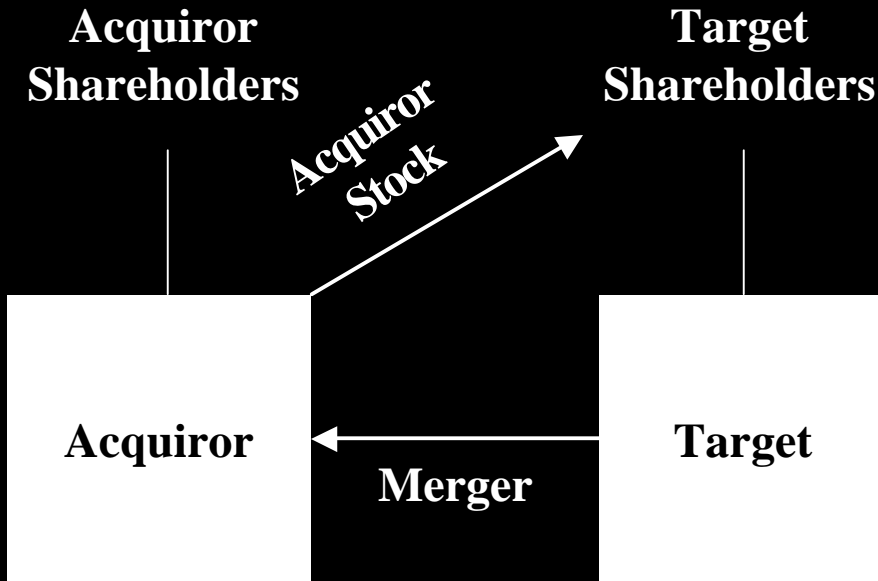
“A” Reorganization (Cont’d)

All target assets and liabilities transfer to Acquiror by operation of law.

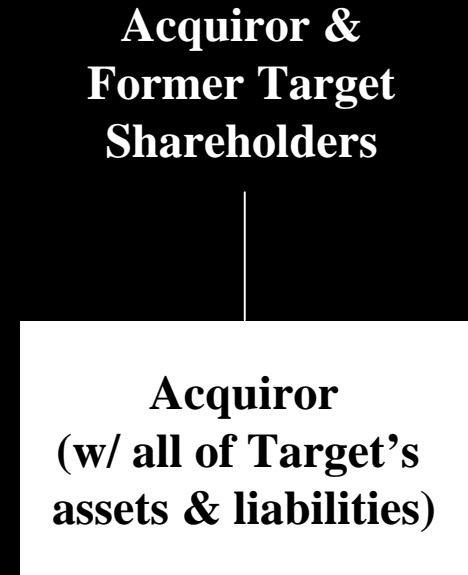
An “A” reorganization that fails to meet the requirements for tax-free treatment will be treated as a taxable sale of the target’s assets, followed by a taxable liquidation of the target.

“A” Reorganization

Acquisition Steps



End Result

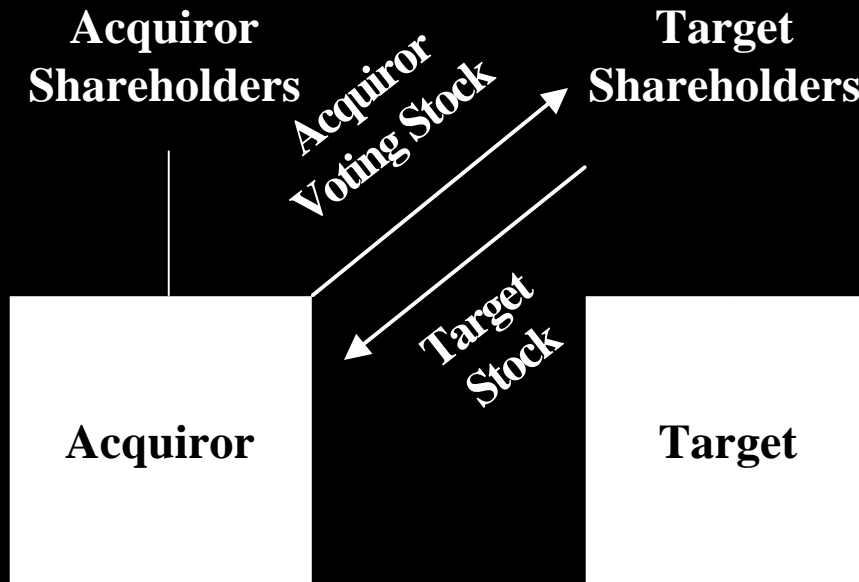


“B” Reorganization – Stock for Stock

- Buyer acquires target stock from target shareholders **solely** in exchange for Buyer voting stock.
- Buyer must be in “control” of target after the reorganization (i.e., own 80% of target’s voting power and 80% of each class of non-voting stock of target).
- Sole consideration allowed is voting stock of Buyer (or Buyer’s parent).

“B” Reorganization

Acquisition Steps



End Result

Acquiror &
Former Target
Shareholders

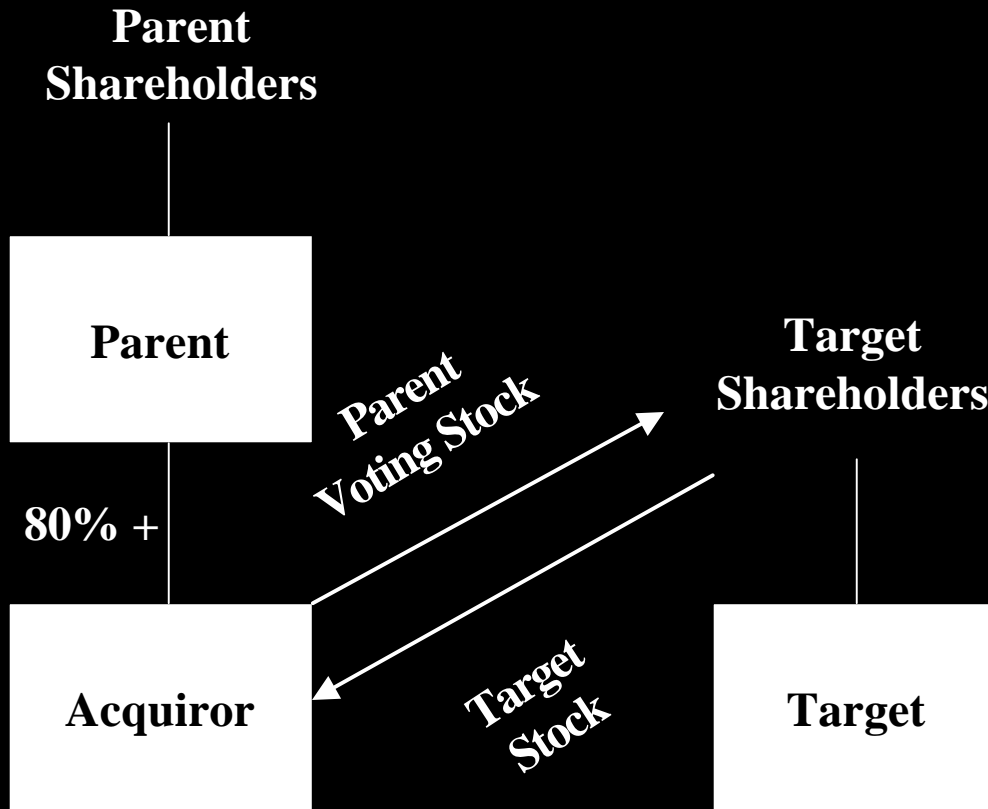


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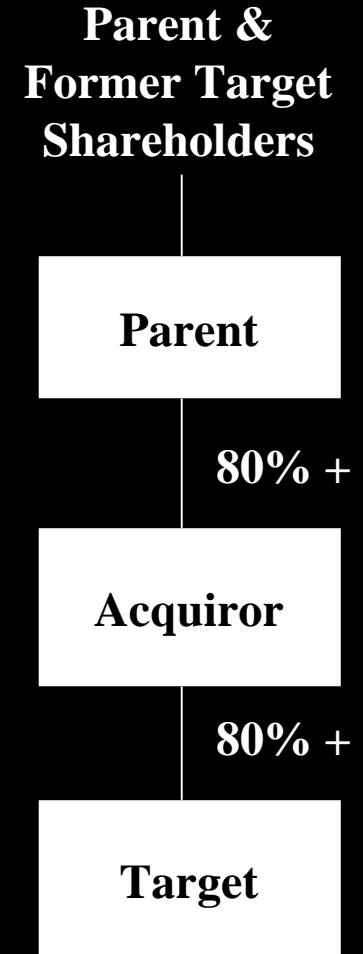


Triangular "B" Reorganization

Acquisition Steps



End Result

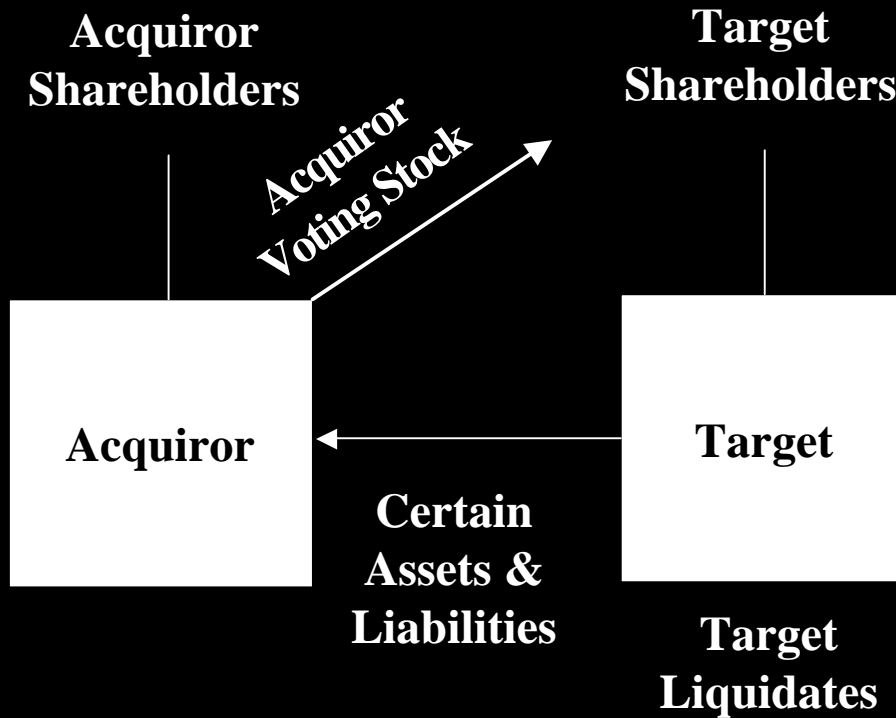


“C” Reorganization – Stock for Assets

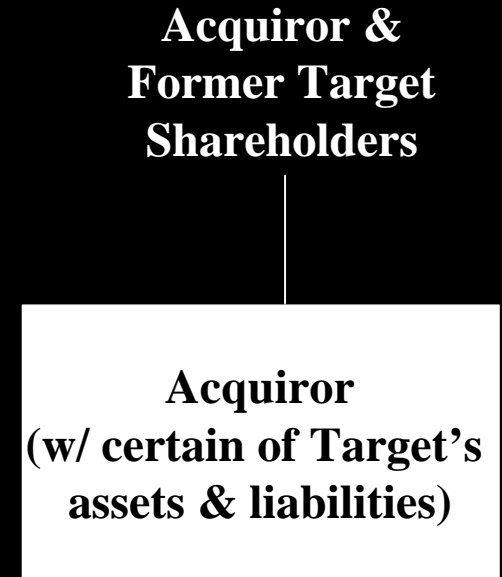
- In a “C” reorganization, the Acquiror must acquire “substantially all” of the Target’s assets “solely” in exchange for Acquiror voting stock. (For this purpose, “substantially all” means 90% of Target’s net assets and 70% of Target’s gross assets.)
- The Target’s assets and liabilities do NOT transfer by operation of law. Thus, the Acquiror may select the liabilities it is willing to assume.
- The Acquiror can issue 80% Acquiror voting stock and 20% cash or other property. (Note: If there is \$1 of boot, the Target’s liabilities count as as boot for purposes of this 80/20 rule.)
- The Target must liquidate and distribute the Acquiror stock and all remaining Target assets to its shareholders.
- A “C” reorganization that fails to meet the requirements for tax-free treatment will be treated as a taxable sale of the Target’s assets, followed by a taxable liquidation of the Target.

“C” Reorganization

Acquisition Steps



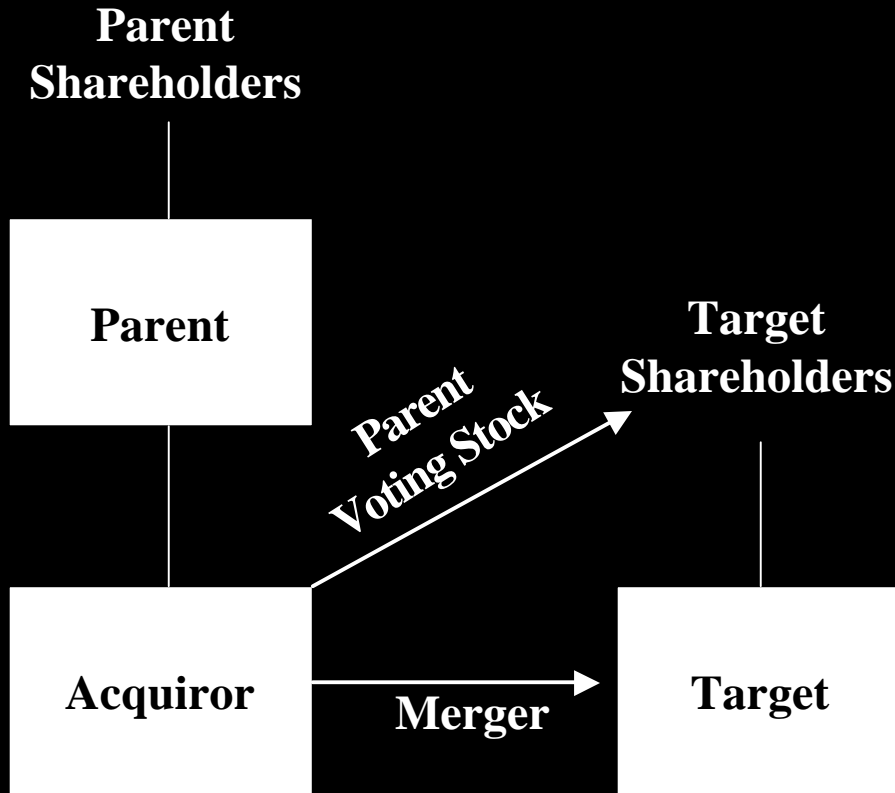
End Result



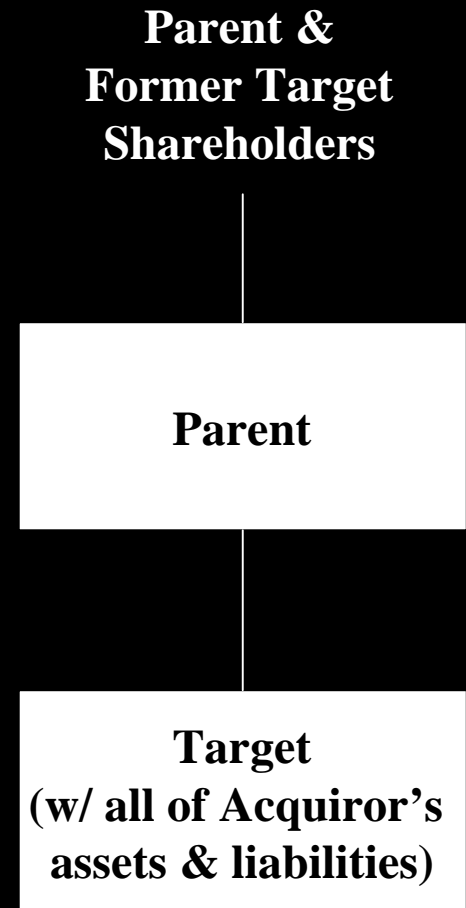
Reverse Subsidiary Merger

- A reverse triangular merger is a merger of the Acquiror with and into the target with the target surviving the merger.
- Parent must own 80% of Acquiror's total combined voting power and at least 80% of the total number of shares of each other class of stock (*i.e.*, non-voting stock).
- After the transaction, the target must hold "substantially all" of its assets and "substantially all" of the Acquiror's assets. (For this purpose, "substantially all" means 90% of each entity's net assets and 70% of each entity's gross assets.)
- The Acquiror can issue 80% Parent voting stock and 20% cash or other property.
- No Acquiror stock may be used in the acquisition.
- A reverse triangular merger that fails to meet the requirements for tax-free treatment will be treated as a taxable sale of the target's stock by the target's shareholders. In the event of a taxable stock purchase, if appropriate, consider making a Code Section 338 Election to treat the stock purchase as an asset purchase in order to step-up the tax basis of the target's assets to fair market value.

Acquisition Steps



End Result

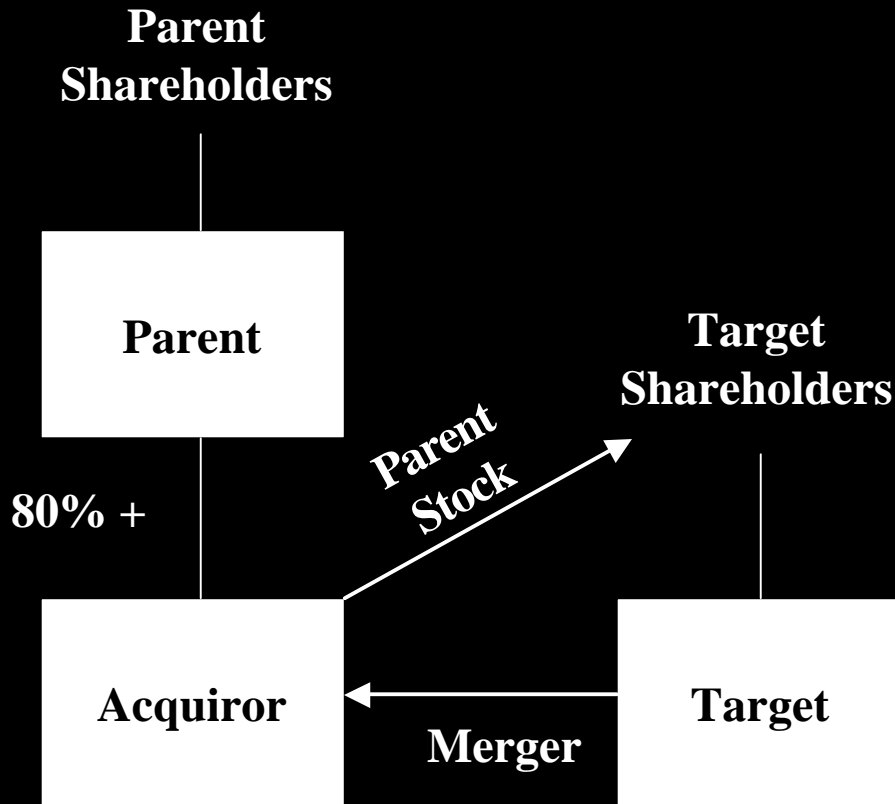


Forward Subsidiary Merger

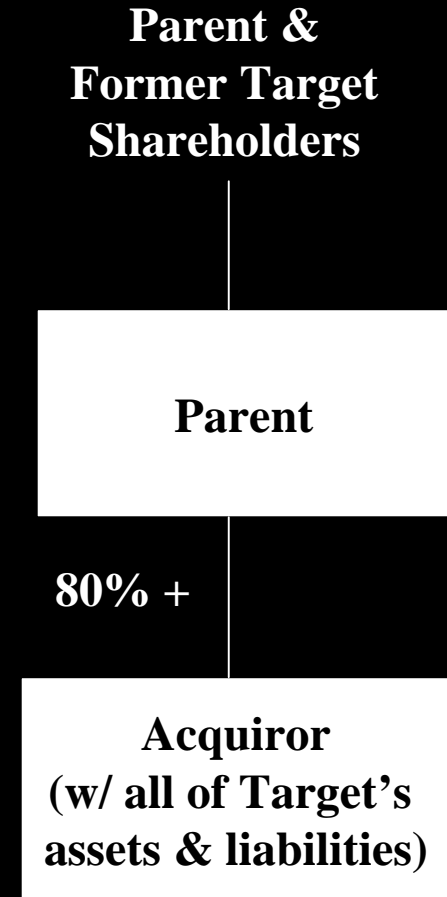
- A forward triangular merger is a merger of the Target with and into the Acquiror with the Acquiror surviving the merger.
- Parent must own 80% of Acquiror's total combined voting power and at least 80% of the total number of shares of each other class of stock (*i.e.*, non-voting stock).
- The Acquiror must acquire "substantially all" of the Target's assets (*i.e.*, 90% of Target's net assets and 70% of Target's gross assets).
- The Acquiror can issue 50% Parent stock (voting or non-voting, common or preferred) and 50% cash or other property. [Note: Most practitioners will go as low as 40% Acquiror stock and 60% boot.]
- No Acquiror stock may be used in the acquisition.
- A forward triangular merger that fails to meet the requirements for tax-free treatment will be treated as a taxable sale of the Target's assets, followed by a taxable liquidation of the Target.

Forward Triangular Merger

Acquisition Steps



End Result



Gain Recognition

- Corporate parties to a reorganization generally do not recognize gain or loss
- Target's shareholders recognize their gain, if any, (but generally not loss, unless they receive no stock), only to the extent of the "boot" or "other property" received.

Which Structure Should Be Used? (Ignoring the Tax Treatment)

- Asset
- Stock
- Merger

Asset Transaction

- Generally Buyers prefer asset transactions so that Buyer acquires only certain specified assets and assumes only certain specified liabilities.
- But consider impact of property title transfers, obtaining consents to assignments of contracts, compliance with bulk sales laws in states with such laws, and license and permit transfers.
- May be desirable if target's stock records are in "disarray".
- Double tax issue
- Are contracts and licenses assignable?

Stock Transaction

- Generally preferred by Seller in that it avoids double tax and relieves Seller of any ongoing liabilities.
- May result in minority ownership of target if Buyer fails to acquire the stock of all shareholders.

Merger

- May be preferred to a stock transaction since Buyer can freeze out Seller's minority shareholders (although appraisal rights are available).

INSURING THAT THE SELLER KEEPS THE CONSIDERATION AFTER THE TRANSACTION CLOSES

- Representations and Warranties of Sellers and target
- Indemnity Obligation of Sellers
- Disclosure Schedule

Representations and Warranties of Sellers and Target

- Backstop to due diligence – seek information regarding target and seller prior to closing.
- Provides Buyer an “out” in the event the Buyer discovers adverse information prior to closing (assumes non-simultaneous signing/closing).
- Provide Buyer a remedy after closing for adverse information about Seller and/or target

Knowledge Qualification

- Risk shifting effect – who should bear the risk of the unknown?
- If the facts giving rise to the breach of a representation had been known prior to the closing, would the purchase price have been reduced to reflect these facts?
- Where knowledge is within the control of a third party?
- Whose knowledge is relevant?

Materiality Qualification

- “Material”
- “In all material respects”
- “Material adverse effect”
- Why does counsel seek a materiality qualification?
 1. To avoid the time and expense of preparing disclosure schedules
 2. A concern that Buyer may try to avoid closing due to a non-material breach
 3. Concern with being harassed for non-material breaches

Materiality Qualification (Cont'd)

- What is material?
- Relationship to indemnification provisions
 - Indemnification only for material breaches?
 - Basket/deductible provisions – how do these provisions interplay with materiality?

Indemnification

- Generally provide that one party will reimburse the other party for any losses, damages or expenses incurred as a result of a breach of a representation or warranty or covenant.
- Procedures for notice of claims and defense of third party claims.

Indemnification Issues

- Survival of representations and warranties
- In the purchase of stock of a public company, usually no survival so due diligence is critical.
- Holdback/Escrow Fund
- Money secures Seller's indemnification obligation
- Basket/Deductible – first dollar or only excess above threshold? – rough approximation of what parties deem to be “material” in comparison to total purchase price

Indemnification Issues (Cont'd)

- Is indemnification obligation tied only to breaches of representations and warranties?
- Tax issues
- Other issues which parties do not want to include in disclosure schedule
- Limit on total liability of Seller
- Purchase Price Adjustment
- Disclosure Schedule

What Are Earn-outs?

- An obligation that may never be paid?
- A solution to the differing views on price held by the “optimistic” seller and the “pessimistic” buyer?
- A nightmare if not adequately addressed?

YES

Earn-outs vary from deal to deal,
but they are generally
“contingent, unsecured obligations”

MANY POTENTIAL PITFALLS FOR SELLERS

- Is it contingent upon post-closing EBITDA?
- Does seller manage business post-closing?
- What is EBITDA? Whatever you want it to be?
- How are acquisitions and dispositions addressed?
- Is there any third party debt?
- Example

EARN-OUTS

1. *Make sure financial hurdles are clear and easy to determine*
2. *No “gamesmanship”*
 - *dispositions*
 - *IPO or other sale*
 - *fired / good reason resignation*

Some Additional Post-Closing Issues and Agreements

- Employment Agreement
 - Often forms part of the consideration for the sale of the business
 - Buyer wants to make sure that the business continues to make money after the sale
 - The employee wants to make sure Buyer/Employer does not “pull the rug out from under” by terminating the employment agreement
 - Make sure termination “for cause” is very clearly defined, with cure rights and the like
 - Draft “penalty” for terminating without cause
 - Put in safeguards to prevent “constructive” termination
 - Prohibit Employer from relocating residence of employee or from changing duties so as to cause employee to “de facto” relocate
 - Prohibit employer from materially altering duties/assignments
 - Make method of calculating any sales or productivity based bonuses very clear and objective

Some Additional Post-Closing Issues and Agreements (cont.)

- Non-Compete Agreement
 - Important to Buyer because Buyer does not want principals (particularly those who are not going to work for Buyer post-closing) to set up shop and compete with the very business they just sold
 - Principals need to make certain the terms are fair
 - Limit duration – 3 years should be sufficient – try to resist 5 years or longer
 - Limit geographical area – if the business only competes in Texas, avoid a “worldwide” or “nationwide” non-compete
 - Limit definition of “competing business” that principal may not engage in – make as narrow as possible

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