Deal Points

The Newsletter of the Mergers and Acquisitions Committee

From the Chair **Wilson Chu**

I'm delighted to announce 2 new Task Forces, each chaired by nationally-prominent authorities in the space.

- M&A Tax Task Force (Chair: Xander Lee, Cooley **alexander.lee@cooley.com**)
- Growth Equity Task Force (Chair: Mike Kendall, Goodwin Procter **MKendall@goodwinlaw.com**)

Xander will have a slot at our Laguna meeting to tease (not put to sleep, hopefully) us with essential post-Tax Reform nuggets for deal lawyers, and to give us his vision on how the Committee will become a leading voice in M&A tax. At our Boston meeting (March 27-28), Mike will have airtime to talk that vision thing as well. Please reach out to Xander or Mike if you're interested in helping them drive the conversation in their respective spaces.

Speaking of Boston: The Deal Hacks are coming, the Deal Hacks are coming! We'll be rolling out our first episode of a regular series in which our members will present their (distinctly succinct) spin on any non-obvious strategy or approach (hopefully, that perfect shortcut) that solves a problem, bridges a gap, simplifies a task, reduces frustration, or otherwise makes us more thoughtful and effective M&A lawyers.

Please contact Vice Chair Mike O'Bryan (**mobryan@mofo.com**) to help us make Deal Hacks a signature program that exemplifies the Committee's dual priorities of (i) projecting thought-leadership; and (ii) creating opportunities for our members to build their name and network.

Last but never least, thanks again to our Laguna meeting sponsors for underwriting our daily bread and adult beverages that we so deserve.

- Kira Systems
- US Bank
- BDO
- Gleiss Lutz Hootz Hirsch
- Loyens & Loeff

And of course, please enjoy the usual high-quality substantive content of this edition of Deal Points, expertly curated again by Chauncey Lane (in particular the CFIUS article which begs the question: Can you kill it with penicillin?).

From the Editor **Chauncey M. Lane**

In this issue of Deal Points, we kick off 2020 with an examination of the new CFIUS regulations for non-real estate investments adopted by the Treasury Department on January 13, 2020. We follow this discussion with a series of practical tips on handling transactions involving government contractors and marijuana-related businesses. We finish with a look at the roles in-house counsel and outside counsel play in a transaction and how these roles often overlap (a good reminder for us all!). Thank you to each of the contributors. Keep the submissions coming! Articles should be 1,500 words or less and should address a topic of general interest to M&A practitioners. All submissions should be sent to **DealPoints@reedsmith.com**.

Contents

NEW LEGAL PROJECT MANAGEMENT (LPM) DEAL TOOLS

By Dennis J. White

The following new LPM deal tools have been posted on the ABA website that is accessible to purchasers of the ABA Guidebook on *Using Legal Project Management in Mergers and Acquisitions Transactions, Second Edition:*

- Limited Auction Checklist (a checklist of key items to consider in a limited auction); and
- Deal Cycle Capture Log (a tool designed to capture and communicate significant matters identified during the deal cycle, particularly during due diligence, that may require later consideration and action).

As with the other tools in the Guidebook, these new additions can be downloaded, edited, and tailored to suit your particular transaction. Website postings like these allow the Task Force on Legal Project Management in M&A to update the Guidebook with new tools and enhancements to existing tools without having to wait for the next hard copy edition. If you have any ideas for new LPM tools that can make the M&A process run more effectively and efficiently, please be sure to send them along to Task Force Co-Chairs Byron Kalogerou and Dennis White.

CFIUS FINAL RULES SHAPED BY INVESTOR CONCERNS

By Grace Maral Burnett*

January's new foreign investment regulations reflect key changes and clarifications in response to comments submitted by Japanese and other foreign investors, as well as U.S. industry groups, companies, and law firms. These final rules, issued by the Department of the Treasury as required by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), apply to the process and standards of the Committee on Foreign Investment in the U.S. (CFIUS).

The regulations give special status to investors from Australia, Canada, and the United Kingdom, loosen thresholds relating to excepted investors so that more investors may attain that status, and implement the newly-required mandatory filing requirements for certain transactions. They also make significant improvements in clarity as regards impacted foreign entities and issues that affect investment funds.

The Final Rules Contain Significant Changes from the Proposed Rules

On January 13, 2020, the U.S. Department of the Treasury issued two final CFIUS regulations (one for non-real estate investments, the subject of this article, and one for covered real estate investments) as well as an interim rule and request for comments setting a new interim definition for the term "principal place of business." Treasury had released proposed versions of the regulations for comment in September 2019. During the comment period, Treasury received 62 comments on the proposed rules on covered investments totaling over 313 pages, including a number of lengthy comments from key stakeholders asking for clarification and in some cases suggesting specific changes to the proposed rules.

The final regulations on covered investments reflect many revisions to the proposed regulations, a large portion of which are substantive and, as explicitly indicated by Treasury in the 45-page introductory section of the regulations entitled "Background," were made in direct response to comments received. (See a blackline comparing the proposed and final versions here).

What's New & Trending

Key New Provisions in the Final Rules

Below are some key developments reflected in the final regulations, but the list is not exhaustive as the changes from the proposed regulations are numerous. The final regulations include revisions for clarity, expansions and narrowing of definitions, and the addition of many illustrative examples to help stakeholders better understand the rules.

Australia, Canada, and the United Kingdom are the first designated excepted foreign states.

The final regulations reveal that CFIUS has selected the first three countries to be considered "excepted foreign states," investments from which are carved out of the definition of covered investments. (The carve-out does not apply to covered control transactions.)

Regarding the choice of these three countries, Treasury states as follows: "The Committee identified these countries due to aspects of their robust intelligence-sharing and defense industrial base integration mechanisms with the United States. Additionally, as noted in the preamble to the proposed rule, the concept and definition of "excepted foreign states" are new and an expansive application carries potentially significant implications for the national security of the United States. Consequently, the Committee is initially identifying a limited number of eligible foreign states and may expand the list in the future."

The final rules clarify that the definition of the term excepted foreign state "operates as a two-criteria conjunctive test, with delayed effectiveness for the second criterion." In short, Australia, Canada, and the U.K. have until 2022 to fulfill the second criterion, which is a determination by the Committee that the country has "established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security."

This two year grace period is intended to give the three countries "time to ensure that their national security-based foreign investment review processes and bilateral cooperation with the United States on national security-based investment reviews meet the requirement under § 800.1001" and also give the Committee time to "to develop processes and procedures for making determinations under § 800.1001, which could be applied to a broader group of countries in the future."

U.K. investors in the U.S., which have shown a marked increase in M&A activity here since Brexit, will welcome this news. What we can expect now is more fine tuning of the three countries' own foreign investment restrictions currently in place over the next two years to ensure that they meet all the criteria to keep their excepted status once the grace period passes in 2022.

Some "excepted investor" thresholds have been loosened so more can qualify.

Treasury has relaxed some of the criteria related to excepted investors as a result of comments it received to the proposed regulations. Excepted investors, which are certain investors connected to excepted foreign states, may now have up to %25 non-excepted-foreign-state membership on their board of directors. Additionally, the minimum excepted ownership percentage was lowered from %90 to %80. In other words, the U.S. or excepted foreign state persons or entities must own %80 of an entity in order for it to maintain its status as an excepted investor.

Shearman & Sterling LLP's Tokyo office commented almost exclusively on the excepted investor criteria, expressing concern to avoid "a disproportionately chilling effect on beneficial investment in U.S. businesses by Japanese investors." Their focus was on board memberships: "[W]e ask CFIUS to consider amending §800.220(a)(3)(iii) of the Proposed Rule to (i) permit a foreign entity of an excepted foreign state to appoint members of its board of directors that are not U.S. nationals or foreign nationals of an excepted foreign state so long as the number of any such members does not comprise a majority of the board of directors (or, alternatively, some smaller proportion of the board of directors that may be deemed more appropriate)." The changes in the final rule are consistent with at least a portion of these comments.

The Japanese Business Federation Kiedanren echoed the same concerns raised by Shearman & Sterling vis-à-vis Japanese investors and requested "to lower the floor of members being U.S. nationals or foreign nationals of excepted states to the greatest extent possible [in order to] better align with the realities of international business and thereby promote international investment without harming national security."

What's New & Trending

A number of other comments also included questions and concerns about the excepted investor scope, including those of White & Case LLP, Sidley Austin LLP, the National Venture Capital Association, and Singapore's Temasek Holdings.

CFIUS has adopted the "nerve center" test used by U.S. federal courts to determine diversity jurisdiction as the basis for new interim definition of "principal place of business."

The proposed regulations did not define the term "principal place of business," one of the criteria for being considered an excepted investor. The American Investment Council's October 17, 2019 comment "on behalf of its members in the U.S. private equity community" to the proposed regulations raised the concern about U.S. funds who use offshore structures but maintain their principal places of business in the U.S. and specifically suggested the "nerve center" test that has been adopted by Treasury. This modification, along with others, shows that CFIUS is taking seriously the concerns of the private equity industry, which lobbied extensively on FIRRMA, and which represents nearly a quarter of all U.S. M&A activity.

There is a mandatory filing requirement for critical technology covered transactions.

The final rules adopt the Critical Technologies Pilot Program interim rule's mandatory filing requirement for covered transactions involving critical technologies. Key aspects of the critical technologies pilot program, which was the first test of CFIUS's new mandatory filing authority under FIRRMA, have made it into the final rules. Prior to FIRRMA, the filing procedures were voluntary. The critical technology pilot program interim rules still apply as of this writing and are effective through February 12, 2020.

NAICS codes, as the basis for critical technologies definition, are soon to be scrapped.

Treasury states in the Background of the final regulations that it "anticipates issuing a notice of proposed rulemaking that would revise the mandatory declaration requirement regarding critical technology at § 800.401(c) from one based upon North American Industry Classification System (NAICS) codes to one based upon export control licensing requirements."

There are new exemptions to the critical technology mandatory declaration requirement.

The new exemptions relate to "excepted investors, FOCI-mitigated entities, certain encryption technology, and investment funds managed exclusively by, and ultimately controlled by, U.S. nationals. Foreign Ownership, Control or Influence (FOCI) is a U.S. Department of Defense designation for certain entities; FOCI entities must be "mitigated" by DSS, a Defense agency, by agreement or other mechanisms in order to get facility security clearance (FCL).

The final regulations contain an important clarification regarding the ownership chain of a foreign entity for the purposes of the excepted investor criteria.

They state that "[c]ommenters expressed an inaccurate view of the minimum excepted ownership criterion's application up the ownership chain of the foreign person. All of the conditions under § 800.219(a)(3), including the minimum excepted ownership conditions, apply to each "parent" (as defined at § 800.235) of the foreign person." The conditions contained in § 800.219(a)(3) are a portion of the criteria required to be fulfilled for a foreign entity to be considered an excepted investor. Among a longer list of criteria, the provision requires that an excepted investor (and per this clarification all of its parents) be (i) "organized under the laws of an excepted foreign state or in the United States"; and (ii) "has its principal place of business in an excepted foreign state or in the United States"; and (iii) 75% "or more of the observers of the board of directors or equivalent governing body are (A) U.S. nationals; or (B) Nationals of one or more excepted foreign states who are not also nationals of any foreign state that is not an excepted foreign state." See, § 800.219(a)(3) for full enumeration of applicable criteria.

This clarification regarding parents seems in large part to address White & Case LLP's comment regarding the definition of parent companies, which it views as ambiguous. Per White & Case, "[u]nder the proposed rules, the concept of "parent" takes on even more significance—necessitating additional clarity in the "parent" definition. For example, the concept of "parent," and the characteristics and conduct of such "parents," now factors into: who qualifies as an "excepted investor" (under 800.220(a)(3), each "parent" of a foreign entity must satisfy certain criteria for that entity to qualify as an "excepted investor"."

What's New & Trending

Genetic information covered by "sensitive personal data" is clarified.

In the final regulations, what used to say "genetic information as defined pursuant to 45 CFR 160.103" now says: "The results of an individual's genetic tests, including any related genetic sequencing data, whenever such results constitute identifiable data. Such results shall not include data derived from databases maintained by the U.S. Government and routinely provided to private parties for purposes of research. For purposes of this paragraph, "genetic test" shall have the meaning provided in 42 U.S.C. 300gg-91(d)(17)." This narrowing of the definition was in response to comments.

Conclusion

The final rules, which become effective on February 13, 2020, implement the FIRRMA, 2018's sweeping CFIUS reform legislation. The new interim definition of "principal place of business" will have a comment period of 30 days ending on the same day the final rules go into effect.

While there are many new updates contained in the final regulations, the FIRRMA framework and its expansion of jurisdiction to certain non-controlling investments and real estate transactions (the separate rulemaking for which is covered in a separate analysis) remains unchanged. The final regulations serve to work out many of the details of how FIRRMA will be implemented.

This article is abridged from the original, published on Bloomberg Law as ANALYSIS: CFIUS Final Rules Shaped by Japan Investor Concerns on January 14, 2020.

*Grace Maral Burnett is a Legal Analyst on Bloomberg Law's transactional team.

GOT NEWS & TRENDS?

Chauncey M. Lane — Editor
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Are you following any new deal trends or have other news relevant to our committee?
If so, I want to share your content. Simply contact me via email at *dealpoints@reedsmith.com.*

Marijuana M&A: Special Due Diligence Considerations

By James J. Black*

The wave of marijuana legalization that has washed over North America in recent years, with Canada and most U.S. states legalizing the substance for medical and/or recreational uses in recent years (although it remains illegal under U.S. federal law), has spurred an increasing number of mergers and acquisitions involving marijuana-related businesses (MRBs). Despite the surge in deal-making, cannabis remains an emerging industry that presents unique issues and challenges, even for experienced M&A practitioners who have advised on deals in a wide range of industries. This article will discuss a few of the unique challenges for deal lawyers in marijuana M&A, including industry-specific due diligence issues and risks that may be hard to quantify and (through appropriate representations, warranties and indemnities) limit for buy-side clients.

Broadly speaking, marijuana deals entail advising companies engaged in the cultivation, processing, sale or distribution of marijuana and products derived from marijuana, as well as some ancillary businesses that, while they do not "touch the plant", primarily or exclusively serve businesses that do. It is important to note that, while both marijuana and hemp are forms of cannabis, the laws and regulations applicable to the two substances vary dramatically, as hemp was legalized under U.S. federal law in 2018.

Because of the unique legal status of marijuana as a federally prohibited controlled substance but a legal and highly sought-after commodity under the laws of most U.S. states, due diligence in marijuana M&A must encompass both the extent to which a target's business is likely to become the subject of federal enforcement actions and its compliance with state and local laws. The risk of federal enforcement itself is in part dependent upon the target's compliance with applicable state laws, but it behooves buyers and their counsel to go beyond a pure state-law analysis to include an assessment of the target's compliance with the factors enumerated by the U.S. Department of Justice in 2013 in the guidance that is commonly referred to as the Cole Memorandum. That document (the effectiveness of which is currently unclear, as it was rescinded by former Attorney General Jeff Sessions in 2018 but subsequently unofficially endorsed by current Attorney General William Barr) established enforcement priorities for federal prosecutors when choosing whether to bringing criminal charges for marijuana-related violations of federal law.

Those priorities focused on such issues as preventing the distribution of marijuana to minors and ensuring that revenues from the sale of marijuana would not flow to criminal enterprises and that state-legal marijuana activity would not be used as a cover for trafficking of other illegal drugs. In order to get some degree of comfort that federal prosecution is at least a limited risk (although there is no legal protection from federal prosecution as long as marijuana remains illegal under federal law), buyers and their counsel should review the extent to which the target presents identifiable risks of implicating one of the enumerated federal enforcement priorities. In addition, since a typical "compliance with law" representation and warranty is not feasible in the marijuana industry with respect to U.S. federal law, this provision of the purchase agreement should be tailored to address not only the target's compliance with applicable state and local law but ideally also the non-implication of the federal enforcement priorities set forth in the Cole Memorandum (although the specific wording of such a provision will likely be heavily negotiated).

While due diligence relating to a marijuana-industry target's compliance with federal law is by nature a limited and highly bespoke exercise, diligence relating to state and local law compliance should be detailed and tailored to address the specific legal and regulatory requirements of the state(s) and localities in which the target operates. The state marijuana laws that have been adopted in recent years vary widely from state to state and are by nature complex, as they seek to create comprehensive regulatory schemes for the creation of an entirely new (legal) industry in their respective states. As an example, the law adopted by the most recent state to legalize adult-use marijuana, Illinois (where adult-use marijuana became legal as of January 1, 2020), comprises over 600 pages of detailed provisions addressing licensing, ownership, operational and marketing requirements, as well as change of control provisions if a licensee changes hands. The parts of the relevant state laws that are applicable to a target will depend on where along the value chain the target operates (i.e., different rules may apply to a grower as opposed to a dispensary operator).

Since state marijuana laws generally seek to closely control the issuance and ownership of licenses for cultivation, processing, transport, sale and distribution of marijuana, a critical issue to be analyzed early in a transaction is whether applicable state laws limit the seller's ability to assign its license(s) and, if a share deal is contemplated, what impact statutory change of control provisions will have. Additionally, state law may include ownership limitations that prohibit a single person or entity from owning an interest in more than a fixed number of licenses, and some forms of cross-ownership of licenses may be restricted. The Illinois law, for example, forbids the ownership by any person or entity of any legal, equitable or beneficial interest in more than three cultivation centers, more than 10 dispensing organizations, or more than three craft grower licenses (and cross-ownership of certain types of licenses is also restricted). In deals in which a simultaneous signing and closing is not possible, it is also important to analyze whether a provision that grants the buyer extensive pre-closing control rights is consistent with legal prohibitions on license transfers without prior state approval.

In addition, the Illinois marijuana law contains social equity provisions that offer preferential treatment in the issuance of licenses to applicants that are controlled by or employ a majority of people who have disproportionately suffered the consequences of enforcement of marijuana laws. These include people who have been arrested or incarcerated for marijuana-related offenses that are eligible for expungement under the law, as well as their family members, and people who reside in high-poverty areas and other areas that have been disproportionately affected by the enforcement of drug laws. If a target's license was granted in part based on the participation of such a "social equity applicant", transfer of that license is subject to additional conditions that the buyer must comply with. As a result, it is critical that a buyer understand the basis on which the target's license was issued and how that might impact the buyer's operation of the business following the acquisition.

Beyond licensing issues, while marijuana deals present many of the same due diligence topics as targets in other industries, some of these topics have special significance in marijuana M&A. Two issues that are of particular importance are the target's access to banking services and insurance, as both of these areas have proven very challenging for many MRBs. In connection with the target's banking relationships (to the extent it has been able to obtain banking services), the buyer should ascertain whether the target's bank is fully aware of the nature of the target's business, as some banks have reportedly terminated banking relationships with customers because of their involvement in the marijuana industry. Due diligence should also encompass payment processing and money-handling, as many MRBs operate largely on a cash basis due to the lack of available service providers. MRBs that operate largely or fully on a cash basis present particular safety and security challenges, and due diligence on such targets is complicated by the fact that cash transactions may not generate electronic records that can be used for fraud control and to verify a target's financial records.

On the insurance front, due diligence should include an examination of the sufficiency of the target's coverage, including director and officer insurance, as many MRBs have struggled to obtain adequate coverage. In this regard, the target's policies should be reviewed to ensure that there are no exclusions that would effectively prevent it from making a claim in the event of a product liability, recall or other loss event.

Finally, federal tax compliance is a critical issue for a buyer's due diligence, as the Internal Revenue Code prohibits MRBs from deducting many expenses that other businesses can deduct as a matter of course. As a result, buyers should carefully review the target's past tax filings to assess the risk that the target has claimed impermissible expense deductions and, therefore, underpaid its federal taxes. It is also essential to review the target's bookkeeping practices to ensure that expenses of different types (e.g., costs of goods sold vs. other types of business expenses) are appropriately recorded, as some expenses are deductible while others are not.

These issues are only a few of the unique aspects of advising clients on marijuana M&A. The industry continues to develop at a dizzying pace, and law and regulation are struggling to keep up with the market. This creates an exciting environment for deal lawyers who are prepared to help their clients navigate an emerging industry with many challenges and even more opportunities.

*James J. Black is Of Counsel in Morrison & Foerster LLP's Business Restructuring and insolvency group.

Using Due Diligence to Identify Cybersecurity Risks

By Patrick McKnight

In late December many holiday shoppers received a disquieting warning from Amazon. The ecommerce giant unexpectedly began notifying 17 million users of the popular Honey browser extension of a data security issue. Amazon identified Honey as a "security risk" and instructed shoppers to uninstall the extension immediately. While the basis for Amazon's warning remains unclear, the announcement was an unwelcome holiday surprise for Honey's recent buyer. Only a few weeks earlier PayPal unveiled their $4 billion acquisition of the coupon software. The deal is the largest in PayPal's history and some analysts worried they paid too much. Now after a public rebuke from one of the world's largest retailers, the deal has come under even closer scrutiny.

The Honey incident is only the most recent example of an ongoing trend. Cybersecurity threats introduce a unique dimension of risk into the structure of a deal. Although tech continues to be one of the most active sectors for M&A activity, cause for concern extends far beyond Silicon Valley.

Nearly all modern businesses depend on secure digital information. Without an incorporation of cybersecurity into the due diligence process, buyers risk overlooking serious liabilities. Several high-profile examples underscore this point.

It's easy to forget that prior to Google and Facebook, Yahoo was an early dominant force in the tech industry. Founded in 1994, the company gradually fell behind and began soliciting takeover offers. It seemed the perfect opportunity for a new start when Verizon announced a deal to acquire Yahoo's operating business. Unfortunately, the optimism didn't last long. Yahoo suffered one of the largest data breaches in history leading up to the Verizon deal. Making matters worse, Yahoo failed to sound the alarm.

According to the SEC, Yahoo's information security team first learned of a massive intrusion into user data in December 2014. Within days they knew Russian hackers had stolen some of their most important user data including user names, phone numbers, email addresses, encrypted passwords, birthdates, and security questions and answers. Not only did hackers access the "crown jewels" of Yahoo's data, they did so on a massive scale. Hundreds of millions of user accounts were compromised.

Yahoo reported the breach to its senior management and legal department but refrained from thoroughly investigating the breach or warning investors. In fact, the breach wasn't disclosed at all for over two years. Only when Yahoo was in the processing of closing its deal with Verizon in 2016 did the company finally announce the breach to the general public.

In February 2017, Verizon agreed to lower its $4.83 billion offer by $350 million. The deal closed in June 2017 with both parties agreeing to share liability for any third-party litigation arising from the data breaches.

In October 2017, a press release announced that further investigation revealed all Yahoo accounts had been affected by a 2013 data theft. With 3 billion user accounts compromised, this incident is the largest known cybersecurity breach to date.

In 2018, Yahoo/Altbaba was fined $35 million by the SEC for violations of Sections 17(a)(2) and 17 (a)(3) of the Securities Act of 1933 and Section 13(a) of the Securities Exchange Act of 1934. The SEC determined Yahoo had filed several quarterly and annual reports following the breach yet failed to disclose any information to investors. The SEC also said Yahoo failed to maintain disclosure controls and procedures.

"Yahoo's failure to have controls and procedures in place to assess its cyber-disclosure obligations ended up leaving its investors totally in the dark about a massive data breach," SEC San Francisco Regional Office Director Jin Choi explained. "Public companies should have controls and procedures in place to properly evaluate cyber incidents and disclose material information to investors."

Unfortunately, Yahoo isn't the only large, high-profile merger recently disrupted by a historic breach. In 2016 Marriott acquired Starwood Hotels & Resorts for $13 billion. In July 2019, Marriott was fined $124 million (about 2.5% of Marriott's total annual revenue) by the United Kingdom's Information Commission Office (ICO) for a data breach impacting approximately 500 million Starwood guests. Furthermore, the ICO determined Marriott had failed to undertake sufficient due diligence during the acquisition process.

Although the breach began as early as 2014, Marriott's response overlapped into the post-GDPR regulatory regime. The GDPR makes businesses accountable for the personal data they control, including carrying out proper due diligence when making a corporate acquisition.

Cybersecurity Due Diligence Best Practices

Given the increasing costs associated with cybersecurity incidents, conducting an exhaustive review of policies and procedures during due diligence is essential. The time spent reviewing a target's cybersecurity is justified against the potential expenses of lawsuits, fines, forensic investigations, and other assumed liabilities of a breach discovered after the deal is closed. Still, investigating a target's compliance with applicable laws and regulations can consume a substantial amount of effort and resources.

The GDPR and CCPA have brought data privacy compliance to the forefront. A good place to start due diligence includes reviewing a target's existing privacy policies, terms of use, internal policies for employees, and vendor contracts. The geographical footprint of the target needs to be reviewed to determine whether GDPR compliance will be implicated.

The sources and purposes of data collection will need to be identified. Next, the location of the information along with accessibility must be carefully analyzed. For example, the target will have different responsibilities depending on whether they're classified as a covered business or a third-party data aggregator under the GDPR. Under both the CCPA and GDPR, individuals have the right to access and delete their information. If a target company is non-compliant with this basic requirement, they are likely behind on other significant details as well.

Due diligence should also include a thorough review of past incidents and how they were handled. As the Yahoo incident demonstrate, officers may be blissfully unaware of past breaches. On the other hand, even if officers are aware of past events, they may fail to appreciate their significance.

Most conventional insurance policies lack coverage for cybersecurity incidents. Carriers are only beginning to offer cybersecurity coverage. Any existing policies need to be reviewed carefully as part of the due diligence process. As a buyer, purchasing cyber insurance coverage should be a serious consideration. Cybersecurity insurance appears to have helped companies affected by data breaches such as Marriott and Equifax limit exposure from their high-profile incidents.

All of a target's enterprise resource planning programs will need to be evaluated. The cloud revolution has produced new legal complexities. Agreements with cloud vendors need to be analyzed to determine the custody and security of information. Data on a cloud may be more difficult to access or be physically located in a different jurisdiction with additional requirements.

Another consideration of cloud computing is how these expenses are represented on the balance sheet. Whereas the purchase and maintenance of a mainframe computer or in-house servers are considered capital expenditures, a cloud or subscription service will be represented as operating expenses. Another often-overlooked consideration is ownership of the cloud encryption key. Many small to mid-size businesses will likely not have ownership of this critical cybersecurity lynchpin. If a target does not own their cloud encryption key, their key-management policies and procedures will also need to be examined.

Representations and warranties should reflect the scale and scope of cybersecurity vulnerabilities. Language concerning known cybersecurity breaches should be specific to the nature and extent of the incidents as well as regarding the standard for knowledge. The difference between actual knowledge and a simple due inquiry can translate into massive liabilities for the buyer.

The nature of the target business helps informs decisions about how to craft the details of the transaction documents. For example, if a target's value derives mainly from troves of valuable personal information, the duration of the representations and warranties may need to be extended. Likewise, if the target works with children, healthcare, or financial information, the importance of cybersecurity measures will be elevated due to the prevalence of sensitive information.

Conclusion

Cybersecurity has become a fact of life in the modern world. Individuals, law firms, businesses, and even courts have made headlines falling victim to sophisticated cybersecurity threats. Not surprisingly, cybersecurity is becoming increasingly relevant when structuring deals. Like #MeToo reps, cybersecurity is another risk a buyer can no longer afford to ignore. The ABA's 2019 Private Target study found 68% of deals had a privacy representation. 70% had a cybersecurity representation. This indicates awareness of cybersecurity risks is growing but has yet to become standard operating procedure.

Part of what makes cyber threats unique is they often go undetected for months or even years after a deal is closed. While reps addressing cyber incidents are increasingly common, they may not always be sufficient. A thorough due diligence of the target's cybersecurity infrastructure, policies, procedures, and any past breaches is essential. Representation and warranty insurance and/or cybersecurity insurance can also be helpful.

Attorneys can't prevent all cybersecurity-related problems for their clients. But assisting buyers in identifying potential problems before a deal is signed is an indispensable risk management best practice.

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Women in M&A Subcommittee

The last Women in M&A subcommittee meeting was held at the Marriot Marquis in Washington, D.C., in September 2019. The meeting featured a panel of female board members who discussed their experience serving as directors on boards of various companies and insights regarding efforts to increase gender diversity on corporate boards of directors.

Our next meeting will be in Laguna Beach, California on Friday, January 31, from 2:30 pm-3:30 pm. The meeting will include a panel presentation on tried and true "life hacks" and practical strategies to build your network both in real life and in the digital world with a particular focus on managing external branding and engaging with social media.

If you have interest in volunteering for the Women in M&A Subcommittee, please send an email to jmuller@hl.com and oneillr@sullcrom.com and indicate your area of interest. We look forward to seeing you at the meeting and thank you in advance for your efforts.

JENNIFER MULLER, CO-CHAIR
RITA-ANNE O'NEILL, CO-CHAIR
JOANNA LIN, VICE-CHAIR

Acquisition of Public Companies Subcommittee

At our meeting in Laguna Beach, the Acquisition of Public Companies Subcommittee will welcome Jenny Hochenberg (Cravath), Charlotte May (Covington) and Ann Beth Stebbins (Skadden) to discuss hot topics in public company M&A, with observations from Chancellor Bouchard of the Delaware Court of Chancery. Co-chairs of the Subcommittee, Rita O'Neill (Sullivan & Cromwell LLP) and Patricia Vella (Morris, Nichols, Arsht & Tunnell LLP), will moderate the discussion on a variety of hot topics in public company M&A, including lessons learned from *Genuine Parts Company v. Essendant Inc.*, (non-solicitation covenant and termination fee provisions); the continuing development of MAE caselaw in Delaware and the Court of Chancery's recent decision in *Channel Medsystems, Inc. v. Boston Scientific Corp.* where the court found that the purchaser failed to prove a MAE justifying its purported termination of the merger agreement; the extension of *Kahn v. M & F Worldwide Corp. (MFW)* in Delaware to cases outside the controlling stockholder cash-out merger context; and an overview of "naked no vote" fees. If you would like to submit any additional topics for consideration, please contact Rita (oneillr@sullcrom.com) or Tricia (pvella@mnat.com). We look forward to seeing you in Laguna!

RITA-ANNE O'NEILL, CO-CHAIR
PATRICIA VELLA, CO-CHAIR

Private Equity M&A Joint Subcommittee

The Private Equity M&A Subcommittee last met on Friday, September 13, 2019 at 10:30 a.m. local time in Washington, D.C., as part of the Business Law Section's Annual Meeting. We had two panel discussions. The first panel, which included Sophie Lamonde of Stikeman Elliott in Montreal, Quebec, Joel Greenberg of Arnold & Porter in New York, New York, and I discussed Financing Issues in Private Equity M&A Transactions. Topics discussed included how a seller protects itself if a "newco" buyer that is party to the purchase agreement fails to close. The second panel, which consisted of Jeny Maier of Axinn in Washington, D.C., and John Clifford of McMillan, Toronto, Ontario, discussed Antitrust Issues for Private Equity M&A Lawyers. Topics discussed included issues regarding the pooling of bids by private equity firms and strategies for handling HSR Act requirements.

The Private Equity M&A Joint Subcommittee will meet again on Friday, January 31, 2020 at 10:30 a.m. local time in Laguna Beach, California, as part of the Merger & Acquisition Committee's Stand-Alone Meeting. We are planning two panel presentations. First, there will be a panel discussion entitled "Conflict Issues for PE Professionals and their Counsel When Serving as Directors or Counsel for Portfolio Companies". This panel will include Delaware Chancellor Bouchard, Lisa Stark of K&L Gates, Wilmington, Delaware, and the Subcommittee's Chair and Vice Chair, David Albin of Finn Dixon & Herling, Stamford, Connecticut and Samantha Horn of Stikeman Elliott, Toronto, Ontario. We will then discuss a few recent cases that should be of interest to Private Equity M&A attorneys. Lisa Hedrick of Hirschler, Richmond, Virginia, will lead our discussion of *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund* (First Cir. 2019), Brad Davey of Potter Anderson, Wilmington, Delaware, will lead a discussion of *Hill v. LW Buyer, LLC* (Del Ch. 2019), and, time permitting, I will lead a discussion of *Kotler v. Shipman Associates* (Del. Ch. 2019).

My Vice Chair, the aforementioned Samantha Horn, and I continue to seek **YOUR** feedback as to the meetings and the Joint Subcommittee, either by talking to one of us in Laguna Beach or reaching out to one of us afterwards. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. And, as I've said before, if you don't know me and you are at the Laguna Beach meetings, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Laguna Beach on Friday, January 31st at 10:30 a.m. local time. If you are unable to be there, please feel free to dial in and listen using the instructions set forth elsewhere in *Deal Points*.

DAVID ALBIN, CHAIR
MIREILLE FONTAINE, VICE-CHAIR
SAMANTHA HORN, VICE-CHAIR

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee will meet on Friday, January 31, 2020 at 9:00 a.m. local time in Laguna Beach. Dial-in information for the meeting is included in the schedule at the end of this issue of *Deal Points*.

At the meeting we will discuss recent developments in M&A case law, including:

- Ghosts of M&A case law past, including:
  - what constitutes indemnifiable losses – in the latest iteration of *Winshall v. Viacom International*, which was previously featured in our 2014 Annual Survey; and
  - what constitutes a partnership-in-fact – in the recent reversal of *Sun Capital Partners III, L.P. v. New England Teamsters & Trucking* Industry Pension Fund, which was also featured in the 2014 Annual Survey
- Other recent developments in M&A case law, including:
  - what constitutes privileged communications under New York law with respect to pre-acquisition *communications (Askari v. McDermott, Will & Emery, LLP*); and
  - what constitutes termination of an engagement letter (Stone Key Partners).

The group will also discuss the topics under review by the Judicial Interpretations Working Group, ideas for new memo topics, and opportunities for new member participation.

The cases and other materials will be distributed by e-mail. If you don't get the e-mail, but would like to, please let one of us know.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by e-mail either to Lisa Hedrick at **lhedrick@hirschlerlaw.com** or Nate Cartmell at **nathaniel.cartmell@pillsburylaw.com**. Please state in your email why you believe the case merits inclusion in the survey. We rely on members to help identify important cases from all jurisdictions, **so we need you to help identify cases!**

To be included, a decision must:

1) Involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control

2) (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim.

More generally:

For those of you who don't know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up to date on judicial developments relating to M&A. Our Subcommittee includes:

- The Annual Survey Working Group -- identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to M&A, which is published in The Business Lawyer. The Annual Surveys also are posted in the on-line M&A Lawyers' Library, which Committee members can access from the Committee's home page on the ABA website: (http://apps.americanbar.org/dch/committee.cfm?com=CL560000).

- The Judicial Interpretations Working Group -- examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking for recent cases and also examining the deeper body of case law. The Working Group produces memoranda summarizing our findings, which are circulated to Subcommittee members and, when finished, posted in the M&A Lawyers' Library.

- The M&A Lawyers' Library Publication Project Group -- is compiling the contents of the M&A Lawyers' Library into an ABA Publication.

We need more topics!

The Judicial Interpretations Working Group is actively soliciting suggestions for topics for new memoranda for the M&A Lawyers' Library and seeking volunteers to research and draft memoranda. If you have ideas for new topics or would like to work on a memorandum, please contact Frederic Smith at fsmith@bradley.com.

We are currently excluding cases dealing exclusively with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

Join our Subcommittee!

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary. To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

NATHANIEL CARTMELL, III, CHAIR

LISA HEDRICK, CHAIR
ANNUAL SURVEY TASK FORCE

FREDERIC SMITH, CHAIR
JUDICIAL INTERPRETATIONS WORKING GROUP

M&A Market Trends Subcommittee

I hope you can join us for the next Market Trends meeting. We have a packed agenda.

In the largest segment of the meeting, we will show additional video clips from the "Materiality Scrapes" video from the "What's Market" Video Series. Work on the other videos for "Season 1" is ongoing. In fact, at the Laguna meetings we will be shooting the interviews for several of the other video courses that will be part of Season 1. For the video courses that will not be part of the video shoot in Laguna, the teams are diligently working on the outlines and scripts that will make up the first batch of videos. At the meeting we will discuss the plans going forward for the additional videos that will be part of "Season 1" and will discuss plans for additional video courses.

As I'm sure you've seen, both the U.S. Private Target Deal Points Study and the Canadian Private Target Deal Points Study were released in the past few months. Work is progressing on the Canadian Public Target Deal Points Study and the European Private Target Deal Points Study that will be released later this year. As always, if you would like to volunteer for any of the studies, we would love to have your involvement. Working on a Deal Points Study is a great way to get more involved in the M&A Committee and meet other members of the Committee.

Our meeting will also include a presentation from the Kira team on the use of non-competition provisions in private target deals. This presentation will highlight the differences between deals involving targets with venture capital investors and deals involving targets that are private equity portfolio companies. This should be an informative and useful presentation, so I hope you can join us.

As we customarily do at the beginning of each new year, this meeting will finish with a market overview presentation from Jennifer Muller of Houlihan Lokey.

The Subcommittee will meet on Saturday, February 1 from 9:00am to 10:30am (local time). Location and dial-in information are located later in this edition of Deal Points.

To maximize the benefit of these meetings, please let us know if you have any suggestions for topics or comments on how to improve our meetings. I can be reached at cmenden@willkie.com and Kevin at kkyte@stikeman.com.

We look forward to seeing you in Laguna.

CRAIG MENDEN, CHAIR
KEVIN KYTE, VICE-CHAIR

Membership Subcommittee

Welcome to paradise! We are so fortunate to be able to meet at the world famous Montage Laguna Beach. Of the 5,258 members within the M&A subcommittee, approximately 200 of us convene at this coastal retreat for the stand-alone meeting. For those quick mathematicians out there, that is 3.8% of our membership.

Part of our 2020 focus is to expand our meetings to attract more members and non-members alike! We are counting on you for your help with that.

But first, we must brag a little: our committee's membership has grown 53% over the last 5 years. How incredible is that!

Now, where are all these people working you ask? Here is a breakdown of the organization types we see represented:

2,752 organizations are represented among membership.

- 44% of lawyer members are from large firms with over 100 attorneys.
- 14% of lawyers are with mid-size firms with 20 to 99 attorneys.
- 15% of lawyer members are with firms under 19 attorneys.

Anyone else curious where the other 27% are? Shout out to the non-lawyer M&A professionals coming in strong! So you see, you do not have to be an attorney to be a member of the ABA. High fives all around.

Are you looking to get more involved in our committee above and beyond cocktails at the lobby bar? The membership committee, in conjunction with the WiMA Scholars Program, will be hosting a casual ice-breaker meet-up with our WiMA Scholars in the breakfast area of the Montage at 8.00 am on Friday January 31st. We welcome any new (and seasoned) members to come join us to meet our amazing WiMA Scholars and to find out from the membership committee how you can get more involved in the subcommittees.

If you can't make the meet-up, please find Gina or Tracy throughout the meeting to discuss volunteer opportunities within each of our subcommittees. Earn those drinks people.

See you all at the beach! We mean, in the meetings…

TRACY BRADLEY WASHBURN, CHAIR
GINA CONHEADY, VICE-CHAIR

Technology in M&A Subcommittee

The Technology in M&A Subcommittee met on Saturday, September 14, 2019 at the Business Law Section's Annual Meeting in Washington, DC. The meeting primarily comprised:

- An update by Will Norton of SimplyAgree on the highly popular Technology in M&A Directory he is helping the subcommittee to develop, including an outline of planned next steps.
- A presentation by Anne McNulty of Kira Systems on the rights that Kira, an AI-assisted contract review platform, takes in the data that we upload into it. Specifically, she explained the nuances around the rights in "machine learning models" that we embed into this kind of software when we use it. This issue forms part of our Technology in M&A Ethical Issues project (which Anne is involved in) and we were given an update on where the project is up to.
- An update on our latest project, namely to create a protocol for the use of eSignings and eClosings in M&A transactions, including highlights of some of the issues faced.
- Alex Chiang and Jason Balog of Miles & Stockbridge gave us a live demonstration of the SimplyAgree signature and closing management tool.

A brand new version of the directory of technologies currently being used by M&A practitioners, which Will Norton of SimplyAgree is helping the subcommittee to develop, will be circulated ahead of the Laguna meeting and will also be available in our subcommittee's folder in the main committee's Library on the Connect platform. Because it is a work in progress it will only be available to subcommittee members (you can join through the "Join this subcommittee" button on the main ABA platform at **https://www.americanbar.org/groups/business_law/committees/ma/subcommittees**).

Tom and I would like to repeat our thanks to Will for all his hard work in progressing the directory further and also to thank those members of our subcommittee who have given us initial comments on it.

If you are aware of additional technologies not listed in the directory please let us know. Please also let us know if you have practical experience with any of these technologies and, if so, whether you would be interested in sharing your experiences with subcommittee members in connection with our planned development of a series of case studies on these technologies or by demonstrating them at a future meeting.

Going forward we continue with five other projects:

- Our newest project to create guidance on electronic closings, which is being led by Tom Romer of Greenberg Traurig and Anshu Pasricha of Koley Jessen.
- The ethical issues that arise when using different types of technology in M&A. This project is being led by Matt Kittay of Fox Rothschild.
- Crowdsourcing data from our members (e.g. by polling) on the M&A technologies they are using and what they think of them.
- A project for the wider M&A Committee, considering how all of our subcommittees and task forces might communicate better with our members.
- Producing a series of case studies on technologies being used in M&A.

Please join as at our forthcoming meeting, which will take place from 1:00 pm to 2:30 pm on Saturday, February 1, 2020 at the M&A Committee's Annual Standalone Meeting in Laguna Beach, CA. The agenda for that meeting will include the following:

- An update on our highly popular Technology in M&A Directory, including a discussion on a planned survey to members.
- An update on our Technology in M&A Ethical Issues project, including a presentation on some issues that the project is covering.
- An update on our latest project, namely to create a protocol for the use of eSignings and eClosings in M&A transactions, including highlights of some of the issues faced.
- A live demonstration of a technology currently being used in M&A transactions.

If you use a type of technology that you'd like to demonstrate at a future meeting (or to produce a case study on – see above) please let us know.

Being a member of our subcommittee is the only way to ensure that you receive updates on our Technology in M&A directory and other relevant materials from our subcommittee. If you are not already a member we warmly invite and encourage you to join, through the through the "M&A Subcommittees" page on the main ABA platform at **https://www.americanbar.org/groups/business_law/committees/ma/subcommittees**).

Our subcommittee is also responsible for maintaining the M&A Committee's pages on the ABA website, where the platform we have been using for many years has recently been replaced by two new platforms. For details of the changes and where you can find everything now please see the article on page 4 of the Winter 2019 issue of Deal Points.

If you have ideas for how we might take the subcommittee forward, please share them with us. Please come to our forthcoming meeting in Laguna and if you can't do that please email my Vice-Chair Tom Romer (romert@gtlaw.com), Tom's Co-Project Leader on our eSignings and eClosings in M&A Transactions Project Anshu Pasricha (anshu.pasricha@koleyjessen.com), our M&A Directory Project Leader Will Norton (will@simplyagree.com), our Ethics in M&A Technology Project Leader Matt Kittay (mkittay@foxrothschild.com) or me (daniel.rosenberg@crsblaw.com).

DANIEL ROSENBERG, CHAIR
TOM ROMER, VICE-CHAIR

Task Force on the Revised Model Asset Purchase Agreement

The Task Force on the Revised Model Asset Purchase Agreement has moved to the editorial stage, so it did not meet at the Annual Meeting and the Task Force is not meeting in Laguna Beach. The editorial working group could use the assistance of a couple of people on discreet tasks in the coming months. If you are interested in assisting, please contact one of the Co-Chairs (Edward.deibert@arnoldporter.com or john.clifford@mcmillan.ca).

JOHN CLIFFORD, CO-CHAIR
EDWARD DEIBERT, CO-CHAIR

Task Force on Legal Project Management in M&A

The last meeting of the Task Force was held in Washington, D.C. in September in conjunction with the Annual Meeting of the Business Law Section. It featured a program on Matter Management Boards, sometimes referred to as KanBan boards by David Skinner of Gimbal Lean Practice Management Advisors in Montreal. David explained how Matter Management Boards can serve as a work and workflow visualization aide that works particularly well in the context of M&A transactions. You can download Gimbal's All-in-One Guide to Setting up Matter Management Boards at the following URL: https://gimbal.ck.page/141367a2ed1.

The next in-person meeting of our Task Force will be held in conjunction with the Stand Alone meeting of the Mergers and Acquisitions Committee. We will be convening at 10:30 am (Pacific Time) on Saturday, January 31 in Gallery I and II at the Montage Resort in Laguna Beach, California. Dial in information for those who cannot attend is provided later in this edition of Deal Points:

At our upcoming meeting, we will be discussing among other things:

- A draft Post-Closing Reference Guide that alerts clients to important post-closing date, deadlines and action items. We will also discuss a future program on post-closing integration we expect to hold at our Fall meeting in Chicago with Deloitte Consulting;
- Four draft tools for use in international joint ventures based on our M&A deal tools;
- A proposed new tool for use in connection with the sale of a distressed enterprise; and
- Digitization of certain tools (e.g., the budgeting tool)

Finally, we will engage in some brainstorming on new tools or other subjects of interest to our Task Force members. We look forward to seeing or hearing from you in Laguna Beach.

BYRON KALOGEROU, CO-CHAIR
DENNIS WHITE, CO-CHAIR

Joint Task Force on Model Short Form M&A Documents

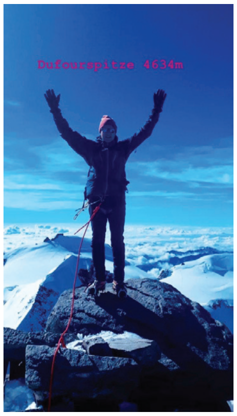
The Joint Task Force on Model Short Form M&A Documents is a combined effort of the M&A Committee and the Middle Market and Small Business Committee with the goal of publishing a set of "short form" acquisition agreements (with ancillary documents and commentary) that are more easily adapted for use in smaller M&A transactions. In September, the Joint Task Force spent a productive session reviewing and discussing the current draft of the model short form stock purchase agreement at the ABA Business Law Section Annual Meeting in Washington D.C. The Joint Task Force is close to finalizing the stock purchase agreement and will then focus on preparing the commentary.

CALLING ALL RMAPA VOLUTEERS!!! The Joint Task Force is also about to ramp up its efforts related to the short form asset purchase agreement. The plan is to leverage off of the work being completed by the Revised Model Asset Purchase Agreement (RMAPA) Task Force. This a great opportunity to get involved in an ABA project at the ground level and would be a natural fit for those who finished their tenure assisting RMAPA and are looking for a new project. Please stop by in Laguna Beach to learn about opportunities and how you can get involved.

The M&A Committee members of the Joint Task Force will be meeting on Friday, January 31st from 10:30 a.m. to 11:30 a.m. (Pacific Time). Location and dial-in details are located later in this edition of Deal Points. We look forward to seeing you in Laguna Beach and encourage you to get involved with this project.

JASON BALOG, CO-CHAIR
ERIC GRABEN, CO-CHAIR

Marco Toni



Marco Toni is a partner of and heads the Zurich office of Loyens & Loeff. That office has 40+ lawyers who focus their practice on international mergers and acquisitions (both, for strategic and private equity clients), joint ventures and general corporate matters. Marco studied in Zurich, Switzerland, and in New York at Columbia Law School and has been an active participant of M&A Committee meetings since 2017.

Marco is fascinated with rock climbing and high-alpine mountaineering. He started climbing several years ago with a tour in the Swiss Alps. His goal was to climb 15 summits all over 4,000m (13,134ft) above sea level in four days. This tour is called the "Spaghetti-Tour" in Switzerland because of the food provided in the alpine huts along the route. Bad weather conditions, including snow storms, restricted Marco to only three climbs. But he was hooked and Marco has been an avid climber since then. Last summer, in one day, Marco climbed the second and third highest peaks in Europe, the so called "Dufourspitze" and "Nordend", both over 4,600m (15,000ft).

Marco says that being outdoors and exposed on mountain walls and on small ridges strengthens his senses and concentration. Every mistake can have serious consequences. He really enjoys pushing the limits of what he is capable of doing. Not to mention that he gets to encounter cows, eagles, capricorns and other wildlife in their natural habitat; a great joy for a city kid (if you can say that for a Swiss guy☺).

Marco's goal for 2020 is set: In mid-April he will be in Alaska to climb the summit of Denali, the highest mountain peak in North America with a summit elevation of 6,190m (20,310ft) above sea level. This summer, he plans to climb the world-famous Matterhorn and the Eiger (not the north face, though!).

Marco also loves surfing; an odd passion for someone from a landlocked country like Switzerland. Yes, he says, it is possible. He started surfing with a beginner course on the North Shore in Hawaii about 20 years ago. Since then, he has "hocked-up" with the aloha spirit and surfing. Surf travels have brought him to Brazil, Nicaragua, Panama, Costa Rica, the remote Mentawai islands in Indonesia and Maldives.

Surfing has taught Marco to respect the forces of nature (no doubt not unlike the howling winds on the side of a mountain!) and given him a lot of self-confidence. Paddling into a big wave requires a strong belief that you are actually able to surf this big mass of water. If you have doubts, you will fail and fall of your board. Also, trying to combat a wave will not lead to success. Marco has learned to go with the forces of nature and to adjust accordingly. Some of the happiest moments of his life to date have been when he is paddling out on a surf board and waiting for waves to come, being fully alone in the water, unless there are dolphins or turtles around his board!!

Watch out in Laguna Beach, maybe you'll see Marco out on a surf board. But if you see him on land, be sure to say hello!

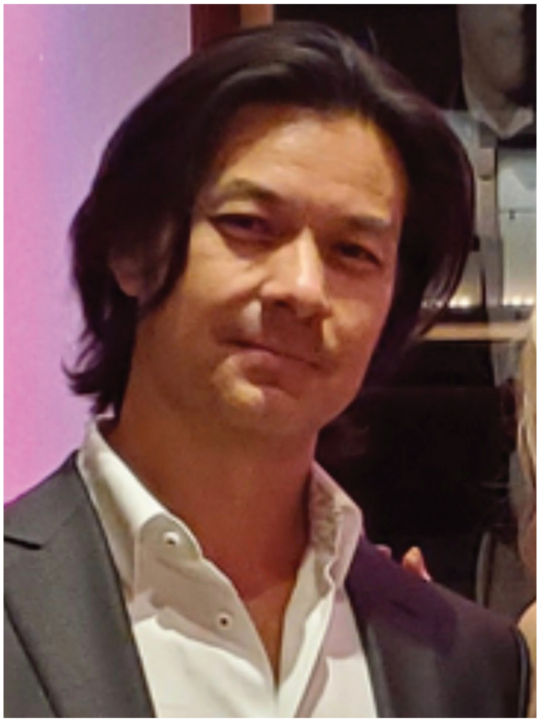
About Deal People

Deal People is a feature in *Deal Points* that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

If you have pictures from Committee meetings that you would like to suggest for inclusion in a future issue of *Deal Points*, please send them to me.

John F Clifford | McMillan LLP | Toronto, Canada | john.clifford@mcmillan.ca

Xander Lee



Alexander (Xander) Lee is a partner of Cooley and works out of Cooley's office in Santa Monica, California. Xander is a tax lawyer; he is the youngest practitioner to be recognized by Chambers Global and the Legal 500 International as one of the top 20 leading experts in International Tax in the USA. And, he recently agreed to lead a Tax Subcommittee of the M&A Committee.

Xander graduated with an LLM in Taxation from NYU in 1998, where we was a Tax Law Scholar and an editor of the Tax Law Review. He began his career at Fenwick & West in Palo Alto where he had the privilege of working under the tutelage of Jim Fuller. Xander eventually headed for sunny Southern California and worked as an associate in Paul Hastings's Orange County office. In 2004, he was promoted to equity partner and transferred to the Paul Hastings Los Angeles office, where he spent 12 years leading the Tax practice. After a brief stint at McDermott, Will & Emery, he joined Cooley in July 2018.

The tagline in Xander's Cooley bio says that he "blends traditional methods with an unconventional approach to produce creative tax solutions . . ." Xander is a fan of multi-media and began a video series in early 2016 to provide clients with a different method of getting their tax client alerts. The series, "Tax Takes" blossomed in 2017 with the introduction of the Tax Cuts and Jobs Act. "Everyone wanted to know what was new in the tax law and didn't want to have to read through pages and pages of articles," said Xander. After his move to Cooley, he rebranded the series "Taxsplaining" (credit to Wilson Chu for coining the term) and has shifted his focus to educating young entrepreneurs on the "ins and outs" of tax law for early stage companies from a business perspective.

Xander is a "biohacker" and constantly strives to find the best and most efficient workouts and foods to provide him with the best health results. He notes: "I am constantly hacking the Tax Code to find the best solutions for my clients, so it makes sense that I would do the same for my own health." Bulletproof Upgrade Labs (a spinoff from Dave Asprey's "The Bulletproof Diet") recently featured Xander in one of its testimonials where he describes how he lost 51 pounds and 15% body fat in less than a year. Just this last year, he ran a marathon (faster than in his twenties), did a solo climb of Mount Whitney in a single day, and he typically swims a mile every other day. "I am constantly reading, searching for, and trying out new biohacks, including Cryotherapy, sleep tracking, Brain Tap technologies, digestive enzymes, and ARX strength training," he says. Some of his favorite books include, Code of the Extraordinary Mind (Vishen Lakiani), Headstrong (Dave Asprey), Natrual Born Heroes (Christopher McDougal), TB12 (Tom Brady), Why We Sleep (Mathew Walker), and 10% Happier (Dan Harris).

Xander is the proud parent of a Disney Princess. His daughter Jessica currently stars as Princess Anna, from Frozen, on the National Tour of Disney on Ice. After spending several years on the U.S. National Team as a top pairs skater, Jessica decided to tour with Disney on Ice for a few years before starting college. In the last couple of years, she has performed in the United States, Europe, Asia and South America in various roles from Anna (Frozen) to Rapunzel (Tangled) to Ariel (the Little Mermaid).

Please say hello to Xander at our meeting in Laguna Beach; no Tax Code required!

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John F Clifford | McMillan LLP | Toronto, Canada | john.clifford@mcmillan.ca

DIAL-IN AGENDA

Mergers & Acquisitions Committee Meeting
January 31 to February 1, 2020
Montage Laguna Beach

PLEASE NOTE THAT TIMES LISTED ARE PACIFIC TIME.

Dial-in numbers are different for the two meeting rooms that are in use.

Please be conscientious of start and end times.

Meeting Room	Toll-Free US Number	International Number	Conference Code
Grand Ballroom	(866) 646-6488	(707) 287-9583	6234776971
Gallery I & II	(866) 646-6488	(707) 287-9583	1446196893

Friday, January 31, 2020

9:00 am – 10:30 am **M&A Jurisprudence Subcommittee** Chair: Nathaniel M. Cartmell, III	Grand Ballroom
10:30 am – 12:00 pm **Private Equity M&A Subcommittee** Chair: David I. Albin	Grand Ballroom
10:30 am – 11:30 am Short Form Agreement Task Force Co-Chairs: Eric K. Graben & Jason E. Balog	Gallery I & II
1:30pm – 2:30 pm **Acquisition of Public Companies Subcommittee** Co-Chairs: Rita-Anne O'Neill & Patricia O. Vella	Grand Ballroom
2:30 pm – 3:30 pm **Women in M&A Subcommittee** Co-Chairs: Jennifer Muller & Rita-Anne O'Neill	Gallery I & II
3:30 pm – 4:30 pm **Meeting of Committee Chair and Vice ChairsSubcommittee and Task Force Chairs** Chair: Wilson Chu	Grand Ballroom

Saturday, February 1, 2020

9:00 am – 10:30 am **Market Trends Subcommittee** Chair: Craig Menden	Grand Ballroom
10:30 am – 12:00 pm **Legal Project Management Task Force** Co-Chairs: Byron S. Kalogerou & Dennis J. White	Gallery I & II
10:30 am – 12:00 pm **International M&A Subcommittee** Chair: Jeff LaBine	Grand Ballroom
1:00 pm – 2:30 pm **Technology in M&A Subcommittee** Chair: Daniel P. Rosenberg	Grand Ballroom
1:30 pm – 2:30 pm **Academic Subcommittee** Chair: Glenn D. West	Gallery I & II
2:45 pm – 5:00 pm **Mergers and Acquisitions Full Committee Meeting** Chair: Wilson Chu	Grand Ballroom

COMMITTEE MEETING AGENDA

February 1, 2020, 2:45 – 5:00pm
Laguna Beach, CA

Welcome and Around-the-Horn Introductions (20 mins)
Wilson Chu, Chair, McDermott Will & Emery, Dallas, TX

A Look At Tech M&A In 2019 And What Lies Ahead (20 mins)
Mike O'Bryan, Morrison & Foerster, SF, CA
Derrick Chao, BofA Merrill Lynch

M&A Tax Corner: 3 Structuring Tips You Need to Know Post-Tax Reform (15 mins)
Alexander Lee, Cooley, LA, CA

Update: Market Check Videos (10 mins)
Craig Menden, Willkie Farr & Gallagher, Palo Alto, CA
Ian Nelson, Hotshot, NY, NY

M&A Negotiation in the Wake of Deal Point Studies: A Lost Art? (45 mins)
Joel Greenberg, Arnold & Porter, NY, NY
Jessica Pearlman, K&L Gates, Seattle, WA
Glenn West, Weil Gotshal & Manges, Dallas, TX

Adjourn

Committee Structure and Leadership

MAC Subcommittee/Task Force Leadership

Subcommittee/Task Force	Subcommittee/Task Force
Academic • Chair, Glenn West	Delaware Judiciary Liaison • Lisa Stark • Patricia Vella
International M&A • Chair, Jeff Labine	Legal Project Management • Co-Chair, Byron Kalogerou • Co-Chair, Dennis White
M&A Jurisprudence • Chair, Nathaniel Cartmell, III • Chair, Judicial Interpretations Working Group, Frederic Smith • Chair, Annual Survey Task Force, Lisa Hedrick	Market Trends • Chair, Craig Menden • Vice-Chair, Kevin Kyte
Model Asset Purchase Agreement • Co-Chair, John Clifford • Co-Chair, Edward Deibert	Membership • Chair, Tracy Bradley Washburn • Vice-Chair, Gina Conheady
Public Company Acquisitions • Co-Chair, Rita-Anne O'Neill • Co-Chair, Patricia Vella	Private Equity M&A (joint subcommittee of the Venture Capital and Private Equity Committee) • Chair, David Albin • Vice-Chair, Mireille Fontaine • Vice-Chair, Samantha Horn
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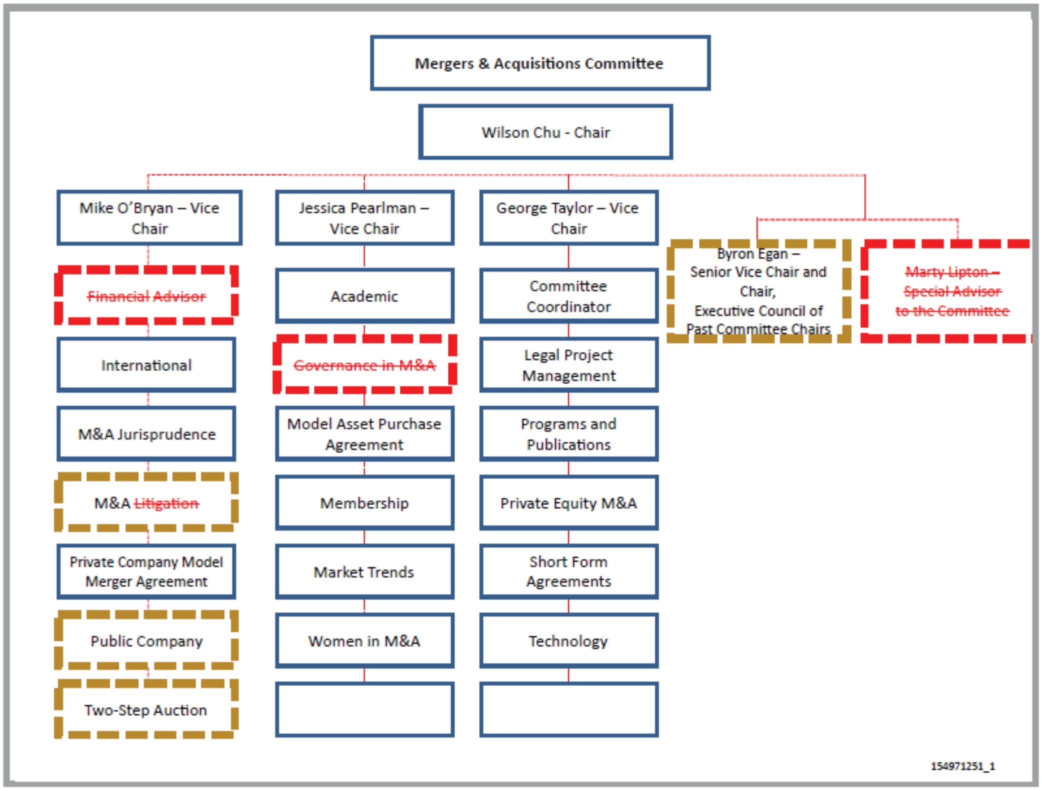

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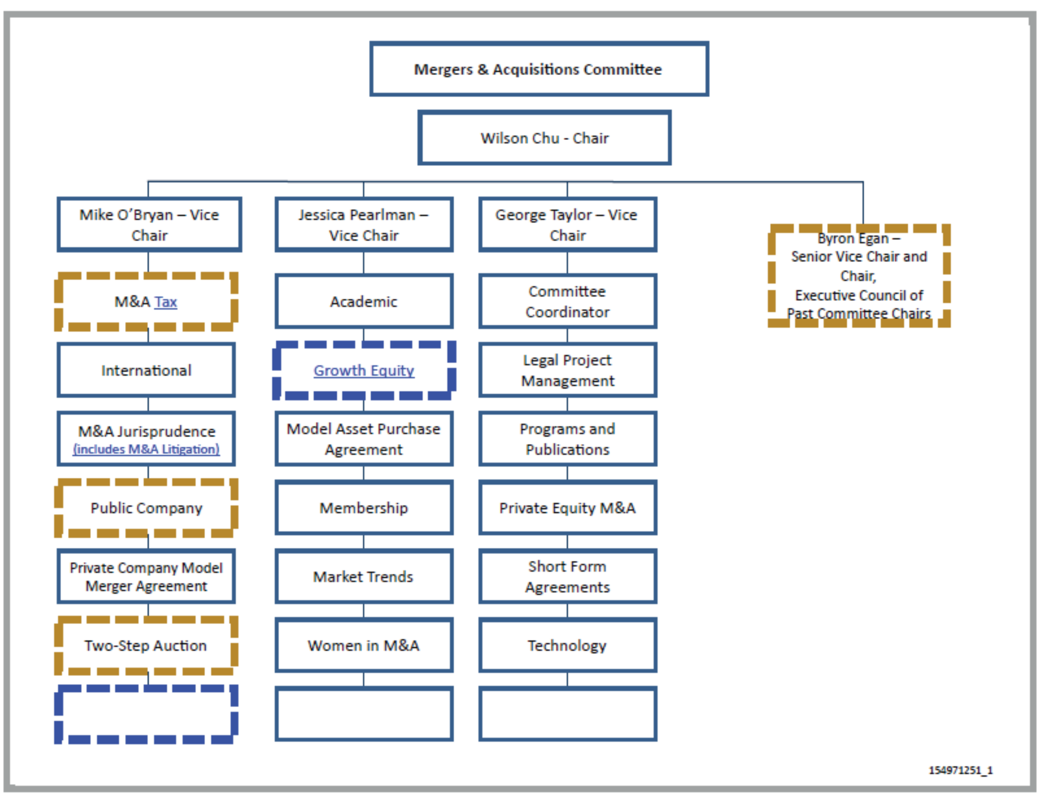

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Unique Considerations for Transactions Involving Government Contractors

By Kathryn L. Hickey, David T. Shafer, Samuel S. Finnerty, and Francis G. Massaro*

M&A transactions involving government contractors carry several regulatory and industry-specific considerations that can materially impact all aspects of the deal—from high-level structuring considerations to risk allocation for compliance issues to additional administrative checklist items. If neglected or overlooked, they can result in major headaches. This article outlines certain key issues that practitioners should consider in transactions involving government contractors.

I. Pre-Transaction Structuring Considerations

a. Novation

The Anti-Assignment Act (41 U.S.C. § 6305) generally prohibits companies from selling government contracts. The Federal Acquisition Regulation (FAR) permits the government to recognize a transferee of a contract following a transfer of all of a company's assets involved in performing the contract through the novation process. Novation is only required for asset acquisitions, not for changes in ownership as a result of equity acquisitions. A drawback to transactions requiring novation is that novation adds uncertainty and delay to the acquisition, as the government may decline to novate contracts if it determines that novation is not in the government's best interest or if it finds the transaction to be a mere sale of a contract in violation of the Anti-Assignment Act. Further, because an application for novation may only be submitted following consummation of the transfer of assets, parties to the transaction must expend significant resources and assume risk post-closing before they have assurance that the contract transfer will be permitted. As a result, parties involved in acquisitions involving prime federal contracts often lean strongly towards transactions structured as acquisitions of equity rather than assets. The impact of novation should be considered at the structuring stages, in addition to traditional tax, liability, and operational considerations.

b. Affiliation

Any acquirer considering a target with small business set-aside contracts should understand how its own size and how acquisition of, and subsequent affiliation with, the target may affect the size of the acquirer, its current affiliates, the target, and any post-closing affiliates. A company's size for this purpose is determined under contract-specific North American Industry Classification System (NAICS) codes based on gross revenues or number of employees of the company and its "affiliates." Under Small Business Administration affiliation rules, if one company owns more than 50% of another company, the companies are affiliated, so traditional business acquisitions will typically result in affiliation of the constituent parties for size purposes. Minority equity investment transactions can also trigger affiliation if the investor acquires too much control over the management and decision-making of the company. Whether affiliation will put a company over its NAICS code size standard should be determined early in a transaction, as it could impact the future value of the company's contracts. The affiliation analysis will also influence any post-closing recertification, as discussed below.

II. Diligence Issues and Reps and Warranties Considerations

a. Organizational Conflicts of Interest

Often, one of the key benefits identified by business and operations teams for a transaction is the ability to leverage the counterparty's experience, relationships, and past-performance. An organizational conflict of interest (OCI) arises when, because of relationship or circumstances, a contractor may (a) be unable to render impartial advice or assistance to the government, (b) be unable to objectively perform contract work, or (c) have an unfair competitive advantage. Accordingly, at the outset of the diligence period, parties should consider if a combination could cause one of three types of OCI: (1) unequal access to information, (2) biased ground rule, and (3) impaired objectivity. Identifying potential OCIs early in diligence will help parties determine the best method for mitigating those issues while still achieving business objectives.

b. Regulatory Compliance

In a definitive agreement for the acquisition of a government contractor, the representations and warranties relating to government contracting regulations and requirements will be extensive. Because regulatory compliance is such a critical source of value and potential liability for a buyer, many buyers will push for the government contract representations to be subject to longer survival periods and higher indemnification caps as compared to "general" representations. Some issues that are important to address in government contracting representations and warranties include: (1) verification of any preferential status (small business, veteran-owned, woman-owned, etc.); (2) compliance with export control regulations, the FAR, the Defense Federal Acquisition Regulation, the Foreign Corrupt Practices Act of 1977, and the Defense Base Act; and (3) identification of any suspension or debarments of key principals or False Claims Act liabilities. Additionally, applicable statutes of limitation for certain liabilities associated with the foregoing list tend to be lengthy, so the lookback period referenced in those representations (and in related diligence) should correspond with the periods for which liability remains open.

c. Assignment of Receivables

In transactions where accounts receivable will be assigned to a lender or other third party, the Assignment of Claims Act of 1940 (31 U.S.C. § 3727, 41 U.S.C. § 15) should be consulted to ensure the assignee is able to receive payments directly from the government on any U.S. government receivables and enforce its right to collect payment from the applicable agency. Note that while the Assignment of Claims Act sets forth certain conditions for U.S. government receivables to be assigned, Article 9 of the Uniform Commercial Code still governs the creation and perfection of the security interest. The Assignment of Claims Act permits a government contractor to assign its right to receivables due under a federal contract only if certain conditions are met, including (1) that the contract does not prohibit the assignment and (2) that the parties must obtain a notice of assignment executed by an authorized representative of the applicable government agency. Depending on the number of government contracts and agencies involved, the process for obtaining the necessary assignment notices can be lengthy and frustrating, potentially delaying closing if the process is not initiated as early as practicable.

III. **Post-Transaction Issues**

a. Security Clearances

Many contracts require a company to maintain a facility security clearance. The Defense Counterintelligence and Security Agency (DCSA) requires a cleared contractor to report certain changes affecting its facility clearance, including changes in ownership, changes in key management personnel, and changes in name or legal structure. An acquirer should ensure that it satisfies the facility clearance requirements and that the transaction will not jeopardize the target's facility clearance and, by extension, company value. DCSA will verify that the ownership change will not adversely affect the target's eligibility for a facility clearance, which may require further evaluation of the new parent entity or individual owners of the target.

b. Recertification

A company that qualifies as small or of a certain socio-economic status (e.g., veteran-owned, woman-owned) at the time of initial offer for a contract will maintain that status throughout the life of the contract. However, a company must recertify its size or socio-economic status within 30 days following consummation of certain transactions. The duty to recertify is imposed on different parties depending on the type of transaction. If, as part of an asset acquisition, a contract novation is required, the acquirer must recertify its status under the novated contracts to the procuring agency—the regulations, however, do not expressly obligate the acquirer to recertify its own small business contracts. If, as part of a merger, sale, or acquisition, contract novation is not required, then both the acquirer and the target must recertify their respective statuses. If, following the transaction, a company is no longer eligible under the applicable status and cannot recertify as such, the procuring agency can no longer count subsequent options or orders issued pursuant to the contract toward its small business or socio-economic goals, and such a recertification may trigger the agency to terminate the contracts for convenience, thus decreasing the potential value on those contracts following closing. As a result, an acquirer should understand the target's recertification requirements and evaluate how the transaction might affect the target's size or socio-economic status and any contracts awarded under such status.

c. Name Changes; Database Registrations

Certain reorganizations that are routine and straightforward from a business perspective may involve additional administrative steps for government contractors. For example, in any transaction involving the conversion of an operating company from one type of entity form to another, the resulting name change, even if simply changing "LLC" to "Inc.", will require the company to enter into a name-change agreement with the federal government in a process governed by the FAR. Similarly, a name change will require the company to update its profile in databases such as SAM.gov, which, if not updated in a timely manner, can cause delayed receipt of payments for work performed on contracts, resulting in disruptions to cash flow and operations. Name-change agreements and updated database registrations may take time to process, so it is important to identify these requirements early and ensure they are satisfied in a timely manner following closing.

The issues and considerations discussed above represent only a portion of the concerns unique to government contractors that can impact a transaction. Legal practitioners should consider government contracting-specific regulations to understand how they impact transaction value, structure, and timing.

* Kathryn Hickey is a Partner and Chair of PilieroMazza's Business & Corporate Group. Ms. Hickey's co-authors include Associates David Shafer and Francis Massaro of the Business & Corporate Group, as well as Samuel Finnerty of the Firm's Government Contracts Group.

M&A Practice Tips for In-House Counsel, and Outside Counsel Who Work with Them

By Bart Breinin*

I. **Introduction**

As a corporate lawyer specializing in M&A, with over 33 years of experience working in both law firms and in-house legal departments where I have closely collaborated with outside counsel, I have gained some valuable perspective regarding (a) what is most important for an in-house M&A counsel to focus on; (b) what an in-house M&A counsel's role in a deal should typically entail; and (c) how outside counsel can work effectively with in-house counsel on deals. The purpose of this piece is to share some of my insights, many or all of which may be familiar to experienced M&A practitioners, but may be of use to newer lawyers and a helpful reminder for those who are not.

II. **Discussion**

A. What is most important for an in-house M&A counsel to focus on?

The following sets forth three key insights for how an in-house deal lawyer can best serve his or her internal clients (e.g., management, the business leads, corporate development)[2] on a transaction:

1. *Trees are important, but the forest is more so…especially to your clients*. As important as it is for the legal team to be detail-oriented, thorough and diligent in a transaction, what the business team is going to want most from its in-house counsel is an understanding of any important legal issues that might create a substantial impediment to getting a deal done, whether arising from due diligence, regulatory review or the negotiations.

2. *Serve as a liaison between the legal team (in-house and outside) and the business team…be the translator and facilitator*. Typically, many of your clients, no matter how intelligent and knowledgeable, will have neither the time nor the interest to read or listen to lengthy legal analyses of various issues, even if the concerns raised are not only valid but also important. Thus, a key role for in-house counsel is not only to weed out the less important legal issues(with which the legal team should be able to deal on its own) but to identify the more important ones for the business team, to help them understand those that require "translation" and then work together to arrive at an appropriate resolution, and to keep the deal moving.

3. *Identify material risks; come up with practical solutions when possible*. Trite as it may be, it's worth emphasizing that responding to a client with "Yes, but" is almost always preferable to "no". But it's also worth emphasizing that there may be times when a counselor should not be afraid to "just say no". Business teams value problem solvers and pragmatists above cautious or inflexible naysayers, and striving to be the former should usually be the goal of every good in-house deal lawyer. However, it does neither the counselor nor his clients any good to be a "yes person" in the (hopefully infrequent) circumstances when going forward with a transaction raises serious legal concerns that could cause real economic or reputational damages (or worse) for the business.

Clearly, all three of the foregoing insights are inter-related, and require the right balance of legal acumen, judgment, pragmatism and conviction for an in-house deal counsel to best serve his or her clients.

B. What should an in-house M&A counsel's role in a deal typically entail?

The following lists key tasks that an in-house deal lawyer should typically undertake in a transaction:

1. *Work with the business and tax teams on structuring the transaction*. Try to get involved in planning deal structure as early as possible. This critical "gating issue" will often involve business and tax considerations for both the buyer and the seller.

2. *Get a non-disclosure agreement (NDA) in place*. This is especially important if you are representing the seller. Often an NDA will include a non-solicit/ non- hire provision. Once an NDA is in place, you may want to consider advising the business team to make disclosures of confidential and proprietary information in stages (postponing the more sensitive disclosures to later in the process, when closing is more assured).

3. *Draft a letter of intent or term sheet (if deal timing allows)*. This will create a "floor plan" for the transaction addressing key issues including:

    a. Deal structure (i.e., as a merger, share or asset acquisition, joint venture, etc.).

    b. Payment of consideration (up-front vs. over time; if over time, mandatory vs. contingent; if contingent, based on retention vs. earn-out). Be aware there can be different tax consequences.

    c. Liabilities (definite and contingent, known and unknown). The buyer may not know enough at this stage to structure these provisions, but it is prudent to reserve for the possibility of having:

        i. Purchase price adjustments (e.g., working capital, net asset value).

        ii. Holdbacks and escrows (protection against contingent liabilities, paid or released to the seller after an agreed period of time post-closing without the contingency occurring; retained by or released to the buyer to the extent the liability materializes during the period).

        iii. Special indemnities (often uncapped, or capped at full purchase price) vs. indemnification for most representations and warranties (capped).

    d. Management and employees (e.g., roles, compensation and benefits).

    e. Non-competes / non-solicits (the buyer may not want to raise at this stage).

    f. Key closing conditions (e.g., regulatory approvals (such as possible antitrust clearance); employee sign ups; client consents).

    g. Expected timing of the deal (this may hinge on resolution of any regulatory issues).

4. *Navigate between internal constituencies*. As critical as it is for in-house counsel to serve as a liaison between the legal and business teams, it's also important for them to navigate and mediate between various internal constituencies. It is often the case that a company's management, business leads (i.e., deal sponsors) and corporate development, among other groups, may not see eye to eye on all issues, and in-house counsel can play a key role in bringing them together and helping to

2 The ultimate client is, of course, the company or firm for which the in-house lawyer works, but these are its core representatives (i.e., the business team) whom he or she will be advising.

forge a compromise (or otherwise arrive at an agreed outcome).

5. *If outside counsel will be used, choose wisely*. Typically, a transaction will require more than just one lawyer for each side, no matter how adept. Part of in-house counsel's role is to make sure that a deal is staffed appropriately. If outside counsel will be used, that does not necessarily mean you should opt for the largest or most expensive firm. The choice can depend on various factors (e.g., size and type of transaction, risk perception, institutional comfort, no conflict with the counterparty).

6. *Legal Due Diligence*. The buyer's counsel should make sure to highlight any material issues for the business team as soon as possible, and coordinate review of disclosure schedules. Specialists (e.g., tax, employment, benefits, intellectual property, real estate, environmental, litigation, regulatory) should be involved as necessary. Diligence should cover not only the target but also its key personnel.

7. D*ocumentation process*. It's important to draft or review and comment on deal documents, but (as previously noted) it's critical to focus the business team on key issues. The business team may not read all/ some/ any of the documents, so in-house counsel needs to be their conduit, but only for material items unless they want to know everything. In addition, often the seller's counsel will need to assist with preparation of the disclosure and "mutual" schedules, and the buyer's counsel will need to assist with the preparation of buyer's and "mutual" schedules.

8. *Integration issues*. Often, the issues that arise are not legal but operational, but legal questions may arise in connection with the proposed integration of the two businesses (e.g., competition/anti-trust, employment). For example, in the anti-trust area, you may need to advise on constraints on coordination of the businesses pre-signing and pre-closing, and in some deals arrange for a Hart- Scott-Rodino filing and foreign clearances. Getting integration right is key to whether a deal will be successful, so make sure the appropriate people are focused on it.

9. *Get the deal closed!* Your company is going to be more appreciative if the deal is closed on time and efficiently than if minor t's are crossed and i's dotted. For example, you may determine to advise your company to waive a non- fundamental closing condition at least partially, such as requiring the counterparty to obtain certain contractual consents from third parties.

10. *Post-Closing Assistance*. Once the deal is closed, you may need to help address various items that can arise after closing like purchase price adjustments, indemnification claims, interpretation and enforcement of restrictive covenants, and if you advise the buyer, resolution of certain "inherited" legal matters assumed in the deal such as pending litigation or regulatory investigations. A best practice for in-house counsel is to maintain an electronic database of the company's transactions and all related documents, for easy access by the company's legal and business teams when needed.

As noted, some of these items are more relevant for the buyer's or seller's counsel, but most are important for counsel in either role.

B. For deals where outside counsel are engaged, how can they work effectively with in-house counsel?

It is important for outside counsel to recognize that at many companies, in-house counsel's role has evolved over the years to become much more central to the business and management, including in connection with M&A transactions. This means that:

1. *Outside counsel should make sure they understand their role in a given transaction*. Consideration should be given at the outset to the following questions:

   a. Who will be outside counsel's primary contact? Will it be in-house counsel, or the business team?

   b. What is the division of labor between outside and in-house counsel?

      i. Will in-house or outside counsel take the lead on the legal negotiations with the counterparty?

      i. No matter the answer to (i), outside counsel will likely have primary responsibility for drafting.

      i. Will specialist areas (e.g., tax, employment, benefits, intellectual property, real estate, environmental, litigation, regulatory) require outside counsel support or be addressed by in-house specialists?3

Answers to these questions vary depending on the client, including the size and sophistication of its legal department, the department's modus operandi, and both the business team's and legal department's comfort with the outside counsel.

1. Outside counsel should keep in-house counsel informed. As a trusted adviser, in-house counsel should be kept in the loop on key aspects of M&A. Even when outside counsel takes the lead on a deal and reports directly to the business team, outside counsel should make sure to let in-house counsel know what's going on. This is important not only to maintain a good relationship with in-house counsel, but because:

   a. In-house counsel is often the repository of important legal information for reasons including: (i) the company does not become overly dependent on any outside firm; (ii) the company may want in-house counsel to handle

3 *An article in the January 27, 2017 issue of InsideCounsel Magazine notes that 75% of in-house IP counsel in a recent life sciences survey say they are involved in company efforts on mergers and acquisitions.*

certain deals in the future; and (iii) outside counsel may have a future conflict of interest preventing the firm from representing the company on a given deal.

b. In-house counsel may have critical institutional knowledge that it can impart to outside counsel when there are open lines of communication.

Outside counsel should also make sure its billing is up-to-date, to avoid unpleasant surprises. It is often a good idea to agree on an estimated budget for a deal up front, and then to keep in-house counsel updated on costs.

III. **Conclusion**

Whether you are acting as in-house or outside M&A counsel, key ingredients to a successful transaction are (1) understanding your role in the deal; (2) clear and effective communication with your clients (whether they are the business team or in-house counsel); and (3) provision of excellent, timely and relevant advice and effective execution of your role. Following the practice tips in this piece should help you to achieve client satisfaction and career longevity.

* *Bart Breinin is a Partner in the Paul Ellis Law Group LLC, where he leads the M&A practice and advises on other corporate and commercial matters. Previously he was an in-house counsel for over 20 years, and before that practiced at two major law firms. He is a member of the New York City Bar Association's In-House Counsel Committee, and moderated its 2017 symposium on "M&A for In- House Counsel." Mr. Breinin is grateful to his co-panelists for suggesting some of the practice tips contained in this article.*

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