Roadmap

By Steven Olechny, Vincent Garozzo and L. Taylor Hall

There are multiple and diverse reasons why a company may be interested in either acquiring or disposing of all or any portion of a business through a negotiated transaction (colloquially referred to as mergers and acquisitions or "M&A"). Acquirers may seek opportunities to buy market share or diversify their product lines. On the other hand, sellers may wish to exit unprofitable markets or provide liquidity for their owners and investors. No matter the reason, two things are certain. First, M&A transactions often represent a significant and/or defining moment in the life of an organization. Second, for small in-house law departments, the process associated with such a transaction is often a journey into the unknown and, for the busy in-house practitioner who may already be short on resources, a seemingly daunting task.

The purpose of this article is to provide small law department practitioners with a roadmap toward the completion of a transaction. Like any good roadmap, this article will identify many of the significant M&A landmarks, and hopefully, will provide some guidance and insight on how to approach such matters. However, this article cannot and does not attempt to address every twist and turn of the journey. In-house counsel are always encouraged to engage outside M&A counsel for additional guidance.

30-SECOND SUMMARY

For small in-house law departments, merger and acquisition (M&A) transactions may appear daunting. This article provides practitioners with a roadmap, identifying many of the significant M&A landmarks that one will encounter on the trip toward the acquisition or disposition of a business. The first landmarks involve assembling a team consisting of management-level employees from all departments of the company, preparing and executing a non-disclosure agreement, issuing letters of intent that outline the preliminary agreement of the parties, and conducting a full-scale due diligence review of the seller and its business. Towards the end of the journey, issues of importance include: the definitive transaction document, statements of fact that both the acquirer and the seller must disclose regarding the legal structure, operations, financials, assets and liabilities of their respective companies, and pre-closing covenants or closing conditions.

Assembling your team

One of the biggest potential pitfalls for an in-house counsel who is unfamiliar with the M&A process is underestimating the amount of time and effort it will take to prepare for, document and negotiate a successful business transaction. No matter how large or small a transaction may be, make no mistake: It will involve a substantial commitment of time and resources. For lawyers in small law departments, this often presents a significant challenge, given the number of existing tasks for which they may already be responsible. It is imperative that counsel for both the acquirer and the seller form a team that is available to shoulder the burden from the very beginning. This team should consist of executive- and/or management-level employees from all departments of the company, including finance, human resources, operations and others. In addition, engaging outside financial, legal and environmental specialists may provide substantial benefit as well.

Confidentiality and non-disclosure agreements

One of the first agreements that will be prepared and executed in most transactions is a non-disclosure agreement (NDA), which restricts the ability of a recipient of confidential information from disclosing such information to third parties. While most are familiar with the content and function of an NDA, when negotiated and executed in connection with a M&A transaction, some additional consideration should be given to the following matters:

- **Defining confidential information:** An effective NDA must clearly identify what information should be deemed "confidential" and thus subject to the restrictions set forth in the NDA. For the seller's counsel, it is imperative that "confidential information" be defined as broadly as possible. Any such definition should include every category and type of information that will be disclosed to the acquirer. In addition, confidential information must also include any materials, reports and/or analyses that are generated by the acquirer and its representatives pursuant to their evaluation of the seller and its confidential information. Finally, given the sensitive nature of a transaction and the impact it may have on the seller's employees and customers, counsel for the seller is encouraged to include the existence and content of the NDA and any ongoing negotiations within the definition of confidential information.
- **Exclusions from confidential information:** Although most acquirers will not object to legitimate restrictions placed on truly confidential information, the acquirer's counsel must ensure that certain types of information are excluded from the definition of confidential information and thus, the restrictions of the NDA. For example, any information that the acquirer may become legally mandated to disclose must not be subject to the restrictions of the NDA. However, the counsel for the seller would be wise to include limitations to this exclusion, such as the requirement of a legal opinion stating that any such disclosure is in fact legally mandated. Other common exclusions from the definition of confidential information include any information that was previously available to the acquirer on a non-confidential basis; provided by a third party not subject to or bound by a confidentiality agreement with the seller; or independently developed by the acquirer without use of the confidential information.
- **Access to confidential information:** The most efficient diligence reviews by an acquirer are those that receive input from all levels of an organization. In addition, depending on the specifics of the transaction, it is often prudent to have both specialists (i.e., financial, tax, environmental, etc.) and outside counsel review materials. Thus, for the acquirer, it is imperative that the NDA permits the review of confidential information by such individuals. However, to the extent that the terms and conditions of the NDA applies to both the acquirer and its employees and representatives, it is imperative that all employees and representatives are familiar with the NDA and the obligations of the acquirer thereunder.

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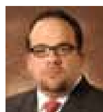

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At no point in the M&A process will the seller's leverage be greater than prior to execution of the LOI. As previously noted, the execution of the LOI typically occurs prior to commencement of a full-scale diligence review by the acquirer; thus, prior to the execution of the LOI, the acquirer is at a huge informational disadvantage.

- **Counsel for the seller should have three preeminent concerns:** First, regardless of the protection offered by the NDA, it is generally in the seller's best interest to limit the number of individuals with access to their confidential information. Limiting the number of individuals receiving confidential information provides the seller with increased control over what can sometimes become an unwieldy process. Second, not only should the acquirer be bound by the terms of the NDA, but each of their representatives receiving confidential information must also be subject to the restrictions of the NDA as though they were a party to it. Finally, the acquirer should bear the responsibility of ensuring that their representatives comply with the terms of the NDA. Thus, any breach of the NDA by a representative should be deemed a breach by the acquirer.
- **Providing confidential information to competitors/non-solicitation:** To the extent that a potential M&A transaction involves a competitor, special consideration should be given as to how and when extra-sensitive information, such as customer contracts and pricing data, should be provided to the acquirer. In addition, through the diligence process, the acquirer will generally have access to the seller's employees and customers. As a result, within the terms of the NDA, the seller's counsel is strongly encouraged to restrict the ability of the acquirer to hire, or solicit for hire, the seller's employees, and to contact or solicit business from the seller's customers.

Letters of intent

Letters of intent (LOI) and other similar preliminary agreements are widely employed precursors to the completion of due diligence, and the drafting and negotiation of definitive M&A transaction documents. While most of the provisions set forth in an LOI are typically non-binding, an LOI can nevertheless serve as a useful tool in outlining the preliminary agreement of the parties with respect to the key terms of a transaction prior to incurring the potentially significant costs associated with drafting and negotiating definitive transaction documents.

While each transaction is different, counsel for both parties should consider including the following key terms in the LOI:

- structure of the proposed transaction;
- purchase price and payment terms;
- closing conditions;
- terms of indemnification;
- allocation of responsibilities for drafting and transaction expenses;
- restrictive covenants (non-competition and non-solicitation);
- exclusivity (typically a binding provision).

For both the seller and the acquirer, a well-drafted LOI can serve four important purposes. First, by outlining the agreement of the parties as to certain key issues, the LOI can help focus upcoming negotiations. Second, the execution of an LOI illustrates a level of commitment by both parties toward getting a deal done. Furthermore, it often minimizes the possibility that one of the parties may attempt to deviate from the terms of the LOI at some point in the future. Third, the process of completing the LOI can often provide the momentum necessary to keep the transaction on pace and move a deal past its preliminary stages, and expedite the drafting and negotiation process. Fourth and finally, by discussing key transaction terms at the beginning of the process, it allows the parties to identify any significant problems, which could otherwise derail the transaction later in the process.

At no point in the M&A process will the seller's leverage be greater than prior to execution of the LOI. As previously noted, the execution of the LOI typically occurs prior to commencement of a full-scale diligence review by the acquirer; thus, prior to the execution of the LOI, the acquirer is at a huge informational disadvantage. Furthermore, at this point, the seller has yet to commit to a transaction and, from the acquirer's standpoint, still has options. In attempting to maximize this leverage, counsel for the seller should seek specificity in the terms of the LOI and firm commitment from the acquirer. If the seller is looking for a specific provision or concession from the acquirer, now is the time to try and get it.

With respect to the LOI, the acquirer's counsel should have two key considerations. First, unlike the seller, it is in the acquirer's best interest to have the LOI remain as general as possible. In light of the acquirer's informational disadvantage, a more generalized LOI will provide the flexibility and time necessary to complete a full-scale diligence review prior to reaching agreement on specific terms. Second, to ensure that the acquirer's initial investment of resources in exploring a potential transaction are protected, the

acquirer should seek to have the LOI include a binding provision providing the acquirer with the exclusive rights to negotiate a transaction with the seller for a set period of time.

Other than exclusivity and potential confidentiality, the provisions in an LOI are typically non-binding. However, it is imperative that this is clearly spelled out in the terms of the LOI. Recent jurisprudence has proven that in the absence of a clear and definitive statement to that effect, courts may look to outside factors, such as whether the terms of the LOI are so clear as to eliminate any ambiguity and create an enforceable (binding) contract between the parties.[1]

Despite the many benefits of a well-drafted LOI, both acquirers and sellers must consider the risks associated with engaging in the LOI process. First, in light of the recent attention given to the potentially binding nature of an LOI, failure of the parties to prepare a clear, concise and unambiguous LOI can increase the risk for litigation. Second, parties will often allow themselves to become bogged down in the minutiae when negotiating an LOI. This results in increased costs in both time and resources to produce a document that is generally non-binding. Furthermore, in the event that a transaction is not consummated, the lost transaction costs associated with the LOI can be far greater than necessary.

Due diligence

The final significant step in the preliminary M&A process is the acquirer's completion of a full-scale due diligence review of the seller and its business. While more art than science, at its core, due diligence is an investigation of the business, legal and financial affairs of the seller by the acquirer for purposes of evaluating the potential risks and benefits associated with the seller's business. At this stage in the transaction, it becomes absolutely crucial that the entire M&A team for both the seller and the acquirer become intimately involved in the process. Both the preparation of due diligence materials and completing the review of these materials can be an extensive project. It will require the assistance of others in order to satisfy the needs of the respective parties in an efficient and comprehensive manner.

Generally speaking, in-house counsel will be charged with the task of leading the diligence process, particularly inside the seller's organization. As a result, it becomes critical that in-house counsel have the influence within the organization to ensure that the process of gathering and sorting information is handled in a comprehensive, careful manner. Often times, this means motivating busy and potentially

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uninterested employees who wish to remain focused on their "real" jobs and will be inclined to produce responsive diligence materials only to the extent they are readily accessible. In-house counsel must be prepared to navigate these potential hazards along the way.

The concerns of the seller's counsel in connection with due diligence should be twofold. First, with the assistance of outside counsel, it is imperative that a method is developed for managing the process of both collecting and distributing the appropriate information to the acquirer. It is recommended that each member of the M&A team be responsible for responding to the diligence requests within their department. In addition, it has become increasingly common — if not expected — to manage the production and delivery of the diligence information through the use of a virtual data room. A multitude of virtual data room providers exist, each of which varies in services provided and cost. It is recommended that seller's counsel discuss these options with their outside M&A counsel.

Second, and most importantly, the production of due diligence materials provides the seller's organization with an opportunity to re-examine its own business. Without fail, virtually every seller will uncover various issues and concerns regarding their own business, and there is no better time to address these items than in connection with a potential transaction. The seller will be asked to make a number of representations and warranties regarding the business in the definitive transaction document; thus, a thorough understanding of the business is essential in making such representations and warranties. Often, in-house counsel are expected to be most intimate with the details of the documents produced during diligence, and will be required to provide other executives within the organization guidance in connection with their consideration of the various representations and warranties. Furthermore, the acquirer is more likely to seek stringent and/or comprehensive representations and warranties when there exists a gap or void in the diligence information provided to the acquirer. Thus, the more thorough the in-house counsel for the seller is with respect to managing the production of diligence materials, the more likely it is that counsel for the acquirer will be willing to offer some concessions when it comes to negotiating the representations and warranties.

For the acquirer, completion of a due diligence review serves many purposes — the most important of which is the assistance it provides in truly quantifying the potential risks and/or liabilities associated with an acquisition of the seller. The acquirer must obtain a thorough understanding of any such risks and/or liabilities so that items, such as the final purchase price, the inclusion of an escrow account, representations and warranties, and indemnification obligations, are adjusted to account for such risks and liabilities. In addition, by providing both the acquirer's counsel and the M&A team members with a greater understanding of the seller's business, a comprehensive diligence review can pay significant dividends when attempting to integrate the seller and its business.

Structuring the transaction

Based on the various goals of both the seller and the acquirer, an M&A transaction can manifest itself in a variety of ways, but they typically come in one of three different forms: asset sales, stock sales and mergers. Although counsel for both the seller and the acquirer are encouraged to discuss the many factors to consider when selecting the appropriate structure with their outside M&A counsel, it is beneficial to have a general understanding of the competing interests of the parties within each structure.

Asset sales: An asset sale is typically viewed as a structure, which is more favorable for the acquirer as it provides the flexibility to selectively pick and choose the assets it will acquire and the liabilities it wishes to assume. Furthermore, an asset sale provides the acquirer with a significant tax advantage (i.e., the acquirer will receive a step-up in its tax basis for the acquired assets). This means that the assets are typically written up from their value on the seller's balance sheet to the fair market value of such assets on the acquirer's balance sheet. As a result, the acquirer may realize greater depreciation deductions from the increased basis. However, asset sales can be more complicated, costly and time-consuming transactions. Often, such a transaction will involve many different classes of assets that may require different mechanics for their transfer. In addition, asset sales generally require the seller to receive numerous third-party consents for the transfer of the applicable assets. In-house counsel will need to be mindful of the various third-party obligations that her company may owe.

There are some instances where an asset sale can be beneficial to the seller. For example, if the seller wishes to retain certain assets or continue operating the entity following the transaction, an asset sale allows for this. However, in addition to the potential for increased costs in time and resources noted above, an asset sale can also place the seller at a significant tax disadvantage. First, if the seller is a traditional C-Corporation, it will generally incur a double tax on the consideration received for the sale of the assets — one at the corporate level, and then again at the shareholder level when the consideration is distributed. Second, a significant portion of the consideration received by the seller will be taxed as ordinary income, as opposed to capital gains, resulting in a potentially significant increase in

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the seller's tax burden. In light of the foregoing, the seller's counsel should seek an increase in purchase price to offset the additional tax incurred by the seller and the tax benefits received by the acquirer.

Stock sales: Unlike an asset sale, when purchasing the stock of a company, the acquirer receives all of the assets, but more importantly, all of the liabilities of the seller. In order to protect the company, counsel for the acquirer must ensure that the definitive transaction document provides both stringent and comprehensive representations and warranties. In addition, it is also recommended that part of the consideration paid for the stock be held in escrow. Typically, the amount of consideration withheld is determined as a percentage of the purchase price, and the acquirer's counsel would be wise, in the context of a stock sale, to demand an amount at the higher end of the average range of 7 percent to 15 percent.[2] Notwithstanding the foregoing, a stock sale does provide some benefit to the acquirer. First, a stock sale is typically a much simpler and more efficient process, particularly when acquiring a smaller, closely held company. Second, when acquiring the stock of a company, the acquirer is generally purchasing a true going concern and will be able to more readily take advantage of the seller's exiting position in the market. Finally, through the acquisition of the seller's stock, the acquirer may be permitted to reap the financial benefits of carrying over any of the seller's net operating losses, as well as retaining favorable insurance and employment ratings.

A stock sale has very few disadvantages for the seller. First, unlike an asset sale, because the acquirer is usually purchasing the stock directly from the shareholders, there is no concern about double taxation with a traditional C-Corp, as the company itself recognizes no gain on the sale. Furthermore, the shareholders will receive capital gains treatment on the sale of the stock, which greatly reduces their tax rate in connection with the transaction. However, much like the acquirer in an asset sale, the seller's counsel should anticipate some adjustment to the purchase price to account for the tax benefits realized by the seller. Second, unless otherwise agreed, the acquirer, through acquisition of the stock, assumes all of the risks and liabilities of the seller, leaving the seller with a clean slate. Finally, as mentioned above, typically, a stock sale is a much quicker and more efficient process, which often requires no third-party consents and greatly minimizes the potential for disruptions in the seller's business.

Mergers: Simply put, a merger is a stock acquisition in which two companies are combined into one legal entity that assumes the assets and liabilities of the extinguished entity. Typically, mergers are structured in one of three different ways. The first is a standard forward merger in which the seller is merged with and into the acquirer. The acquirer, by operation of law, assumes all of the assets and liabilities of the seller, and the seller then ceases to exist following the transaction. Second is a forward triangular merger, where the acquirer forms a subsidiary into which the seller is merged. The subsidiary assumes all of the assets and liabilities of the seller, and the seller entity is then extinguished. Finally, there is a reverse triangular merger. Once again, the acquirer will form a subsidiary; however, in this structure, the subsidiary is merged with and into the seller. Thus, the seller assumes the assets and liabilities of the subsidiary and survives the merger, thus becoming a subsidiary of the acquirer.

In many ways, mergers, as a whole, are similar to a stock sale, and as a result, many of the considerations for the parties to a merger are similar to those involved in a stock sale. However, each of the three merger structures referenced above will impact the parties differently with respect to both risk exposure and taxes. Thus, in-house counsel for both the seller and the acquirer are encouraged to discuss each of these alternatives with outside M&A counsel.

The definitive transaction document

Despite the different forms that a transaction may take, there are certain common elements that will be found within the definitive agreement between the parties. Due to the increasingly complex nature of such agreements, it is commonly more efficient and effective to have them drafted by outside M&A counsel, with in-house counsel playing a key supporting role as the "inside" legal voice. Additionally, many management teams will look to the in-house practitioner to "sort out" many operational issues with M&A counsel and to surface to the management team those that most apply to their company. Although discussing each of the potential issues that may arise in the course of drafting and negotiating a definitive agreement is beyond the scope of this article, there are certain key concepts about which in-house counsel should have a general understanding.

Purchase price: The most crucial decision to be made in connection with any transaction is what the purchase price will be. However, additional consideration must also be given as to how and when the purchase price will be paid.

Purchase price adjustments: The most common type of post-closing purchase price adjustment is made in connection with the determination of the working capital of the seller. If the acquirer is purchasing a true going concern and needs to be in a position to operate the business of the seller immediately following the closing, it may be necessary to purchase the working capital of the seller along with its stock and/or assets. Thus, an estimate of the closing date working capital is made prior to the closing, and to the extent it is less than or exceeds a post-closing calculation of the actual working capital, a corresponding adjustment to the purchase price is made. While the process is generally uneventful, careful consideration by both parties must be given to both the definition of "working capital" and the method by which it will be calculated, both prior to and after the closing. Disputes and difficulties occur when there exists any type of ambiguity in this area.

Escrow accounts: In any M&A transaction, the acquirer will seek to have the seller indemnify them for any losses they may incur in connection with the seller's failure to perform certain covenants, or breach of a representation or warranty. However, to the extent there is some uncertainty as to the size of any potential loss, and more importantly, the ability of the seller to indemnify the acquirer following the closing, the acquirer may wish to have a portion of the purchase price held in escrow for purposes of funding any indemnification payments to the acquirer. While this may be acceptable to the seller in theory, both the percentage of the purchase price held in escrow, as well as the length of time for which it is to be held, are often heavily negotiated. Obviously, the acquirer receives increased security when a greater percentage of the purchase price is held for a longer period of time. On the other hand, the seller may view the inclusion of an escrow requirement as effectively reducing the current value of a transaction. The parties should consider staggering the release of the escrow amount and/or substituting a longer holding period for a reduced escrow amount as means toward reaching a common ground.

Representations and warranties: These are statements of fact, which both the acquirer and the seller must disclose regarding the legal structure, operations, financials, assets and liabilities of their respective companies. Typically, the focus of the parties is placed on the representations of the seller; however, the seller's counsel is encouraged to discuss the important aspects of the acquirer's representations and warranties with outside M&A counsel.

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In providing the acquirer with assurances as to the current state of its business, the seller's representations and warranties offer protection for the acquirer and form the foundation for any indemnification claims in case of a breach by the seller. In essence, the representations and warranties serve as a mechanism by which the acquirer can seek damages if the business they bought is not what they were told it would be. As a result, the acquirer is encouraged to seek broad and wide-ranging representations regarding all aspects of the business and operations of the seller. Furthermore, the seller should be required to make such representations, both upon the execution of the agreement and the closing of the transaction.

In preparing the representations and warranties, in-house counsel must compel input from all members of the M&A team to ensure that the seller is accurately disclosing all appropriate information, thus underscoring in-house counsel's need to manage a thorough due diligence review and disclosure process. The seller's counsel should seek to limit the scope of the representations in order to reduce the company's potential exposure. First, each representation and warranty should be drafted as precisely and specifically as possible. The broader the language, the more likely it is that something may fall through the cracks. Second, the seller should attempt to limit the representations and warranties to items that are material. For example, instead of stating that the seller is not subject to any litigation, provide that the seller is not subject to any material litigation. Finally, where appropriate, the statements of fact contained in the representations and warranties should be limited to the knowledge of a select group of key employees and/or officers of the seller.

Indemnification: In any definitive M&A agreement, both parties will make numerous representations, warranties and covenants. However, what if such representations, warranties and covenants are breached? While the parties may contractually agree to any number of remedies, most commonly the breaching party must indemnify the other party for any loss incurred in connection with a breach. Although both the acquirer and the seller will indemnify the other party, most claims and/or areas of dispute arise within the context of the seller's obligation to indemnify the acquirer. The degree to which the seller must indemnify the acquirer, and the inclusion of any limitations on the indemnity, are often subject to increased scrutiny by the parties. The following are the most common types of limitations on the seller's indemnification obligations:

Survival: The indemnification obligations of the seller are not unlimited. In particular, the indemnification obligations with respect to representations and warranties are typically drafted to exist for a pre-determined period of time, upon the expiration of which no claims for a breach of a representation or warranty may be brought by the acquirer. Obviously, the seller's counsel should attempt to limit the length of such period as much as possible. On the other hand, the acquirer's counsel would be wise to demand a more lengthy survival period, which provides the acquirer more time to uncover any potential breach. Survival

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periods typically range anywhere from 12 to 24 months following the closing.[3]

Caps: The seller's counsel should provide that the acquirer's total potential recovery from the seller should be limited to a specific dollar amount. This "cap" is typically set at an amount less than the total purchase price.[4]

Baskets: A "basket" provision operates as a deductible. Thus, through use of a basket, the seller seeks to avoid any indemnification obligations until the aggregate amount of losses incurred have exceeded some pre-determined amount. Expressed as a percentage of the purchase price, the basket is commonly set between 0 and 1 percent of the purchase price.[5] Additionally, the seller's counsel may seek to further limit their indemnification obligations through use of a "tipping basket," which provides that the seller will only be liable for the amount of any losses incurred that exceed the basket amount. For example, if the basket is set at 1 percent, the seller would not be liable for the initial 1 percent of losses, but only the losses which exceed 1 percent. On the other hand, the acquirer's counsel may wish to demand a "dollar-one basket," which requires the seller, once the basket has been exceeded, to indemnify the acquirer for all losses incurred, including the first 1 percent.

Carve-outs: The acquirer's counsel, in seeking to counteract the impact of any of the foregoing limitations, is encouraged to consider carving out certain representations and warranties and/or covenants from the aforementioned survival periods, baskets and caps. Commonly, the parties will agree to a certain set of fundamental representations (such as authority to complete a transaction and/or title to the purchased assets or stocks), which will not be subject to the aforementioned limitations.

Pre-closing covenants and/or closing conditions: When there is a gap between the signing and closing of an M&A transaction, it will be necessary for the parties to consider the inclusion of certain pre-closing covenants and closing conditions.

Pre-closing covenants: Based on the specific details of a particular transaction, there may be any number of pre-closing covenants that are important to the parties. However, in any circumstance where there is a delayed closing, the acquirer's counsel should include pre-closing covenants, which seek to limit the way the seller operates the business prior to the closing. As an example, to the extent that the seller wishes to enter into or terminate any material contract, hire or fire certain key employees, assume debt, etc., the seller should be required to receive the written consent of the acquirer prior to taking such action.

Closing conditions: These are conditions, identified by the parties, which must be met prior to triggering an obligation of the other party to close. The conditions often simply identify certain regulatory and/or consent requirements that must be met. However, many times the acquirer may use this as an opportunity to provide an escape route from a transaction where things do not proceed as planned. Two of the most common acquirer-friendly closing conditions are tied to financing and due diligence. Thus, if the acquirer is unable to acquire third-party financing, or does not complete the due diligence process to their satisfaction, they would be permitted to walk away from the transaction. While in some instances these closing conditions may be appropriate, the seller's counsel should resist them at all costs. Such conditions only increase the leverage of the acquirer, while robbing the seller of any true sense of deal certainty.

Tailor-made

Although the foregoing "roadmap" has tackled many of the significant topics that in-house counsel will face throughout the course of a transaction, it is impossible to anticipate, much less address, the numerous issues that will surface during the process. As a result, in-house counsel must appreciate and prepare for the unexpected. Careful management of the delicate interplay between outside counsel and the input of the company's management team is crucial in order to carefully tailor a transaction to meet the needs of the company, while still providing for the appropriate level of protection. **ACC**

In preparing the representations and warranties, in-house counsel must compel input from all members of the M&A team to ensure that the seller is accurately disclosing all appropriate information, thus underscoring in-house counsel's need to manage a thorough due diligence review and disclosure process.

NOTES

1. *Global Asset Capital, LLC v. Rubicon US Reit, Inc., C.A.* No. 5071-VCL (Del Ch. Nov. 16, 2009).
2. M&A Market Trends Subcommittee, Mergers & Acquisitions Committee of the American Bar Association, *2011 Private Target M&A Deal Points Study* (2011), available at *http://apps.americanbar.org/dch/committee.cfm?com=CL560003.*
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