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AN OVERVIEW OF MERGERS AND ACQUISITIONS: BASIC INFORMATION BUSINESSES SHOULD KNOW

Current and future business owners are well advised to recognize the significant economic and legal implications involved in any merger or acquisition. A few years ago, mergers and acquisitions in Central Florida were dominated by technology and software companies. Now companies in all industries are targets for acquisition. Mergers and acquisitions are often so complex and detailed that every proposal is a new challenge best handled by a professional familiar with the ramifications of any decision that might be made. Douglas Starcher, a partner at Broad and Cassel's Orlando office who focuses his practice in Corporate and Securities Law, has highlighted some of the major areas of concern for businesses to consider when entering into a merger or acquisition.

The Competing Interests of Buyers and Sellers

Sellers of a business have the following general objectives:

- ◆ To actually receive and retain the consideration - money or property - they have agreed to accept for the business,
- ◆ To limit the buyer's ability to reduce the purchase price after the contract has been signed, and,
- ◆ To limit the obligations the seller has to the buyer after the closing.

A buyer has objectives as well:

- ◆ To make sure the buyer actually receives what it expects to buy, and
- ◆ To have recourse against the seller and the seller's owners if the buyer does not receive what is expected.

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These objectives play themselves out in a number of typical acquisition agreement provisions. For example, it is important that the agreement accurately state the assets being purchased and identify the expected condition of the assets. In addition, a buyer typically asks the seller for various representations concerning the seller's business. In the event one or more of the representations turns out not to be true, the buyer wants to invoke its rights under an indemnification clause, allowing the buyer to demand payment (either in the form of reimbursement or a reduction in future payments owed) from the seller under the theory that the buyer would not have paid as much for the business had the true story been known.

Many times the objectives of the buyer and seller are in direct conflict with each other. The negotiation occurs in balancing these competing goals. For example,

- ◆ Buyers want the representation and indemnification sections in the contract to be as broad as possible, while sellers want to limit this exposure.
- ◆ Buyers want a lengthy time for recovery under indemnities and many persons to be responsible for payment. To the contrary, sellers want to limit the amount at risk, the time such amount is at risk, and who has to pay.

Liens

Another important factor to address prior to closing an acquisition is the determination of whether or not any liens exist with respect to the assets being purchased and the satisfaction of such liens. Unfortunately for buyers, a prior creditor's interest in the assets does not disappear just because the assets are sold. The creditor's interest in the assets follows the assets into the hands of the buyer, unless the debt is paid in full.

Taxes

Tax treatment of an acquisition also varies greatly depending on how the deal is structured. The federal and state tax laws surrounding mergers and acquisitions and other corporate changes can be quite complex. The most popular types of acquisitions

are asset sales, stock sales and mergers. Often sellers and buyers desire different structures to achieve goals that are not necessarily similar. As a result, deal structure often becomes a significant point of negotiation.

Conclusion

The above issues are but a sampling of the complex factors to be considered in any acquisition. What is important for potential buyers and sellers to recognize is that with many of the issues related to mergers and acquisitions, the goals are different for sellers and buyers, even in the simplest of deals. Parties trying to structure, document and close a deal without counsel may not be aware of the factors they should consider, or that the person on the other side of the table has goals directly in opposition to them. For that reason, it is strongly recommended that every merger or acquisition proceed only with the assistance of an experienced professional.

The attorneys in Broad and Cassel's Corporate and Securities group can assist businesses draft and negotiate contracts and agreements, and provide counsel on joint ventures and strategic alliances, and asset and stock purchases. For more information, visit our website at www.broadandcassel.com or contact Douglas Starcher at (407) 839.4200.