



Mergers & Acquisitions: Strategies for Getting Good Deals Done

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**Presented by: Andrew J. Sherman, Esq.
YEO General Counsel and Senior Partner
McDermott Will & Emery LLP
600 - 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8610
ajsherman@mwe.com**



Mergers and Acquisitions – Key Trends for Emerging Growth Companies

- The merger-and-acquisition frenzy that has taken place in 1999 and 2000 affected owners and managers of businesses of all types and sizes and brought us mega-deals such as AOL Time Warner, Exxon Mobil and Daimler-Chrysler, is back again in 2004 after a short hiatus in 2002 and 2003. National and local business press has again been filled with news of transactions and legislation involving tender offers, mergers, reorganizations, leveraged buyouts, management buyouts, spinoffs, divestitures, redemptions and share exchanges. This uptick in M&A activity has trickled down to the middle-markets and smaller companies, where private equity and buyout funds have been considering deals with as little as \$2,000,000 in EBITDA.
- Deals today need to be fairly structured, reasonably priced and genuinely make sense ... or they will not get done. The heyday and even nonsensical valuations and transactions of the late 1990's have not returned in 2004 (and may never return again) BUT what does seem to be improving is the pace and rate of deal flow as well as an increase in a cautious optimism that a good deal can now get done in this market.
- What conditions have fueled this uptick in M&A activity? A recovery and stabilization of the stock markets, improvements in the economy, interest rates remaining low, improvements in financial controls, systems and corporate governance, cross-border deals on the rise, the “overhang” in the private equity industry, a willingness of sellers to be more realistic from a valuation perspective and a genuine focus on quality of transactions over quantity of transactions. Yes, we still have daily violence in Iraq and the Middle East, threats of domestic transmission, uncomfortably high levels of unemployment and weaknesses in the manufacturing sector, but the market's willingness to shrug off these troubling conditions has led to a measurable uptick in M&A activity.



Key Trends (cont'd)

- Valuations on the seller's side have continued to become more realistic, creating many opportunities for buyers who have cash, (or access to cash) and the right internal and advisory teams to get deals done. The Fed's active bias towards lowering rates reduces borrowing and transactional costs for the right types of transactions which lend themselves to leveraged finance. Reduced valuations have also created opportunities for consolidation; many VC's and private equity funds are very motivated and willing to sell the "dogs" and perceived under-performing companies at a fraction of what they paid.
- Deals are closing on a slower timeframe – the rush to get deals done quickly has subsided except in special circumstances – the due diligence periods have become extended and issues more complex for both Sarbanes-Oxley as well as strategic reasons – ranging from increased litigation, more challenging intellectual property issues, underwater stock option plans, etc. Your professional advisors must be extra careful in drafting your Representations and Warranties in the Acquisition Agreement to address these new due diligence challenges – as well as the scope and terms of indemnification and other covenants to protect the buyer against surprises. During these challenging times, it is more critical than ever to have the right "deal team" assembled, made up of both internal executives and external advisors who have the experience and the tenacity to get deals done properly.

Key Discussion Points

- Some issues for us to consider and discuss during today's program include:
 1. What lessons can we learn from the meltdown and significantly-reduced post-closing valuations of the companies that were very acquisitive in 1998-2001? How can conglomerates built via acquisition ever achieve scale and full value? What can we learn from the overpriced deals done by Cisco, Lucent and many others?
 2. What new due diligence, deal structuring, negotiation techniques and best practices have emerged in a post-Enron environment? What new rules and regulations and best practices have impacted the M&A process?
 3. How will global events and terrorism fears affect the level cross-border transactional activity? Will everyone decide to focus on their own backyard? Or are those just the growing pains of globalization as we move towards a truly interdependent world?
 4. What does post-closing synergy really mean anymore? What went wrong? Why have so many deals failed to achieve post-closing integration and economics of scale objectives? Will shareholders trust their leaders and recommended deals?
 5. Where are the industry sectors or regions of the country that remain strong and are likely to remain strong in late 2004 and beyond? How long will the defense and homeland security sectors remain hot? What about the predicted rebound for computer technology and telecomm? Biotech? Nanotech? What about traditional manufacturing and retail businesses?
 6. Are your advisory teams prepared to deal with the fact that intellectual property and intangible assets (e.g. brands, relationships, know-how, databases, patents, teams, etc.) make-up the lion's shares of the assets/value being purchased? Does the team have the skills and experience to recognize these assets, make sure they have been properly protected and identify their full potential on a post-closing basis?



The Seller's Perspective

The Seller's Mantra: Preparation is the Key

Preparing for the M&A process is a critical step for sellers of all sizes and in all industries. The steps include:

- Getting Your House In Order
- Legal/Financial/Governance and IP Audits
- Anticipating the Due Diligence Needs/Concerns of A Prospective Buyer
- “Don’t Call My Baby Ugly” Syndrome
- Time to get Uncle Henry Off the Payroll (Anticipating the Needs of the public buyer in a Sarbox world)
- Recasting and Positioning
- Understanding A Buyer’s Value Drivers
- Due diligence is a two-way street (especially if deal is structured with a heavy back-end)

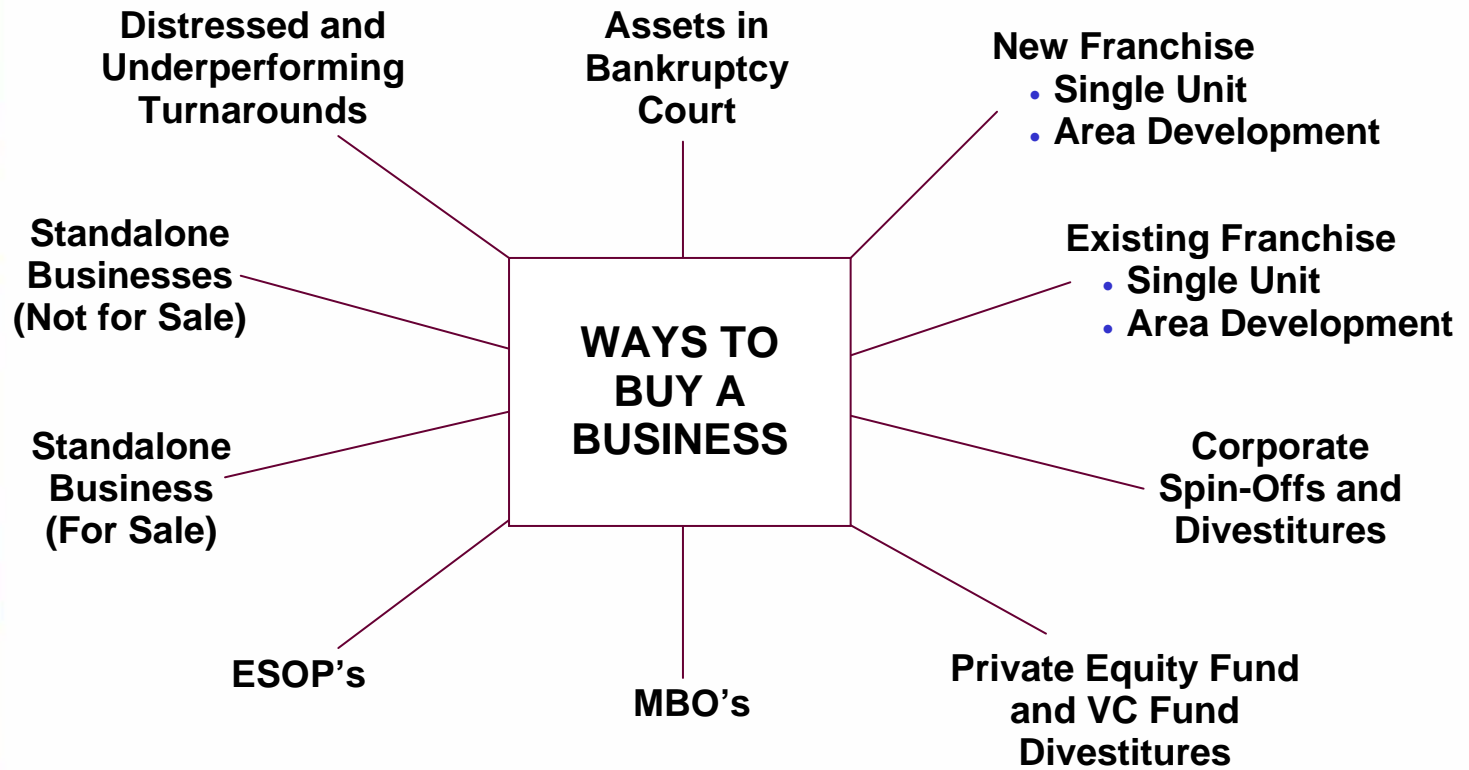
The Seller's Process: Getting Ready for the Big Dance

- Assembling the Advisory Team
- Determining the Usage/Role of Investment Bankers and Intermediaries
- Valuation and Structural Objectives
- Preparing the Offering Memorandum
- Reaching the Targeted Buyers
 - ⓘ Financial
 - ⓘ Strategic
 - ⓘ Auction
- Confidentiality Issues
- Managing the Due Diligence Process



The Buyer's Perspective

Ways to Buy a Business






The Buyer's Mantra: Develop an Acquisition Plan

- Mergers and acquisitions are used by entrepreneurs and middle-market companies when it is more efficient to acquire assets and resources from outside rather than expand internally (“cheaper to buy than to build” mentality). The process should begin with an **Acquisition Plan**, which identifies the specific objectives of the transaction and the criteria to be applied in analyzing a potential target company. The Acquisition Plan will also be presented to various sources of acquisition financing to provide the capital needed. Although the reasons for considering growth by acquisition will vary from industry to industry and from company to company, the most common strategic advantages from the perspective of a buyer include:
 - ① **You can achieve operating and financial synergies and economics of scale** with respect to production and manufacturing, research and development, management or marketing, and distribution.
 - ① **Your company may be able to develop the full potential of the target company's proprietary products or services** that are suffering from lack of capital to move projects forward.
 - ① **The target company may stand to lose its management team** due to the lack of career growth potential unless it is acquired by a business that offers higher salaries, increased employee benefits and greater opportunity for advancement. Conversely, you may have a surplus of strong managers who are likely to leave unless your company acquires other businesses that they can operate and develop.
 - ① **You may want to stabilize your company's earnings stream** and mitigate its risk of business failure by diversifying your products and services through acquisition rather than internal development.
 - ① **Your company may need to deploy excess cash into a tax-efficient project** (because both distribution of dividends and stock redemptions are generally taxable events to its shareholders).
 - ① **Your company may want to achieve certain production and distribution economies of scale** through vertical integration, which would involve the acquisition of a key supplier or customer.

Develop an Acquisition Plan (cont'd)

- ① **The target company's management team may be ready for retirement** or a key manager may have recently died (leaving the business with residual assets that can be utilized by your company).
- ① **You may wish to increase your market power by acquiring competitors**, which may be a less costly alternative for growth than internal expansion.
- ① **You may be weak in certain key business areas**, such as research and development or marketing, and it may be more efficient to fill these gaps through an acquisition rather than to build these departments internally.
- ① **Your company may have superior products and services but lack the consumer loyalty or protected trademarks** needed to gain recognition in the marketplace. The acquisition of an older, more established firm can be a more efficient method of developing goodwill.
- ① **Your company may want to penetrate new geographic markets** and conclude that it is cheaper to acquire firms already doing business in those areas than to establish market diversification from scratch.
- ① **Your company may provide the technical expertise or capital** the target company needs to grow to the next stage in its development.

Steps Involved in the Buyer's Process

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- **Develop acquisition objectives**
 - **Analyze projected economic and financial gains** to be achieved by the acquisition
 - **Assemble an acquisition team** (typically managers, attorneys, accountants, a business appraiser and investment bankers)
 - **Conduct the search for acquisition candidates**
 - **Perform due-diligence analysis** of prime candidates
 - **Conduct initial negotiations** and valuation of the selected target
 - **Select the structure of the transaction**
 - **Identify sources of financing** for the transaction
 - **Conduct detailed bidding** and negotiations
 - **Obtain all shareholder and third-party consents** and approvals
 - **Structure the legal documents**
 - **Prepare for the closing**
 - **Close the deal**
 - **Perform post-closing tasks** and responsibilities
 - **Implement the strategic integration of your company** and the acquired company



The Analysis of Target Companies: A Critical Step for Buyers

- After the team which will be analyzing a series of targets have identified the acquisition objectives and developed the criteria for analyzing each company, the next logical step for the team is to select and then narrow the field of candidates. The transaction should achieve one or more of your defined acquisition objectives, and the target company should meet many (if not all) of the criteria identified. A candidate under serious consideration should possess most or all of the following criteria:
 - ① **be operating in an industry** that demonstrates growth potential;
 - ① **be protective of the proprietary aspects** of its products and services;
 - ① **demonstrate a well-defined and established market position**;
 - ① **be involved in a minimal amount of litigation** (especially if the litigation is with a key customer or supplier);
 - ① **be in a position to readily obtain key third-party consents** from lessors, bankers, creditors, suppliers and customers. *Failure to obtain necessary consents to the assignment of key contracts will serve as a substantial impediment to the completion of the transaction*;
 - ① **be positioned for a sale** (except in hostile takeover situations) so that negotiations focus on the terms of the sale and not whether to sell in the first place; and
 - ① **have its principal place of business located within an hour** (via air) of your company's headquarters or satellite offices (unless, of course, your primary objective is to enter into new geographic markets).

Selecting the Target Company

- Once you have narrowed the field of candidates, it's time to select the company that you want to acquire. Effective rating and analysis of the finalists will involve two phases: the acquisition review and, once you think you've identified the specific company you want to acquire, the detailed legal and business due diligence.

Acquisition Review

- The acquisition review is the preliminary analysis of the two or three finalists that most closely meet your objectives. In all likelihood, the prospective targets will have different strengths and weaknesses, which makes the selection of the winner that much more difficult. As a result, the primary goal of the acquisition review is to collect data that will help you determine the value of the finalists for negotiation and bidding purposes.

The key areas of inquiry at this stage in the transaction include:

- ① **the targets' management teams;**
- ① **financial performances** (current and projected);
- ① **areas of potential liability** to a successor company;
- ① **legal or business impediments** to the transaction;
- ① **confirmation of any facts underlying the terms** of the proposed valuation and bid; and
- ① **the extent to which the intellectual property** of the target companies has been protected.


Conducting Due Diligence

- After you have reached a preliminary agreement with your target candidate, you and your acquisition team should immediately embark on the extensive **legal and business due diligence** that must occur prior to closing the transaction. The legal due diligence focuses on the potential legal issues and problems that may impede the transaction, shedding light on how the documents should be structured. The business due diligence focuses on the strategic issues surrounding the transaction, such as integration of the human and financial resources of the two companies, confirmation of the operating, production and distribution synergies and economies of scale to be achieved by the acquisition, and the gathering of information necessary for financing the transaction.
- The due-diligence process can be tedious, frustrating, time-consuming and expensive. Yet it is necessary to a well-planned acquisition and can be quite revealing in analyzing the target company and measuring the costs and risks of the transaction. Expect sellers to become defensive, evasive and impatient during this phase of the transaction. Most entrepreneurs do not enjoy having their business policies and decisions examined under a microscope (especially for an extended period of time and by a party searching for skeletons in the closet) and can become especially frustrated when you and your advisers probe and second-guess key decisions from the past. Eventually, the target may give an ultimatum to the prospective buyer: “Finish the due diligence soon or the deal is off.” When negotiations have reached this point, it’s probably best to end the examination process.
- Keep in mind that due diligence is *not* a perfect process. Information will slip through the cracks, which is precisely why broad representations, warranties and indemnification provisions should be structured into the final purchase agreement to protect you, as the buyer. The nature and scope of these provisions are likely to be hotly contested in the negotiations.

Assessing the Legal Issues of Due Diligence

- In reviewing the legal documents and business records, the acquisition team should gather data necessary to answer the following types of preliminary legal questions:
 - ④ **What legal steps will need to be taken to complete the transaction** (for example, director and stockholder approval, share-transfer restrictions, restrictive covenants in loan documentation)?
 - ④ **What antitrust problems (if any) are raised by the transaction?** Will filing be necessary under the premerger notification provisions of the Hart-Scott-Rodino Act?
 - ④ **Will the transaction be exempt from registration** under applicable federal and state securities laws under the “sale of business” doctrine?
 - ④ **What potential adverse tax consequences** to you, the seller and your respective stockholders may be triggered by the transaction?
 - ④ **What are your potential post-closing risks and obligations?** To what extent should the seller be responsible for such potential liability? What steps (if any) can be taken to reduce these potential risks or liabilities? What will it cost to implement these steps?

Assessing the Legal Issues of Due Diligence (cont'd)

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- ④ **What are the impediments to your ability to sell key tangible and intangible assets of the target company** (such as real estate, intellectual property, favorable contracts or leases, human resources, or plant and equipment)?
 - ④ **What are your and the seller's obligations and responsibilities under applicable environmental and hazardous waste laws?**
 - ④ **What are your and the seller's obligations and responsibilities to the creditors of the target?**
 - ④ **What are your and the seller's obligations and responsibilities under applicable federal and state labor and employment laws?** (For example, will you be subject to successor liability under federal labor laws and, as a result, be bound by existing collective-bargaining agreements?)
 - ④ **To what extent will employment, consulting, confidentiality or noncompetition agreements need to be created or modified** in connection with the proposed transaction?
 - Finally, the acquisition team and legal counsel should carefully review the documents and records received from the target to determine how the information gathered will affect the structure or the proposed financing of the transaction.

Analyzing the Business Issues of Due Diligence

- In conducting due diligence from a business perspective, you are likely to encounter a variety of financial problems and risk areas when analyzing the target company. These typically include:
 - ④ **undervaluation of inventories**
 - ④ **overdue tax liabilities**
 - ④ **inadequate management information systems**
 - ④ **incomplete financial documentation** or customer information
 - ④ **related-party transactions** (especially in small, closely held companies)
 - ④ **an unhealthy reliance** on a few key customers or suppliers
 - ④ **aging accounts receivable**
 - ④ **unrecorded liabilities** (for example, warranty claims, vacation pay, claims, sales returns and allowances)
 - ④ **an immediate need for significant expenditures** as a result of obsolete equipment, inventory or computer systems.
- Each of these problems poses different risks and costs, which you should weigh against the benefits to be gained from the transaction. An experienced buyer must be prepared to walk away from any deal at any time (in other words, do not fall in love with any deal), and the due-diligence process is designed to help ensure that you are actually getting what you bargained for at the outset of the negotiations. Don't feel trapped into proceeding if and when the process uncovers unpleasant or unacceptable surprises, even if you have a lot of time and money invested in the deal.



Valuation, Pricing and Sources of Acquisition Financing

- When you have completed your due diligence, but before you structure and draft the formal legal documentation, the acquisition team should reach certain conclusions regarding the valuation, pricing and financing for the proposed transaction.
- One of the key members of the acquisition team should always be a qualified business appraiser who understands the special issues raised in assessing the value of a closely held company. By determining the valuation parameters of the target, the appraiser plays an important role in determining the proposed structure, pricing and source of financing for the acquisition. Most of the information that an appraiser will need to analyze the value of the target can be gathered as part of the ordinary due-diligence process. The appraiser's job is to answer the following questions:
 - ④ **How will the value of the target be affected by the loss of its current management** (if applicable)?
 - ④ **How should the goodwill of the target be valued?** What are the various components that make up the target's goodwill?
 - ④ **How and to what extent should the target's intangible assets be assigned some relative tangible value?** (These may include customer list, intellectual property, license and distributorship agreements, regulatory approvals, leasehold interests, and employment contracts.)
 - ④ **If less than complete ownership of the target is being acquired**, what effect do the remaining minority shareholders have on the target's overall value?
 - ④ **If the transaction is structured as a stock rather than an asset acquisition**, what effect do the unknown contingent liabilities have on overall value? This assumes that there is no comprehensive indemnification provision.
 - ④ **What effect should the target's accounting methods**, credit ratings, business plans or projections, or income-tax returns have on the overall value of its business?



Getting Deals Done

The Letter of Intent

- When you have the data for the finalists, assemble your acquisition team to analyze the information, select the target company and structure the terms of the offering. The result should be a letter of intent or preliminary agreement with the target company selected. Often, the buyer and seller execute a letter of intent as an agreement in principle to consummate the transaction. The parties should be very clear as to whether the letter of intent is a binding preliminary contract or merely a memorandum from which the formal legal documents can be drafted once due diligence is completed. The letter of intent has many advantages to both parties, which include:
 - ④ a **psychological commitment** to the transaction;
 - ④ a **way to expedite the formal negotiations process**; and
 - ④ an **overview of the matters** that require further discussion.
- One difficult issue in drafting the letter of intent has been whether to include a price. From your perspective as buyer, you don't want to set the purchase price until due diligence has been completed. However, the seller may hesitate to proceed without a price commitment. Therefore, you should establish a price range with a clause that states the factors that will influence the final price. As the buyer, always reserve the right to change the price and terms in the event that you discover information during due diligence that will offset the target's value (or to draft "holdback" clauses to allow for any unforeseen liabilities or events). Finally, it is not unusual for a seller to request that you execute a confidentiality agreement before you conduct extensive due diligence. Negotiate the narrowest possible scope in connection with such agreements, especially if you are in the same or a similar industry as the target.

Keeping the Transaction on Track

- One of the key challenges for the management and advisory teams of both buyer and seller is to keep a transaction on track once it has commenced. Communication, coordination and momentum are critical and each party/team to the transaction should have a designated quarterback and point of contact. This quarterback must have the business acumen and transactional experience to diagnose “deal killers” and have the tools to destroy them.
- The first step is understanding the source of the problem.

The Source of the Problem Will Dictate the Solution			
Seller	<u>Stakeholders</u>	<u>Third Party Approvals</u>	A L L P A R T I E S
	<ul style="list-style-type: none"> <input type="checkbox"/> Minority shareholders <input type="checkbox"/> Key employees <input type="checkbox"/> VC investors <input type="checkbox"/> Family members 	<ul style="list-style-type: none"> <input type="checkbox"/> Regulatory <input type="checkbox"/> Lenders <input type="checkbox"/> Landlords <input type="checkbox"/> Unions <input type="checkbox"/> Key Customers/Suppliers 	
Buyer	<u>Sources of Capital</u>	<u>Professional Advisors</u>	
	<ul style="list-style-type: none"> <input type="checkbox"/> Debt <input type="checkbox"/> Equity <input type="checkbox"/> Mezzanine 	<ul style="list-style-type: none"> <input type="checkbox"/> Lawyers <input type="checkbox"/> CPA's <input type="checkbox"/> Investment Bankers <input type="checkbox"/> Consultants 	

Types of Deal Killers

- Once the source of the problem is understood, the advisory team should identify the type of deal killer, which include the following:
 - ④ Egos clash
 - ④ Misalignment of objectives
 - ④ Inexperienced players
 - ④ Internal and external politics (board-level, executives, venture investors, etc.)
 - ④ Due diligence red flags/surprises
 - ④ Pricing and structural challenges (price vs. terms)
 - ④ Valuation problems (tax/source of financing/in general)
 - ④ Third party approval delays
 - ④ Seller's/buyer's/source of capital remorse
 - ④ Employee and customer issues
 - ④ Overdependence on the founder/key employee/key customer or relationship
 - ④ Loss of trust/integrity during the transactional process
 - ④ Nepotism
 - ④ Failure to develop a mutually-agreeable post-closing integration plan
 - ④ Shareholder approvals
 - ④ Accounting/financial statement irregularities (post-Worldcom)
 - ④ Sarbanes-Oxley post-closing concerns
 - ④ Breakdowns in leadership and coordination/too little or too many points of communication

Types of Deal Killers (cont'd)

- ① Too little or too much “principal to principal” communications
- ① Crowded Auctions
- ① Impatience to get to closing vs. loss of momentum (flow and timing issues)
- ① Incompatibility of culture and/or business systems (e.g. IT Infrastructure, costs and budgeting policies, compensation and reward programs, accounting policies, etc.)
- ① Force-feeding deals that don't meet M&A objectives (square peg/round hole) (Bad deal avoidance/good deal capture — systems and filters)
- ① Who's driving the bus in this deal? (M vs. A)
- ① Changes in seller performance during the transactional process (upside surprises vs. unexpected downside surprises)
- ① Loss of a key customer or strategic relationship during the transactional process
- ① Failure to agree on post-closing obligations, roles and responsibilities
- ① Environmental problems (buyers less willing to rely on indemnification and insurance protections)
- ① Unexpected changes in the buyer's strategy or operations during the transactional process (including a change in management or strategic direction)

Structural and Drafting Tools

- There are a wide variety of structural and drafting tools which can be used to solve a problem in an M&A transaction. The more common tools include:
 - ④ Earn-out's/deferred and contingent post-closing consideration
 - ④ Representations, warranties and indemnities (tools to adjust allocation and assumption of risk) (weighting of priorities issues)
 - ④ Adjusting the post-closing survival period of R&W's
 - ④ Holdbacks and security interests
 - ④ Closing date audits
 - ④ Third party performance guaranties/performance bonds/escrows
 - ④ M&A insurance policies
 - ④ Restrictions on sale by seller of buyer's securities issued as part of the overall consideration
 - ④ Recasting of financial projections and retooling post-closing business plans

Structuring the Deal

- There are a multitude of ways in which an M&A transaction may be structured, and the structure selected may also affect the range of financing alternatives available. There are also a wide variety of corporate, tax and securities-law issues that affect the final decision as to the structure of any transaction. Each issue must be carefully considered from a legal and accounting perspective. However, at the heart of each alternative are the following basic issues:
 - ④ **Will you be acquiring the stock** or the assets?
 - ④ **What form of payment will be made** (cash, notes, securities, etc.)?
 - ④ **Will the purchase price be fixed, contingent or payable** over time on an installment basis?
 - ④ **What are the tax consequences of the proposed structure** for the acquisition?
- Perhaps the most fundamental issue in structuring the acquisition of a target company is whether the transaction will take the form of an **asset** or **stock** purchase. Each form has its advantages and disadvantages, depending on the facts and circumstances surrounding the transaction.

Structuring the Deal (cont'd)

- The acquisition team should consider the following factors in determining the ultimate form of the transaction.
 - ① **ADVANTAGES OF A STOCK PURCHASE:**
 - **The business identity, licenses and permits** can usually be preserved.
 - *Continuity of the corporate identity, contracts* and structure are maintained.
 - ① **DISADVANTAGES OF A STOCK PURCHASE:**
 - **There is less flexibility to cherry-pick key assets** of the seller.
 - **The buyer may be liable for unknown, undisclosed or contingent liabilities** (unless adequately protected in the purchase agreement).
 - **The buyer will be forced to contend with the seller's minority shareholders** unless all shares of company are purchased.
 - **The offer and sale of the securities** may need to be registered under federal or state securities laws.



Structuring the Deal (cont'd)

⤴ ADVANTAGES OF AN ASSET ACQUISITION:

- **The buyer can be selective as to which assets** of the target company will be purchased.
- **The buyer is generally not liable for the seller's liabilities** unless specifically assumed under contract.

⤴ DISADVANTAGES OF AN ASSET ACQUISITION:

- **The bill of sale must be comprehensive enough to ensure that no key assets are overlooked** and as a result are not transferred to the buyer.
- **A variety of third-party consents will typically be required** to transfer key tangible and intangible assets to the purchaser.
- **The seller will be responsible for liquidating the remaining corporate "shell"** and distributing the proceeds of the asset sale to its shareholders, which may result in double taxation unless a special tax election is made.
- **Compliance with applicable state bulk-sales statutes is required.**
- State and local sales and transfer taxes must be paid.

Preparing the Definitive Legal Documents

- Once the parties have completed their respective due diligence, conducted all valuations and appraisals, negotiated the terms and price, and arranged the financing, the acquisition team must work carefully with the attorneys to structure and begin preparing the definitive legal documentation that will formalize the transaction. Drafting and negotiating these documents usually focuses on the following issues:
 - ① **nature and scope of the seller's representations** and warranties;
 - ① **terms of the seller's indemnification** to the buyer;
 - ① **conditions for closing** the transaction;
 - ① **responsibilities of the parties between execution of the purchase agreement** and actual closing;
 - ① **terms of payment** of the purchase price;
 - ① **scope of post-closing covenants of competition**; and
 - ① **predetermined remedies** (if any) for breach of the covenants, representations or warranties.

Understanding the Key Documents

- The following chart is designed to be a diagnostic tool to ensure that all parties to the transaction understand the Acquisition Agreement and to ensure that the three (3) key categories of issues, namely, Consideration, Mechanics and Allocation of Risk, have been addressed and that the definitive documents are reflective of the business points reached between the parties. Virtually all key issues in the Agreement fall into one of these three categories.

Key Components of the Acquisition Agreement		
Consideration	Mechanics	Allocation of Risk
<ul style="list-style-type: none"> ■ Structure ■ Scope of Purchase ■ Price ■ How/when paid ■ Deferred Consideration/Security ■ Earn-Out's and Contingent Payments ■ Other Ongoing Financial Relationships Between Buyer & Seller ■ Employment/Consultant Agreements ■ Post-Closing Adjustments 	<ul style="list-style-type: none"> ■ Conditions to Closing ■ Timetable ■ Covenants (including Covenants Not to Compete) ■ Third-Party and regulatory approvals ■ Schedules (Exceptions/Substantiation) ■ Opinions ■ Dispute Resolution 	<ul style="list-style-type: none"> ■ Representations and Warranties (R&W's) 2-Way Street (Due Diligence Driven) ■ Indemnification ■ Holdbacks and Baskets ■ If Seller is Taking Buyer's Stock or Notes, then R&W's Are a 2-Way Street ■ Collars ■ R&W Insurance ■ Methods for Dealing With Surprises

Playing With The Buzz Words

- Any veteran transactional lawyer knows that there are certain key “buzz words” that can be inserted into sections of the Purchase Agreement which will detract or enhance or even shift liability by and among the buyer and seller. Depending on which side of the fence you are on, look out for words or phrases like:
 1. “materially,”
 2. “to the best of our knowledge,”
 3. “could possibly,”
 4. “without any independent investigation,”
 5. “except for ...,”
 6. “subject to ...,”
 7. “reasonably believes ...,”
 8. “ordinary course of business,”
 9. “to which we are aware ...,”
 10. “would not have a material adverse affect on ...,”
 11. “primarily relating to ...,”
 12. “substantially all ...,”
 13. “might” (instead of “would”),
 14. “exclusively,”
 15. “other than claims which may be less than \$____,”
 16. “have received no written notice of ...,”
 17. “have used our best efforts (or commercially reasonable efforts) to ...,” or
 18. even merely “endeavor to ...” as tools for negotiation and as phrases.

M&A Resources

- Three key organizations are devoted to the educational and rebranding needs of the M&A professionals. They are:
 - (A) Association for Corporate Growth (ACG)
(www.acg.org)
Founded in 1954 with 8,000 members in 44 chapters worldwide
 - (B) Alliance of Merger & Acquisition Advisors (AMAA)
(www.advisor-alliance.com)
Founded in 2002 with over 100 members in North America
 - (C) International Network of M&A Professionals (IMAP)
(www.imap.com)
Founded in 1971, IMAP is an exclusive global partnership of leading M&A advisory firms

- There are dozens of websites that provide resources and data on mergers and acquisitions. Some of my favorites include:
 - (a) TechDealmaker.com
 - (b) M&A Advisor (www.maadvisor.com)
 - (c) Acquisitions Monthly (www.acquisitions-monthly.com)
 - (d) Mergers & Acquisitions Report (www.mareport.com)
 - (e) Buyout Journal (www.buyouts.com)



About the Presenter

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Andrew J. Sherman, Esq. is an internationally-recognized authority on the legal and strategic aspects of business growth. A summary of his accomplishments include:

- ❑ Mr. Sherman is a senior partner with **McDermott Will & Emery LLP (McDermott)**, an international law firm with nearly 1,000 lawyers worldwide, where he manages a multi-million dollar corporate and transactional practice representing Fortune 500 corporations as well as hundreds of technology-driven, and rapidly growing businesses and government contractors. He is the co-developer and practice leader for the McDermott **Intellectual Property Protection and Leveraging Analysis (IPPLA)** special practice and has written and lectured extensively on intellectual property protection and leveraging.
- ❑ Mr. Sherman is also one of the leaders of the firm's regional Emerging Business and Technology practice group as well as chairs the firm's international Franchising, Licensing and Distribution group. His current and previous clients include Intel, Apple Computer, America On-Line (AOL), Texaco, Panasonic, Chevron-Phillips, Revlon, Beatrice Foods, Caterpillar, Ikea, Invensys, Edison Foundation, Bell & Howell, Rogers Communications (Canada), Sanyo, Tower Records, Bell & Howell, Indian Motorcycles, GAF, Caterpillar, Owens-Corning, Shell Oil, Sears, Metrocall, Bankers Trust, Household Finance Corporation, Pritzker Organization (Hyatt Hotels) and the Western Professional Hockey League.
- ❑ He is the author of twelve (12) books on business growth, capital formation and the leveraging of intellectual property, including the best-selling and critically-acclaimed **Raising Capital** (Kiplingers, 2000), **Mergers and Acquisitions from A to Z** (AMACOM Books, 1998), **The Complete Guide to Running and Growing Your Business**, (Random House, 1997) and **Franchising and Licensing: Two Ways to Build Your Business**, (2nd edition) (AMACOM Books, 1999), and the third edition was published in Dec. 2003, and **Fast Track Growth Strategies** (Kiplinger) which was released in January of 2002.



- ❑ He has appeared as a guest and a commentator on all of the major television networks as well as **CNBC's** "Power Lunch," **CNN's** "Day Watch," **CNNfn's** "For Entrepreneurs Only," USA Network's "First Business,"⁸⁰
- ❑ and **Bloomberg's** "Small Business Weekly" and various other regional and local television broadcasts as well as national and local radio interviews for **National Public Radio (NPR)**, Business News Network (BNN), Bloomberg Radio, **AP Radio** Network, Voice of America, Talk America Radio Network and the USA Radio Network, as a resource on capital formation, entrepreneurship and technology development.
- ❑ He has served as a top-rated Adjunct Professor in the Masters of Business Administration (MBA) programs at the **University of Maryland** for twelve (12) years and at **Georgetown University** for six (6) years where he teaches courses on Entrepreneurship and Business Planning, Growth Strategies and New Venture Financing, and has won various teaching awards including the Krowe Award for Teaching Excellence in 2000.
- ❑ He serves as **General Counsel** to several of the nation and region's leading entrepreneurship and business growth organizations, including the **Young Entrepreneurs Organization (YEO)**, the **Collegiate Entrepreneurs Organization (CEO)**, the National Foundation for Teaching Entrepreneurship (NFTE), the Let's Talk Business Network (LTBN) and the Morino Institute's Netpreneur program, since the inception of these organizations. He was one of the co-founders of the Washington, D.C. regional chapter of the Association for Corporate Growth and serves on the Inner Circle and as a key advisor to the Dingman Center for Entrepreneurship at the University of Maryland. He is the co-founder and **Chairman of the Board** of the newly-formed **Small and Emerging Contractors Advisory Forum (SECAF)**, an education and networking resource headquartered in Washington, D.C. to support small and mid-sized government and defense contractors.



- ❑ Mr. Sherman is a frequent author, serves as a resource and has been quoted for articles in a wide variety of the nation's leading magazines, newspapers and websites including the **Wall Street Journal**, the **New York Times**, **Fortune**, **Investor's Business Daily**, **USA Today**, **Inc.**, **Nation's Business**, **Success**, the **Washington Post**, **Forbes**, **My Business**, **U.S. News and World Report**, **Business Week**, **Money**, **Legal Times**, **Washington Business Journal**, **Crain's**, **Entrepreneur**, **Reuters News Service**, **AP News Wire**, CNNfn.com, Inc.com, Fortune.com, Office.com, MSNBC.com, and the Kauffman Center for Entrepreneurial Leadership's **EntreWorld.org** websites. In the December/January 2002 issue of **Fortune Small Business**, he was recognized as one of the nation's top ten (10) gurus and thought leaders on entrepreneurship and the legal and strategic issues facing small and growing companies.
- ❑ Mr. Sherman is the Chairman of the Professional Advisory Board of the **National Commission on Entrepreneurship** (NCE), the Chairman of the Technology and Innovation Committee for the **Washington Board of Trade's** Potomac Conference, serves on the Board of Directors of Youth Services America, the Editorial Advisory Board of **Inc. Magazine's** latest publication, **International Franchising**, to be launched in January of 2002), the Board of Advisors to the **Collegiate Entrepreneurs Organization (CEO)**, the Research Institute for Small and Emerging Businesses (RISE Business), NFTE (Former Chairman 1993-1995), YEO, the **Washington Business Journal's** Editorial Advisory Board, **Inc. Magazine's** Business Consulting Services Advisory Board, the **Opportunity International** Board of Governors, the **Gazelles/Masters of Business Dynamics** Advisory Board and serves on the advisory boards of several business incubators and early-stage and rapidly-growing technology companies.
- ❑ Mr. Sherman serves as an on-line columnist for two of the internet's leading sites for small and emerging growth companies. He writes the "Can This Business Be Saved?" column for **FortuneSmallBusiness.com** as well as the "View from The Trenches" column for **AOL's Netbusiness.com** and serves as a key member of the **AOL Small and Emerging Business Champions Team**. He is also a frequent contributor to the "Leading Advisors" section of the Kaufman Center for Entrepreneurial Leadership's website, **EntreWorld.org**.



- ❑ He is a frequent national and international lecturer at business conferences where he has delivered speeches and lead seminars on entrepreneurship, capital formation, mergers and acquisitions, the protection and leveraging of intellectual property and business planning for organizations such as **Inc. Magazine** (Growing Your Company, Capital Formation, ThINC.Out Loud and CEO Symposium Conferences), the **MIT/Inc./YEO** “Birthing of Giants” programs, the **Association of Financial Professionals**, the **Young Entrepreneurs Organization** (international meetings and local chapter presentations), the **National Restaurant Association**, **iBreakfast.com**, the **U.S. Chamber of Commerce**, the **New York Venture Group**, the **Dingman Center for Entrepreneurship**, **Netpreneur.org**, the **Baltimore-Washington Venture Group**, the **National Association of Credit Managers**, **PC Expo**, the **International Franchise Association**, **Microsoft’s** Small Business Crossing Seminar Series, the **Regional Investment Bankers Association**, the **Collegiate Entrepreneurs Organization**, the **Association for Corporate Growth**, the **American Management Association**, the **Council for Growing Companies**, and various other international and regional business organizations.

- ❑ He is the developer and lecturer for several different business growth courses and seminar series, including serving as the author of two workbooks and videos for Kiplinger’s, entitled **Growing Your Business** and **Corporate Transition Management and Exit Strategies**, as well as a four-part cyber-conference and workbook on **Mergers and Acquisitions** for the Association of Financial Professionals, a seminar series on **Strategies for Protecting Your Intellectual Property** for Padgett-Thompson, a series of conferences on **Growth-Oriented Distribution Strategies** for the American Management Association and a series of conferences on **Strategies for Doing Business Abroad** for the International Franchise Association.