INSIDE THE MINDS

Business Due Diligence Strategies

Leading Lawyers on Conducting Due Diligence in Today's M&A Deals

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Adjusting Business Due Diligence Strategies to Accommodate Changes in the Economy, Regulation, and Technology

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Introduction

Welcome to the twenty-first century. Changes in the economy, government regulation, and technology call for a new approach to business due diligence strategies. This chapter introduces and discusses elements of a comprehensive, modern-day perspective on due diligence strategies in the mergers and acquisitions (M&A) arena, highlighting specific, novel questions to ask (as adjuncts to a comprehensive due diligence exercise) prior to buying, lending to, or investing in a target enterprise. More specifically, by the end of 2012, we saw a convergence of risk relating to:

1. New computing methods as business becomes more dependent on the Internet for software applications (SaaS) and infrastructure (cloud computing)
2. The uncovering of at least five of the largest financial fraud/Ponzi schemes of all time and increasing rates of corporate fraud[1]
3. The impact of global warming and the intensification and growing unpredictability of weather-related damage and business interruption
4. The slow emergence of the United States from the deepest economic recession in two generations

Attorneys leading due diligence efforts should consider checklist additions and active expansion to accommodate change. Due diligence, the involvement of outside experts, and new issues are raising costs, while simultaneously increasing time and risk around closing deals, and giving rise to greater last-minute price negotiation, risks of failure to close, and longer deal cycles. In addition, the new "connected," networked world may yield unexpected vis-à-vis attentive diligence agendas, as certain potentially relevant information about companies and executives is more widely available than ever before as a result of social networking on the Internet. For example, matters once reduced to back-channel scuttlebutt about a company can now be found on the first page of organic Internet search results if some disgruntled person has blogged about them—which can have a meaningful impact on, for instance, hiring and customer acquisition.

[1] *See* Appendix A, Chart of Corporate Fraud Pending Cases published by the FBI in its Financial Crimes Report to the Public, Fiscal Years 2010–2011.

The Recession's Effect on Business Due Diligence

Over the last year, the US economic recovery has gained momentum, and it appears that lending has opened up again, although with arguably less risk tolerance. Many businesses have been faced with and forced to address extraordinary sets of circumstances regarding their financing arrangements and a number of litigated matters. These have converged with a continuing trend toward assets based in or dependent on software services and technology, with the cloud playing a greater role in infrastructure.

These issues have either evolved or grown in complexity as a result of technological advancement, the explosion of cloud computing, and the economic necessity to outsource more business functions or resources. This in turn has presented new challenges in due diligence—particularly in understanding what a company actually controls and where risk management touch points and difficulties can arise in areas that were not necessarily as relevant in the past. Buyers are taking more time to close deals today, and consequently the due diligence process is taking longer. The need for financing justifications has made valuations more difficult to achieve. More specifically, there is now a greater tendency to put more purchase price on the back end of deals and to negotiate using negative findings and due diligence to reduce the price between the time the letter of intent or term sheet has been signed and the time a contract is finally negotiated.

Additionally, the economic condition of many state governments, which are currently collecting taxes more aggressively, has created different priorities for regulators and tax collecting authorities—and in turn is creating additional reasons to modify business due diligence strategies.[2] Buyers are finding it increasingly important to conduct due diligence with respect to various revenue-generating regulatory issues, to follow those trails to greater depth, and to press for elimination of potential

[2] John Brondolo, *Collecting Taxes During an Economic Crisis: Challenges and Policy Options*, IMF Staff Position Note SPN/09/17 (July 14, 2009), *available at* www.imf.org/external/pubs/ft/spn/2009/spn0917.pdf.

surprises.[3] Those issues have always existed, and buyers should not pay greater diligence to tax or state law compliance merely because of the economy; however, the proliferation of conflicts of laws among multi-jurisdictional entities, competing claims on revenues from various authorities, and the additional risks surrounding contingent liabilities not showing on the balance sheet are making it more important for buyers to research those issues, especially if they will have tight covenants on the financing for those deals.

One of the most intriguing new, twenty-first-century opportunities in due diligence is social media and the pervasiveness of the World Wide Web. There is an amazing amount of information about companies on the Internet—most of which the companies themselves are not aware of. While web-savvy companies monitor their reputations on the Internet, many companies—even technology companies—fail to perform this simple due diligence step. Performing an Internet search may provide links to various blogs and employee-related sites that discuss the quality of the work environment and pay.

Social networking research is equally important today. The way social media users discuss a company's employment practices and potential employment claims, as well as whether the company overpays or underpays its personnel and whether it is a good place to work, can provide a prospective buyer with a valuable evaluation and risk-assessment tool, one that will also help analyze how well the company may be able to attract talent once the acquisition is complete. How many due diligence efforts have a comprehensive Internet search analysis—including organic search results and metrics for the target, traffic, and audience data—for corporate website pages, employee churn figures for five years, and the like?

As a result of the changing nature of due diligence strategies, both acquiring and target companies should expect that it will take longer to conduct adequate due diligence, and the review of finance and cost structures will be greater. They can also expect a deeper review of customer contracts and relationships (particularly any recurring revenue

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[3] George D. Shaw, *The Importance of Post-Recession M&A Due Diligence,* CAPITALENS ¶6 (June 2011), http://www.gelending.com/Clg/CapitaLens/2011/06-2011/ featureArticle.html.

relationships) to ensure those relationships will sustain the deal's term. The due diligence might even examine the financial wellbeing of the customers themselves, although that will likely dissipate as the economy continues to improve. Companies can no longer assume that due diligence that is largely limited to examination of financial statements' listing of revenues, or that reaches just under the financial statements of the target company, is sufficient. Instead, they almost certainly must make the financial wherewithal of their key customers, as well as the contracts those customers possess, a greater priority than in the past.

This means that if a target company wants to reduce the risk of surprising price negotiations before a closing, while also increasing the likelihood of closing within a short time, the company must better prepare for the due diligence process today than was necessary in the past. Doing so enables the company to guide the due diligence process, which is especially important during a time in which buyers are taking more liberties with the process, taking a longer time, asking deeper questions, repeating questions, and even re-examining the same issues toward the end of the process. It is not uncommon today during a ninety-day process to sustain repeated due diligence—a practice that was rarely used in the past. Today, buyers are likely to double-check due diligence or hire multiple outside due diligence expert firms or consultants to evaluate the due diligence results from the first pass, focusing on technology, intellectual property (IP), customer accounts, and certain accounting issues.

Companies should conduct their own diligence on their Internet reputations. Larger firms may wish to engage their human resources (HR) and marketing departments, while lower-market and middle-market firms being acquired may find that surprising questions arise as a result of these information sources. Such companies can similarly benefit from conducting the diligence *before* they start the acquisition process, thereby allowing time to address those issues. Target companies should also be aware that acquiring companies often benefit from the due diligence process taking longer and may actively search for negative Internet material that raises questions and provides them with additional time.

The best way to address negative findings disclosed or discovered via the due diligence process is to identify the information in terms of ultimate risk and cost to a divergence from budget and potential impact on the business plan. It may also prove helpful if the negative information is part of the "perception lags reality" syndrome (i.e., that this was already known and addressed by management, turning a negative into a positive and demonstrating an adept response to the risk).

How New Rules for Disclosure Affect the Due Diligence Process

Due diligence has recently transformed as a result of the convergence of economic circumstances. It will likely continue to adapt as we begin to emerge from the recession and encounter new government regulation resulting from the success of the Patient Protection and Affordable Care Act (PPACA)[4] and other initiatives. New rules for disclosure related to the PPACA will require companies to pay close attention to the types of benefits offered and the potential impacts of those rules on benefit plans and cost structure. The new laws already have changed the way buyers review the companies they consider acquiring. Companies conducting a major portion of their business overseas must become familiar with the Foreign Corrupt Practices Act (FCPA)[5] and the regulatory environment at the time of due diligence.

New laws could change the potential costs and liabilities of a target company, so it is important to assess health care and employee benefits, as well as privacy laws. The acquiring company must specifically assess Internet privacy laws and the target company's compliance with the rules that apply to the utilization of the Internet for doing business and the methods the company uses to maintain secured databases and protect information.

This is especially important because of companies' increasing migration to cloud computing; any company with a significant amount of data or

[4] Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119-1025 (2010).

[5] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, (codified at 15 U.S.C. §78dd-1).

operations dependent on a third party storing that information in the cloud raises a host of diligence issues regarding the location where, and the type of facility in which, the data is stored, the contracts pursuant to which the data is stored, the disaster recovery capabilities of the firm if it must access that data, and the degree to which the company is anchored to a particular SaaS, data storage, or cloud services provider.

For example, if a company runs its entire back office out of its sales and marketing departments or runs its customer relationship management (CRM) function through a third-party provider—essentially using SaaS—the buyer must research the financial wherewithal of the service provider, the technology infrastructure, and the ease with which it could internally replicate that technology infrastructure or move it to a different company or database. I once worked with a company that used an offsite provider as part of its enterprise resource planning (ERP) solutions, and we determined that because of the incompatibility of the data methods and the need for a different type of infrastructure, the costs of switching providers were substantial. Had the company simply conducted diligence regarding what was happening internally to the target, it likely would not have arrived at that conclusion—hence the necessity of going beyond the target and performing due diligence on third-party providers, as well.

The key components of an effective due diligence strategy may be summarized as:

- Organize the process at the beginning, and be forward-thinking.
- Always use checklists, and make sure they are tailored to the target's particular risk set. (*See* Appendix B for a sample checklist.)
- Make sure you have the right team in place to review the business aspects (budgets, models, valuations, staffing, etc.), as well as the legal aspects (organizational documents, employment agreements, IP protection, etc.).
- Review Internet presence, social media, and public records.
- Visit the business locations and interview key personnel.[6]

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[6] Frank A. Ciatto, Stephanie T. Anelli, and Joseph B. Walker, *Diligence in Business Transactions: A Brief Primer*, VENABLE LLP CORPORATE ALERT, ¶5 (Sept. 2011), http://www.venable.com/files/Publication/b9c368ad-1136-445f-ae10-13f801d3814c/Presentation/

Effects of a Company's Size and Experience on the Due Diligence Process

Bigger target companies often have enhanced systems for tracking and responding to the information necessary to conduct proper due diligence on an acquisition; however, greater size also creates complexity. When acquiring a smaller company, the buyer must be sensitive to the fact that, because the target's systems and infrastructure may not be as complete and comprehensive as those of a larger company, negative, unrecorded information that is harder to locate is likely to reside in various places. This in turn requires more second-level exploration, which is not necessarily difficult, but requires the acquiring company to recognize the importance of posing a deeper level of questions on certain elementary issues.

Conversely, while larger target companies may appear to have greater systems, including ERP systems that can provide numerous reports, the acquiring company must query the systems and attempt to affiliate the information technology (IT) department and the chief financial officer (CFO). The acquiring company should request that the target company run reports that are unusual to the firm to determine whether and the extent to which it is possible to parse the data and identify trends and anomalies that standard reports might miss.

Above all, the purchaser of a larger company should not be lulled into a false sense of security, especially since larger companies have more places to hide certain issues, and in terms of time and effort, it can be harder to identify places where particular information might be hidden. I recommend dedicating special attention to long-term employees, who are usually deeply familiar with the firm's history and can identify areas the due diligence might otherwise have missed. The target company is often reluctant to allow the acquirer to conduct employee interviews, but those types of interviews (especially in large companies) can yield significant information not otherwise captured by newer systems.

PublicationAttachment/9bc669e5-6170-4a1b-847c-1dd049907277/Diligence_in_
Business_Transactions_A_Brief_Primer.pdf.

Whether the acquiring company is a private equity fund or an operating company certainly impacts the M&A process. Often in these situations, the due diligence team comes together for the first time with experts brought in by the private equity fund to perform the diligence with the acquirer's various partners and employees. During that process, it is unlikely that the team will be able to make decisions or otherwise act as quickly as a well-honed team of a large company that has worked together through multiple acquisitions. Public companies that are orchestrating consolidations, larger private companies, and even private equity companies that are building add-on acquisitions are likely to become proficient in acquiring the type of company the seller is offering. For example, a company that has been consolidating firms in a different industry is in a position where it will likely take ninety days from initial engagement to letter of intent. That may seem fast, but it is a reasonable amount of time for an experienced company that has worked repeatedly with the same team of people.

If a team is undertaking its first deal together or is in an unfamiliar industry, it is common for each of the acquirer's experts to put the best foot forward to encourage another engagement from the acquirer while simultaneously protecting themselves. Although they may likely work harder to ensure they have not missed something that is outside their portfolio, they also face the challenge of fitting that engagement into their respective schedules and among their priorities for other clients. This means that a target company evaluating the prospect of being subjected to due diligence from a newly assembled team (instead of an experienced team) must factor in the additional costs and time associated with use of a new team, along with the potential for the deal to fail to close as a result of those issues.

Determining Appropriate Disclosures in M&A Transactions

Issues associated with privacy often arise during financial M&A transactions and have prompted the government to enact laws preventing the disclosure of specific types of information in certain situations. Additionally, the size of the players involved in an M&A deal may create issues related to anti-competitive laws and anti-trust laws. Sellers may also be under-informed or confused about the anti-fraud and general fraud rules under state and federal securities laws, which charge sellers with affirmative obligations not to omit or make misleading statements or omissions of material facts.

While the clients in these transactions rarely intend to commit fraud, sellers must make informed business judgments regarding the types of disclosures they make to acquiring companies, requiring them to conduct factual and legal analyses to determine whether a specific matter can be disclosed, if disclosing that matter waives any applicable privileges, and if not disclosing it causes a misleading omission that could form the basis of a later fraud or securities-fraud claim. Various facts relating to the business's actual operation, practice, and compliance with the law all factor into the tension that arises between the obligation to make a disclosure in response to due diligence when selling a business or securities in a business.

Divulging Non-Public Information before Obtaining an NDA

Prior to getting a non-disclosure agreement (NDA), a target company in an M&A should direct all requests for non-public information pertaining to general corporate matters to the representing intermediary. The requests should be limited to a pre-determined fact sheet or "teaser book," and the target company should refuse to respond to any other requests in due diligence prior to getting a NDA. The initial teaser should not identify the target company, but rather provide a description of the business, including fundamental information regarding the relevant industry, the target company's size, profitability, services or goods, whether it has multiple locations, whether it is principally based on revenues from services instead of personnel, and how many people it employs. The seller can provide sufficient information to attract buyers interested in a particular type of industry and company without divulging information that identifies the company and influences the buyer's expectations.

The only financial information the seller should provide before obtaining a NDA is the company's general size, revenue, and profitability to indicate its audited financials. The company should avoid providing information regarding taxes, technology, and IP before obtaining a NDA. Media companies with highly trafficked websites may consider referencing that fact. Additional financial teaser information may include the nature of the product or service offerings, operations, number of locations, number of employees, size of the sales and marketing departments, and perhaps the return on investment (ROI) or the percentage expense allocated.

Finally, the seller should provide information regarding whether the company is in a regulated business. Buyers may find the company attractive if it has developed a profitable track record or a methodology for working properly in an environment that has a great barrier to entry or a methodology for increasing profitability.

Recommendations for Parties Engaged in Due Diligence under a NDA

After negotiating, drafting, and signing the NDA and effectively creating a confidentiality agreement with the prospective buyer, the target company should liberally disclose almost any information pertaining to general corporate matters; finances, accounting, and taxes; technology and IP; product or service offerings; operations; sales and marketing; HR and personnel; and legal and regulatory concerns, as long as such disclosure does not violate other confidentiality agreements or obligations, privacy laws, or legal privileges, nor otherwise impair or compromise competitively sensitive information or trade secrets. The seller should avoid disclosing any information that may potentially reduce the value of the company if the receiving party does not ultimately become the buyer.

Meanwhile, a potential acquirer engaged in due diligence under a NDA runs the risk of polluting its environment with sensitive, competitive information from the target company. For this reason, the acquiring company should avoid involving anyone in the company's line of business in the M&A process. It is best to completely separate the due diligence team from the rest of the company. This sometimes necessitates using an outside service to conduct diligence apart from the company's production team. It also allows the senior executives involved in the acquisition to become familiar with some of the information as a general proposition without the actual production team becoming sensitized to certain issues—thereby making the origin of the proprietary rights of the acquiring company questionable.

M&A attorneys can help address issues arising from a target company's reluctance to disclose information by using blind disclosure methodology related to certain concerns, such as customer identity. This entails describing a customer without providing the customer's name, using several indicators related to what the customer does, and shadowing the information or using third parties to confirm certain underlying information without disclosing specific details. It also helps for the acquiring company to assure the target company that it has established procedures to isolate the specific details of some of the diligence that will keep those details confidential, and that the company will not use them for any purpose not connected to the acquisition.

Assessing Legal Compliance, Customer Relationships, and Financial Standing before Closing M&A Deals

It is absolutely critical for the parties involved in M&A transactions to understand the nature of risk surrounding any potential claims, litigation, and legal compliance so as to not prevent closing. I have witnessed situations in the business of collecting accounts where the business must be licensed in thirty states, and the due diligence process determines that it is not; however, fifteen of those states have exemptions that the business fits into. It is not uncommon for the business to be confronted with these issues for the first time during the due diligence process, which, unfortunately, results in the involvement of numerous parties with disparate interests assessing the issue of licensing compliance. Even if the prospective buyer determines that the firm is in compliance, the *process* of making that determination can cause a deal to die because it can drag it out beyond the term of financing or the window in which it must close for time-sensitive purposes, such as fund allocation or escrow requirements. In this example, a variety of implications arises for a seller, who does not understand its legal compliance position. Another concern that relates to compliance with the law is litigation. The parties must be able to construct a wall around any ongoing litigation, measure the risk, and communicate openly about that litigation to ensure that specific aspect of compliance is under control.

Before closing the M&A deal, the buyer should also conduct due diligence on customers. This entails obtaining information from customers and ensuring there are no problems that might cause the deal to go awry. There are outside consultants who may be engaged to protect certain sensitive information from the buyer while still answering fundamental issues of customer intentions to leave, stay, or make claims.

Finally, financial due diligence is obviously a critical part of any M&A transaction. The seller must identify any factors that might develop into arguments relating to the categorization of financial items that might destroy the deal. The seller should be able to readily answer the buyer's questions regarding the financial aspects of the business. It is necessary to assess the categorization of expensed items versus capitalized items that later require a purchase price allocation. Without competent professionals to help guide the seller in taking positions on those kinds of issues, the deal is likely to unfold. Financial due diligence and your checklist (*See* sample checklist in Appendix B) should include an examination of the following:

- Audited financial statements for the target and any affiliates or subsidiaries and unaudited financials with the auditors' file for the past five years
- Unaudited financial statements for the target and any affiliates or subsidiaries for all quarterly or monthly periods subsequent to the most recent period that was audited
- Correspondence with banks or lenders, including evidence of compliance with terms and conditions contained in all loan documents for the past five years
- All correspondence with auditors for the past five years
- A list of and reasons for any change in accounting methods or principles
- All records of accounts receivable and accounts payable
- Inventory list with valuation assumed and information with respect to time in inventory
- Pricing methods, policies, and compliance
- Credit reports for target, affiliates, and subsidiaries

- Documents and reports containing any analysis from bankers, engineers, management consultants, accountants, or other professionals for the past five years
- Any reports or correspondence to the board of directors with respect to internal corporate controls and functions
- Projections, budgets, and plans for the past five years, together with forecasts
- Documentation on bad debt reserves and unusual charges to operations for the past three years

Addressing the Complications and Costs Arising from a Target Company's Litigation

Many complications associated with issues raised during due diligence relate to the treatment of items for tax purposes. The attorney must determine whether a problem might arise on a subsequent audit with respect to the way certain items are categorized for tax purposes, whether it might materially affect the buyer or the seller, and how to allocate or mitigate that risk. The biggest complication that affects the timing and costs related to due diligence, however, is undoubtedly litigation. It is often difficult to determine the potential exposure in connection with litigation, and it is risky to rely simply on audited financial statements, which merely reflect what management has told the auditors about a particular piece of litigation. In the majority of cases in which a surprising contingent liability arises after an acquisition, it is the result of information that the auditors failed to uncover.

Litigation and claims against a target company can cause numerous issues in the due diligence process, including the additional costs of involving more experts and taking more time. In turn, these issues can ultimately jeopardize the deal. The M&A attorney should play an active role in helping the client drive the process to a conclusion as quickly as possible to help avoid increased costs and prevent the deal from derailing.

Conclusion

Fundamental structural changes in the economy at large and the way that business is conducted have in turn required adjustments to the way due diligence tasks are executed. This makes it more critical than ever to ensure that acquiring companies understand the risks involved, especially as those risks pertain to distributed computing, the cloud, and the manner in which automation, data storage, and software services are provided to and by the target company. The cloud computing revolution and the liability of various providers, as well as firms' ability to remain in control of assets in the cloud and automated processes that may no longer be fully under their control, are uncharted territory that must be carefully assessed and examined. The insurance industry today is also constantly attempting to maintain an understanding of these risks, but the question of whether companies have adequate coverage is increasingly unanswerable.

As odd as it sounds, even an issue such as global warming can have a huge impact on due diligence going forward, as demonstrated recently with the calamity following Hurricane Sandy in New York, which has prompted insurance companies to re-assess the types and costs of coverage. Of course, in any acquisition, insurance for the real estate, business interruption insurance, and insurance for activities related to natural disasters and calamities will be more significant and relevant in the future. How climate change impacts insurance risk management and the costs of doing business in certain areas that are more likely to be adversely affected by climate trends remains to be seen.

Finally, as we recover from the recession, we will have a continued new agenda implementing additional controls over lending, which will also affect governmental support of various lending institutions in certain circumstances and our bankruptcy laws. All of these issues have ramifications for due diligence and risk management, and as new risks evolve in 2013, they will yield new areas on which the attentive diligence team and M&A attorneys must focus.

Key Takeaways

- Encourage your clients to research social media and the Internet during due diligence. Performing an Internet search may provide links to various blogs and employee-related sites that can provide a prospective buyer with a beneficial evaluation and risk-assessment tool, one that will also help analyze how well the company will be able to attract talent once the acquisition is complete.

- Be aware that new laws and more vigorous enforcement of old laws could change the potential costs and liabilities of a target company, so it is important to assess health care and employee benefits, as well as privacy laws.
- Help seller clients provide sufficient "teaser" information to attract buyers without divulging information that identifies the company and influences the buyer's expectations.
- Play an active role in driving the process to a conclusion as quickly as possible, since litigation and claims against a target company can create the additional costs of involving more experts and lengthening the timeframe and may therefore ultimately jeopardize the deal.
- Create/obtain credential references on all risk-management areas and any place where there are red flags as a target—and look for them as a buyer.

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