

## TYPICAL ACQUISITION PROCESS

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Are you considering buying a business or a business' assets to grow/build your existing company? Or are you considering selling your business or selling some or all of your business' assets? Usually, there is an acquisition process that typically is followed for whichever type of party, acquirer or seller, you will be, and for whatever type of transaction you are contemplating. This short article will provide a broad overview and brief discussion of the various steps of the Process one initiates and follows to consummate an acquisition transaction. Having knowledge and an understanding of the Process should save you time and money, regardless of whether you are an acquirer or seller, and regardless of the type of transaction being pursued.

### OVERVIEW

Whether a party is acquiring, a "Buyer", or selling, a "Seller", typically there is a basic 12 Step Process. And, typically, the following legal documents, in order, are prepared & signed for an acquisition transaction: (i) binding bi-lateral non-disclosure agreement ("NDA"), (ii) non-binding letter of intent ("LOI") or non-binding memorandum of understanding ("MOU"), (iii) a definitive, binding purchase agreement ("PA"), and if an asset acquisition, typically referred to as a binding asset purchase agreement ("APA"), with various and numerous exhibits to it (which will include extensive terms, warrants and representations, non-compete, non-solicitation, employment agreement, possible holdback), and (iv) an assignment/bill of sale ("BOS"). The exact type and number of documents for a transaction varies from transaction to transaction, depending on the negotiations between the parties, type of transaction, and agreed upon transaction terms.

### TYPE OF TRANSACTION

Usually, a transaction falls into one of two categories. Either, it is an "Entity Acquisition", which typically is the minority of consummated transactions; or, it is an "Asset Acquisition", which typically is the majority of consummated transactions.

If a party is a Seller for either type of transaction, be prepared to be thoroughly scrubbed by a Buyer with respect to most all aspects of the Seller's business being extensively analyzed by the prospective Buyer, even more so if it is an Entity Acquisition vs. an Asset Acquisition. A Buyer needs to be prepared to extensively scrub the Seller's business. A Seller should be prepared to produce for the Buyer: (i) audited and/or unaudited financials, and tax filings typically for past three years, (ii) records, (iii) documents, (iv) data, all with regard to Seller's business operations, including all relevant and applicable

contracts Seller has entered into for the business. Discussed further in Due Diligence below.

### **PREPARING TO DANCE**

If a party is considering a transaction (which I refer to as 'getting dressed for the 'Dance'), which Dance is it going to be? Two key questions first need to be answered that determines the transaction and process. First Question: Is the party going to be a Seller or Buyer? For purposes of this article, I will assume the party is a Seller. Second Question: Is the Seller desiring to do an Asset Acquisition or an Entity Acquisition? This question is usually answered by the prospective Buyer the Seller is engaged with, based on what type of transaction the Buyer is desiring to accomplish. Of course if a Seller has a specific type of transaction the Seller wants to consummate, then the Seller will answer the Second Question, but in doing so, will probably narrow the pool of prospective Buyers.

### **ASSET ACQUISITION**

For an Asset Acquisition (also referred to as a 'Portfolio Sale'), typically, a Buyer is only buying all or selected assets of a Seller's business. The Buyer is not buying the legal entity (assuming the business is a corporation or limited liability company). All assets of the business would typically include almost everything involved in the operation of the business, as well as anything adding value to the business. As an example, this would include equipment, any and all types of contracts, IT, various types of business lists, etc. What it does not include is the legal entity's state registration of the business and any federal registrations, however, the name of the business maybe be considered an asset. Typically the Buyer through due diligence will determine what assets the Buyer wants to acquire, with appropriate legal documents produced to transfer all such assets to the Buyer at "Closing" of the transaction.

### **ENTITY ACQUISITION**

For an Entity Acquisition, the Buyer is buying the legal entity, which includes everything involved in the operation of the business, excluding employees (employees/officers who have written contracts with the Seller, subject to the terms of the applicable contracts, would be considered assets of the business). Basically, the Buyer takes over the business of the Seller 'lock, stock & barrel', including all liabilities and all 'skeletons in the closet' of the legal entity. Due to liability risks involved in Entity Acquisitions, and the Buyer wanting to mitigate such risks, typically there will be significantly more legal documents prepared to be signed by the Seller to close a transaction than for an Asset Acquisition. Typically, Entity Acquisitions have a much longer Process, thus takes more time, with additional agreements to be prepared and signed by the Seller to consummate the transaction.

### **DUE DILLIGENCE**

A potential Buyer of an Asset Acquisition through due diligence will analyze all aspects of a Seller's past and current business operation, all assets and liabilities associated with the business operation, revenue generated by the assets, as well as determining valuation of the assets individually and in the aggregate. A potential Buyer typically will conduct significantly more detailed due diligence for an Entity Acquisition than one

conducted for an Asset Acquisition, due to higher level of potential liability exposure being acquired/assumed by the Buyer.

The depth and length of due diligence by a Buyer typically will be determined by:

(i) type of acquisition due to significant differences between an Entity Acquisition vs. an Asset acquisition,

(ii) how well organized the Seller is and

(iii) how up to date and organized are the Seller's, including but not limited to: contract files; tax and financial reports; corporate records; all state/federal filings; IT, patents, IP, and tradename files; HR records and employment contracts; current and complete list and files of all debt obligations and liabilities; lawsuit files (filed & pending); with all such applicable documents, records and filings signed, updated, complete, readily available to be reviewed & copied when produced. Additional reports, additional documents and records to be produced typically occur in an Entity Acquisition due diligence vs. an Asset Acquisition.

### **CLOSING**

Typically, for most acquisition transactions, the more knowledgeable a prospective Seller has about **all** aspects of the Seller's business and assets when starting the Dance with a knowledgeable, prospective Buyer, usually this results in a higher valuation being negotiated and agreed to by the parties, whether it be an Entity Acquisition or an Asset Acquisition. This in turn typically results in an easier Process to negotiate, prepare, finalize and consummate/close an acquisition transaction. At the same time, as stated above, knowledge and an understanding of an acquisition Process, not only saves you time and money, but can significantly assist you to navigate whatever acquisition path you have taken, particularly at the 'negotiation' table. Be smart!