

Critical Factors to Consider When Managing an M&A Deal Team

There's been a resurgence of domestic and international mergers and acquisitions activity. With it has come increasing pressure on business development people, investment bankers, accountants and attorneys to get deals done quickly.

In a fast-paced deal market, the importance of building a strong deal team — and making certain the team is well coordinated — only grows. A well-coordinated team is more likely to be efficient, which results in lower transaction costs, and less likely to make the types of mistakes that can be the difference between a company-making and company-breaking deal.

Open communication, definition of roles and efficient information sharing from the launch of the deal, together with ensuring all members understand the effect of purchase agreement terms, are critical to the team's success.

The team must work together through due diligence, negotiation and execution of a purchase agreement, any regulatory consent processes and conditions to closing, interim operations, and finally, closing and post-closing transition and integration.

With the focus on due diligence investigations and purchase agreement negotiations, these are some observations and suggestions to consider when organizing an M&A deal team and leading it through the front end of the acquisition process.

Though this is focused primarily on the buyer's deal team, many of the concepts are applicable to sellers as well.

Coordinating Efforts

Coordination of the deal team is critical before and during the due diligence process. Absent that, team members may duplicate efforts, devote too much time to insignificant matters and not enough time to key issues, or fail to drill down on key issues on the assumption that others are investigating them.

These problems can be avoided by assigning roles, highlighting key areas for investigation, and defining the scope of review and desired output before the process begins. Moreover, a well-coordinated team will make for better relations with the other party by avoiding unnecessary or duplicate requests for information, and by conveying follow-up requests in an organized and systematic manner.

The due diligence team should consist of appropriate business, financial and legal representatives, and subject matter experts when necessary. To promote efficiency and consistency of work product, the team should be kept to the minimum number of people necessary to complete the investigation within applicable time constraints.

Clear Guidance

Team members need to be given enough information to understand the business being acquired, the purpose and structure of the transaction and value drivers. Most importantly, team members need to know the objective of their investigation, which often comes down to a simple discussion about what matters and what doesn't.

It's rarely effective to ask team members to perform an "exceptions review" of diligence information or to "just look for big issues. " Absent clear guidance, team members are likely to have a diversity of views as to what constitutes an exception or a big issue.

Typically, establishing the substance of contract summary forms, site visit checklists and similar road maps for the investigation in advance will streamline the process and ensure that critical data is captured.

Team members also need clear instructions about the scope of their investigation and who is responsible for each area of review. It helps to create detailed task lists that address each aspect of the investigation and the responsible parties.

Due Diligence

Once the investigation is complete, the team's challenge shifts from data collection to consolidation and presentation. Due diligence investigations generate a flood of information, much of which may be useful in developing a general sense of the target business but isn't significant to the deal terms or negotiations.

A thorough due diligence investigation and meticulously drafted diligence reports are of little value if the information gathered isn't utilized in the purchase agreement negotiations.

One or more team leaders representing business, financial, legal or other areas should review and synthesize the output received from other team members. The group should identify any areas requiring further investigation and any issues critical to the decision to proceed with the deal, as well as the final determination of the purchase price or to be addressed in price adjustment mechanisms, representations and warranties, indemnities or other purchase agreement provisions. This process helps ensure that decision-makers and negotiators are armed with critical data without being overwhelmed with unnecessary information.

Purchase Agreement

The purchase agreement in an M&A deal is often 50-100 pages. It usually contains purchase price adjustment mechanisms, representations, and warranties and risk allocation provisions that can have a substantial effect on the economics of the deal. Too often, dealmakers disengage from the process once they've agreed on price and set the attorneys to the task of papering the transaction.

It's critical that the deal team understand the operation of the purchase agreement, and the impact of its terms and conditions on the business deal. Working through real examples with the deal team, while time-consuming and sometimes tedious, is often the best way to accomplish this. For example, the purchase price is frequently subject to a closing date working capital adjustment. The parties must understand and agree on the components of the adjustment mechanism.

How are "current assets" and "current liabilities" defined? Do aged accounts receivable get discounted? How is slow-moving inventory valued? There's a tendency to simply rely on GAAP to answer these questions, but rarely will GAAP provide enough guidance to avoid disagreements over its application, so supplemental rules are often provided in the purchase agreement.

It's worthwhile to have the deal team run a model purchase price adjustment using anticipated inputs so that team members understand the mechanics and the effect of future events on the final purchase price.

Once the deal team has agreed on the mechanics, buyers and sellers should walk through an example to make sure there's agreement on the mechanics before the deal is signed. It's often helpful to include an exhibit to the purchase agreement that sets forth an example purchase price adjustment to memorialize the parties' agreement.

The deal team's job doesn't end with the signing of the purchase agreement. It must continue to work together through any regulatory consent processes and other closing conditions. Setting the right tone early in the acquisition process will help ensure the team's success.

This article was written by Jeffrey Beuche, corporate attorney, Faegre & Benson and originally appeared in the Denver Business Journal.