1. HOW TO STRUCTURE A TRANSACTION – DEAL TYPES AND CONSIDERATION
   a. Main types = Asset purchase, stock purchase and merger. Structure drivers include:
      i. tax considerations
      ii. liability avoidance
      iii. whether there are key contracts or permits to be transferred
      iv. ownership structure of target – are there numerous shareholders or only one or two?
   b. Asset Purchase – Buyer only purchases those tangible and intangible assets and assumes only those liabilities that are specifically identified in the purchase agreement – Buyers generally prefer this form
      i. Advantages to Buyer = Buyer can pick and choose assets they wish to acquire and liabilities they wish to assume, avoiding contingent or unknown liabilities (some laws (environmental) and certain doctrines (successor liability) may nonetheless impose liability on the buyer.
      ii. Often used where Buyer is looking to acquire a single division or business unit within a company or there are considerable liabilities that the Buyer does not wish to take on
      iii. Disadvantages = more time-consuming, more diligence involved, some assets may not be transferable (i.e., contracts requiring consent, permits)
      iv. Tax advantage for Buyer = Asset purchase will typically afford buyers a stepped-up basis in the acquired assets which will facilitate favorable tax treatment in the form of depreciation. Also note ability to elect 338(h)(10) treatment in a stock deal.
c. Stock Purchase – Buyer acquires target company’s stock from its stockholders. The target company stays exactly the same (assets and liabilities unchanged) but with new ownership.
   i. Reps and warranties and indemnification provisions are particularly important in a stock purchase since Buyer is taking on all assets and liabilities
   ii. Advantages to Buyer = Less complicated, consents for transferring third party contracts and permits is usually less complicated (unless CofC provisions)
   iii. Disadvantages to Buyer = more difficult to limit liability so need for thorough due diligence, must acquire all assets and can’t pick and choose, if target has many shareholders, will need shareholder consents or may not get 100% control and will be left with minority shareholders
   iv. Advantages to Seller = Buyer takes on all liabilities, no tax basis step-up (unless agree to 338(h)(10) election, no double taxation (if corporation, typically doesn’t matter if LLC)
   v. Buyer may condition transaction on 100% shareholder participation or on 90% participation and then undertake a “short-form merger” – a state law mechanism allowing a buyer to acquire the remaining minority interest in an expeditious manner without a shareholder vote.
   vi. Tax Considerations:
      1. Sellers typically prefer because only one level of tax on selling shareholders (unless 338(h)(10) election is made).
      2. One advantage of stock sale to Buyers is ability to use target company’s tax loss carry-forwards (NOLs – net operating losses) subject to limitations.

d. Merger – Where there are large numbers of shareholders, not possible to effect a stock purchase so a merger allows for the acquisition of all the target’s stock by operation of law as opposed to individual contracts with each stockholder, with minority stockholders having appraisal rights
i. Types of Mergers – Generally look at Delaware General Corporations Law – can be structured in a number of ways to achieve desired tax results or to ensure that there are fewer change of control issues by having one party or the other survive:

1. Business Combination – merger of two relatively equal companies where one company survives
2. Forward Triangular Merger – Buyer drops a subsidiary and sub merges into target with Buyer sub as surviving company – not as common as reverse triangular merger because does not avoid the consent issues with assignability
3. Reverse Triangular Merger – Buyer drops a sub and sub merges into target with target as surviving company – avoids many change in control issues unless contracts restrict change of control
   a. Meso Scale v. Roche Diagnostics (Feb 2013)– Recently, Delaware Court of Chancery affirmed that reverse triangular merger did not result in an assignment by operation of law (per language in agreements of target company prohibiting “assignment by operation of law”)
   b. Both reverse merger forms do allow for isolation of liabilities in the subsidiary.

ii. Merger Advantages

1. Typically only require consent of a majority of stockholders. Most public company transactions are structured as mergers because of number of stockholders involved.
2. Can potentially avoid transfer of asset issues unless there are specific restrictions on change of control
3. Can ring fence liability into limited liability type subsidiary entity. Mergers can be of corporations, LLCs,
LP or LLP – governed by different sections of business law – Delaware is the most popular because of wealth of case law and familiarity of laws in Delaware.

e. Consideration – deal financing usually includes cash, stock or some combination of the two. Type of consideration will also affect the structure of the transaction.

   i. Cash – most liquid and least risky method from target/Seller’s perspective

   ii. Stock – involves payment of Buyer’s equity, issued to the stockholders of the target company, at a determined ratio relative to the target’s value. Issuance of equity may improve Buyer’s debt rating (reducing future cost of debt financings). Potential transactions risks = need stockholder consent, registration (if public), brokerage fees, etc.

   iii. Assumption of Seller Liabilities

   iv. Contingent Payments and Earn-outs – Ways of deferring part of the purchase price or clawing back purchase price upon certain events
2. ANATOMY OF A TRANSACTION – BRIEF OVERVIEW OF PROCESS
   a. Preliminary Documents
      i. CDA – First step in information exchange between the potential buyer and seller
      ii. Financial Advisor Engagement Letter – Investment bank may be engaged to find buyer and seller and define terms of transaction.
      iii. Letter of Intent/Term Sheet/NBO – Auction process usually requires response including offer letter and process letter. Usually contingent on continuing due diligence and other assumptions such as financial modeling. LOI usually includes:
          1. Type of transaction
          2. Price and form of consideration
          3. Payment terms
          4. Key contingencies (such as availability of buyer financing)
          5. Typically non-binding, although some terms may be binding (such as lock-up/exclusivity, confidentiality, expenses). Also, even though non-binding, it is difficult to change terms after term sheet stage in negotiations so it is best to have major financial, tax, legal ramifications considered before signing.
          6. In some cases Seller may require an earnest money deposit (rare) for exclusivity period.
   b. Due Diligence – See model due diligence checklist – Should be tailored to specific transaction. These questions and findings will affect the representations and warranties and indemnification provisions. This process is ongoing during LOI and definitive agreement stage. Usually set up virtual data room with regular meetings to facilitate ongoing diligence requests.
      i. What corporate approvals will be required? Requires review of corporate books and records and minutes.
ii. Are there third party contracts/licenses to be reviewed for consents? Change of control or assignment issues?

iii. Regulatory issues/approvals/permits?

iv. Are there environmental issues? Do Phase I site assessments need to be done?

v. Material ongoing litigation?

vi. Status of Intellectual Property?

vii. Are there employees being transferred? Employee benefit plans? 280G issues?

viii. Is there any real property? If financing, are there any valuations that need to be done?

ix. Any valuations of Seller’s assets (inventory, equipment, etc.) to be completed?

x. Review of financial records/accounts? Any outstanding debt that needs to be paid off at closing?

c. Anti-Trust/Regulatory Filings – May be affirmative (i.e., required approval prior to closing), negative (i.e., closing permitted if agency does not act to stop or delay the transaction), or informational

   i. Hart-Scott-Rodino is most common in the US and is a negative type filing – requires premerger notification to the FTC and DOJ for certain transactions with a waiting period of 30 (or 15 for tender offers) days depending on type of transaction.

      1. Size of transaction = $78.2MM

d. Key Transaction Agreements

   i. Acquisition Agreement – Asset or Stock Purchase Agreement/Agreement and Plan of Merger

   ii. Ancillary Documents

      1. Promissory Notes (if financing)
      2. Security Agreements
      3. Escrow Agreements (if Indemnity or Earnout/contingent Escrow)
      4. Bills of Sale
      5. Assignment and Assumption Agreements
6. Non-competition and Employment Agreements with Key Employees
7. Officers’ and Secretarys’ Certificates and Closing Memo/Certificate
8. Legal Opinions from outside counsel
9. Transition Services Agreement
10. Exchange Agent Agreement

e. Conditions to Closing – Typically, there are certain conditions or events that need to occur prior to closing. If none, then can have a simultaneous signing and closing
   i. Any HSR waiting periods?
   ii. Third Party consents/transfers of permits and contracts
   iii. Financing contingency?
   iv. Transfers and notices to Employees?
   v. Real property transfers?
   vi. Notices to customers/suppliers?

f. Closing – At closing, all agreements are entered into and consideration that is payable at closing is paid to Seller, usually by wire transfer if cash consideration
   i. Consider timing and closing memo if complicated steps to be taken at closing for consideration to flow to the various shareholders/Sellers

g. Post-Closing/Transition Period – May need a transition services agreement. Should always have a further assurances clause
   i. Post-Closing IP registrations
   ii. Real Property title transfers
   iii. Employee benefits/employee transfers
   iv. SAP/IT transition
   v. Regulatory transitions
   vi. Manufacturing transitions
   vii. Post-Closing Working Capital Adjustment