

Structuring Acquisition Transactions

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MICHAEL DAYTON is a shareholder in Nyemaster's Business, Finance, and Real Estate Department. Michael assists entrepreneurs from the start up to the eventual sale or other wind up of their businesses and with everything in between. At start up, his practice includes: organization of entities and joint ventures; buy-sell and shareholder agreements; venture capital; private equity; and securities law. At sale or wind-up, his practice includes: mergers and acquisitions (asset purchases and stock purchases); share exchanges and spinoffs; leveraged buy-outs; transition planning; shareholder disputes; and dissolution of entities. The in-between includes: general contracting (including contract management processes); distribution agreements; employment and consulting arrangements; corporate governance; website and e-commerce development agreements; lending and secured transactions; corporate finance; regulatory matters; local counsel opinions; and commercial transactions. Michael has assisted professionals and companies in a variety of industries, including: health care (hospitals, clinics, physicians, insurance companies); agribusiness; family farms; construction, supply, distribution and advanced manufacturing; creative services, branding, printing and merchandising; wind energy, biodiesel and other renewable energy; trucking, warehousing and logistics; chemical manufacturing and distribution; animal and human health ingredient production; vegetation management; swine genetics; agricultural equipment finance; software development; casino and gaming; and banking.

Disclaimer

The following presentation does not represent legal advice. If you have specific questions concerning specific circumstances, please consult your attorney.

Presentation Focus

- **Structure Basics**
 - **Asset Acquisition**
 - **Stock Acquisition**
 - **Mergers**
- **Primary Considerations**
 - **Tax**
 - **Commercial Matters**



Asset Acquisition

- Buyer acquires only specific assets
- Buyer assumes only specified liabilities
 - Successor liability
- More complex



Stock Acquisition

- Buyer acquires outstanding stock directly from shareholders
 - Every individual shareholder is a seller
- Buyer ends up with a subsidiary and *all* of the assets and liabilities in the subsidiary
- More straightforward than asset acquisition (if everyone is on board)

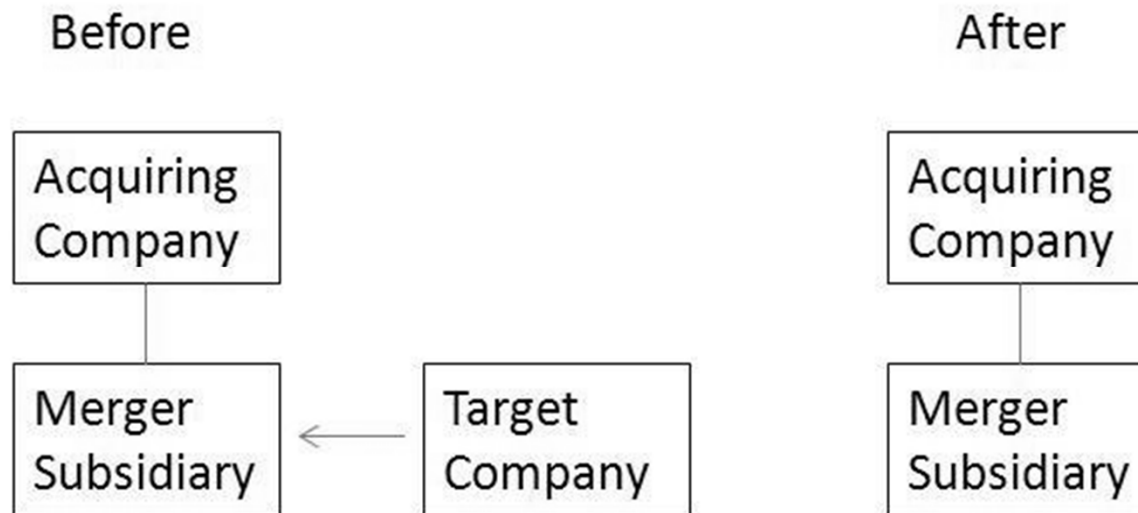


Mergers (Forward)

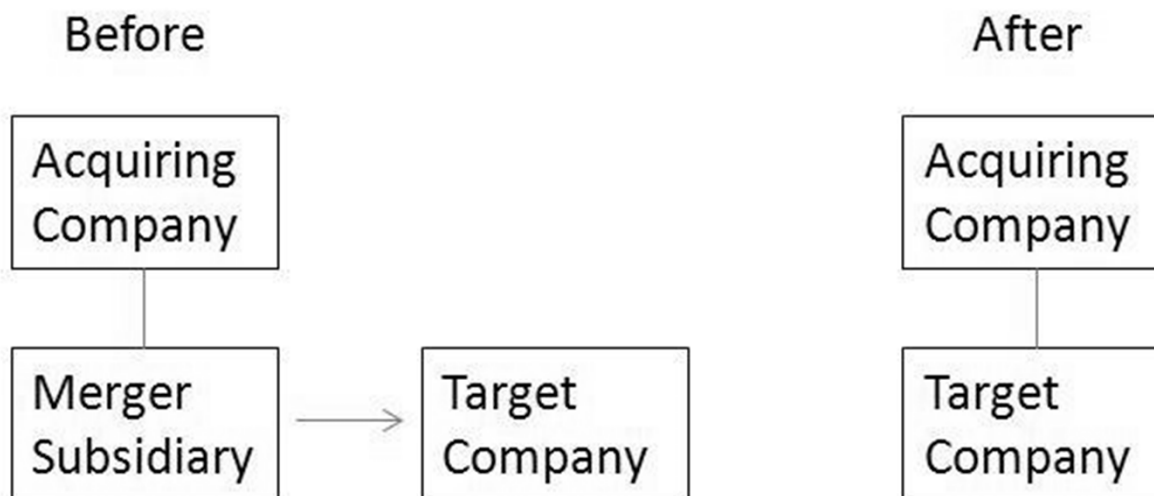
- Merged entity “merges” into surviving entity
 - Surviving entity gets all assets and assumes all liabilities by operation of law
- E.g., Iowa Code 490.1107



Mergers (Forward Triangular)



Mergers (Reverse Triangular)



Alternatives

- **Conversion: Change entity/type and/or jurisdiction**
- **Domestication: Change jurisdiction**



Tax considerations

- **Income Tax**
 - **Asset (forward and forward triangular merger)**
 - **Stock (reverse triangular merger)**
- **Cash and notes as consideration**
- **Outside of scope:**
 - **Tax free reorgs**



Tax considerations

- **Asset acquisition (Income taxes):**
 - **Forward and forward triangular mergers treated as asset acquisition for income tax purposes**
 - **Generally, pro-buyer**
 - **Buyer receives cost basis in acquired assets**
 - **Greater depreciation/
amortization**
 - **Reduces gain on later sale**

Tax considerations

- Seller (if a C-corp) recognizes taxable income equal to difference between “amount realized” on sale and basis in assets
- Owners (if a C-corp) recognize gain on distributions
- Owners (if S-corp, Pship, Disregard) recognize gain on amount realized, regardless of whether distributions actually made



Tax considerations

- **Amount of income (and new cost basis of assets in Buyer's hands) determined on asset by asset basis**
 - **Specify allocation of assets for tax purposes (Form 8594)**
- **Buyer and non C-Corp Seller at odds over allocation; Seller C-corp ambivalent**

Tax considerations

- **Non C-Corp Seller prefers allocation to capital assets with no depreciation recapture or ordinary income tax treatment**
 - **E.g., land, self-developed goodwill**
- **Buyer prefers allocation to depreciable assets with short depreciable life**
 - **E.g., machinery & equipment, inventory**

Tax considerations

- **Miscellaneous**
 - **Buyer generally not liable for past taxes, but:**
 - **Be mindful of successor liability**
 - **FIRPTA**
 - **Seller keeps NOLs**

Tax considerations

- **Stock acquisition (Income Taxes):**
 - **Generally pro-seller**
 - **Shareholders recognize gain/loss – no corporate level tax**
 - **Tax basis of assets remains unchanged for Buyer**
 - **Cost basis in stock**
 - **But Buyer gets NOLs**
 - **338(h)(10) Election**
 - **336(e) Election (relatively new)**



Tax considerations

- **Even more stinking taxes... Sales/Use/Transfer**
 - **Generally Seller's responsibility (vary by K)**
 - **Occur in asset sale, not stock sale**
 - **Casual sale exemption for asset sale in Iowa**
 - **Real estate transfer tax**
 - **Retitling of vehicles (Buyer's issue)**

Commercial Considerations

- **Timing**
- **Third Party Consents**
 - **Contractual**
 - **Regulatory**
- **Corporate (Internal) Consents**

Timing

- **Asset acquisition – more complicated and time consuming**
- **Stock acquisition – can be less time consuming, if...**
- **Merger – somewhere in between**



Third Party Consents - Contractual

- **Asset Acquisition – almost all anti-assignment provisions are triggered**
- **Stock Acquisition – just change of control**
- **Merger – anti-assignment (maybe), anti-transfer (maybe), transfer by operation of law (probably), change of control (yes)**

Third Party Consents - Regulatory

- **Hart Scott Rodino**
- **Industry specific**
- **CFIUS**



Internal Consents

- **Asset Acquisition:**
 - **Seller board consent**
 - **Seller stockholder consent (if selling substantially all of assets)**
 - **Appraisal rights (Part XIII of IBCA)**
 - **Usually Buyer board consent**

Internal Consents

- **Stock Acquisition:**
 - **Purchases directly from stockholder so, no “stockholder consent”**
 - **Seller board consent (if Seller is party to SPA)**
 - **Usually Buyer board consent**

Internal Consents

- **Mergers:**
 - **Board consent from Buyer/subsidiary**
 - **Majority shareholder consent from Buyer (or subsidiary if indirect merger)**
 - **Board consent from target company**
 - **Target company, usually just a majority vote**

Appraisal Rights

- **IBCA Part XIII**
- **Shareholders entitled if:**
 - **Certain mergers**
 - **Certain share exchanges**
 - **Sale of substantially all assets**
 - **Reverse stock split**
 - **Conversion**

Questions?

