

# RUTAN

## RUTAN & TUCKER, LLP

### Post-Closing Considerations for M&A Transactions

The end of the year has come and gone and the decorations are put away. Now many companies are excitedly playing with their new presents – companies that they acquired prior to the end of the year. And as the companies are still in the honeymoon phase of getting to know the teams, business practices, accounting, and product delivery, there are some important considerations to remember when integrating a newly acquired company. Regardless of your chosen method of acquisition (such as an asset purchase, acquisition of equity, or merger), hard work and effort went into diligencing the target and crafting the detailed transaction documents. Lawyers, bankers, CFOs, owners, and many others spent countless hours to make sure that the transaction was researched thoroughly and documented correctly. But it is important to remember that while the quality of earnings may be sound and your transaction documents may state everything clearly and accurately, it doesn't mean that your respective teams know how to execute your plan. Below is a helpful list of items to keep in mind as you and your team implement the post-closing integration.

**1. Internal Explanation of the Transaction.** Make sure that you carefully and succinctly explain the transaction to your entire team. While certain employees might not appreciate the difference between a stock and asset transaction, it is important to explain whether your company purchased all of another company (assets and liabilities) or if you only purchased certain defined assets. For example, if the buyer didn't assume any liabilities, make sure that the buyer's accounting department understands that bills that are properly the obligation of the seller are not paid by the buyer.

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**2. Communications with Vendors and Customers.** Clients typically like to put out a press release celebrating the successful acquisition of a company and generating positive PR for the combined entity. In an asset sale, remember that acting as if you are the successor entity potentially opens the acquirer up to successor liability of the seller's unsettled debts. In an equity deal or merger, make sure that your communications accurately explains what changes (if any) the vendor or customer will experience in their business.

**3. Insurance Policies.** Quite often in an equity deal, a Buyer will ask for the Sellers to purchase a directors and officers insurance tail policy. But in any kind of transaction, Sellers should also work with their own insurance broker to make sure that they are continually covered by insurance for any pre-closing liabilities. For example, if the selling entity has a claims-made policy, and the policy is terminated, the selling entity is no longer covered by insurance for pre-closing liabilities. Keep in mind that often times your indemnification in a purchase agreement will keep the selling entity on the hook for such pre-closing liabilities. So go get a quote for that tail policy.

**4. Accounting.** Regardless of whether you are the buyer or seller in a transaction, work with your accounting department to ensure that the proper financial records are maintained for each entity. Even if you sell your company in the summer, you still have to send those W-2s and 1099s at the appropriate time. As a seller, make sure you maintain your full financial files.

**5. Receipt of Seller Proceeds.** Before you get your largest paycheck ever by selling your company, meet with financial and tax advisors for guidance on the best way to receive those funds. While getting a large wire to your bank account is certainly exciting, take the time to fully vet alternative options such as taking a deferred purchase price, employee stock option plans, or defined benefit plans.

And after the closing, follow up on the proper investment plan for your funds.

**6. Employee Records.** Confirm with legal counsel what you are allowed to do with all those employee records that you have in the HR office. Regardless of the form of transaction, many states restrict what an employer may do with the personnel files of their employees after a sale transaction.

**7. Social Media.** Decide what you plan to do with business-related social media accounts and confirm who controls them during the acquisition process and immediately afterward. Emotions can be high for all employees during a sale transition and breaches of confidentiality or objections to a transaction can be made public very quickly on social media platforms. Make sure that during this time someone with a clear and level head, and maybe in the know of the transaction, has control over the social media passwords and any disclosures.

**8. Purchase Price Adjustments.** Make sure your accounting and finance team is carefully tracking the post-closing adjustments provisions in your purchase agreement, including any schedules or exhibits regarding working capital or prorations. Maintain the integrity of the transaction by following the format as closely as possible.

**9. Employee Integration.** A successful acquisition can be destroyed very quickly if all of your newly acquired staff decide to leave the company. Ensure that all the new employees are successfully adjusting to your company's culture and policies. Keep lines of communication open between your HR department and the newly acquired staff and promptly (and with compassion) address employee matters. Remember, this is a period of intense insecurity for many people, particularly employees that don't learn of the transaction until at or just prior to the closing.

**10. Calendar Post-Closing Events.** Set automatic reminders in your calendaring systems ahead of important dates so that you don't miss deadlines. Items of critical importance are working capital adjustment dates, notices of any breaches of a representation or warranty prior to expiration of a survival period, and any post-closing covenants. For example, if your general representations only survive for 18 months, then make sure you are checking with your team at least a month in advance to ensure no indemnification claims need to be made before the expiry date.

If you are an entity that recently acquired another company, this is a time of celebration and excitement. So ensure that all of the members of your newly combined team feel valued, appreciated, and part of the collaborative effort to improve the company. By working together in implementing your sale documents, you can best protect your expected value and realize the benefits of your transaction.

Congratulations on making it into another year and here's to more transactions throughout 2018.

Cheers!

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Christina McSparron works closely with individual and corporate clients across the country, at all stages in the life cycle of the business. In her practice, she regularly acts as general outside counsel and advises on diverse matters such as entity structuring, corporate governance, mergers, acquisitions, debt and equity financing, licensing, and general business operations. She regularly advises entrepreneurs and executives in the restaurant, food and beverage, building materials and manufacturing, automotive, and retail industries. Christina can be reached at 714-662-4652 or cmcsparron@rutan.com.

