

PROFESSIONALS IN AN M&A TRANSACTION

The proper positioning of your company in anticipation of an M&A transaction is critical. To maximize the chances of success, your M&A "team" should be assembled well in advance in order to enable it to properly prepare for what usually is a very involved, complex transaction.

The balance of this article is designed to assist you in determining who should be on your team, how to pick your team, and what roles each member plays.

The Team

Different companies have different requirements for the composition of the team. However, most teams consist of the following:

- Accountant
- Attorney
- Broker or Investment Banker
- Banker

Depending on the size of the transaction, there may be either a broker or an investment banker. In some of the larger transactions, investment bankers, rather than brokers, play a significant role. Bankers also often play an integral role in helping buyers finance the transaction.

Remember, the team is working for you. Its goal is to maximize the likelihood that your transaction will be successful, that your risks are minimized, that your return is maximized, and there are no lingering problems once the transaction has been completed.

While it may sound fundamental to state that the team is working for you, the unfortunate reality is that often times various team members are squabbling amongst themselves based either upon internal disagreements, or because one or more wants to "run the show." The next section of this article deals with characteristics you should look for when selecting the members of your team, as well as some tips on how to avoid the team not working to its fullest possible potential.

Selecting The Members

Many times one or more of the principals of the company has a pre-existing relationship with one of the professionals that will be on the team. It is usually, but not always, helpful to have had an ongoing relationship with one of your key team members, whether it is the accountant, attorney, broker or banker. Being able to rely on one of the team members that is a trusted advisor, and has knowledge of your philosophy, approach, goals and values, is invaluable. An additional benefit is that as the other team members come on board, they eventually look to that one player who has the relationship with the client. The natural consequence is to diminish the chances of its team members fighting amongst themselves, or of one member usurping another's role.

Even with a trusted advisor, the selection of the remainder of the team is both difficult and critical. While diversity of opinion is often a good idea, in preparing for a merger or acquisition, it is imperative that all team members be on the same page at the same time.

The role each team member is to play will be discussed later. For now, the following are some criteria that should be utilized when selecting a team member.

- Experience. The cliché, "there is no substitute for experience" is epitomized in a merger or acquisition. The dynamics of such a transaction are exceedingly complicated, and the last thing you want is someone who is learning the ropes at your expense.
- Knowledge of Your Industry. Many aspects of a merger or acquisition are driven by industry standards, and the custom and practice that may be unique to your particular industry. Having a professional who has had exposure to, or knowledge of, your industry is most helpful. Some industries require significant knowledge of environmental issues, others have esoteric intellectual property issues, while others have unique valuation considerations. Regardless of which issue or issues are paramount in your industry, having a professional who can grapple with them effectively is a significant benefit to you.
- Competence. It goes without saying that each of your team members must be good at what he/she does. It is very surprising, however, how many professionals label themselves "M&A experts" where, in fact, they have only been involved on either the periphery of some transactions, or just simply are not very skilled at what they do. Checking backgrounds and references can help weed out those you do not want on your team.
- Accessibility. Be sure that your professional has the time to devote to your matter. An experienced, knowledgeable, and competent professional is useless if he/she is too busy to work on your transaction. Many good professionals are in high demand, and with good reason, as many companies are clamoring for their services, and much of the work that they need to do cannot be delegated. Therefore, while interviewing potential team members, you should ascertain whether the timing of your transaction will fit into the professional's schedule.
- Team Player. Here is another cliché, but an important one. Each member of your team must be able to work with the other members, and not feel that he/she is either independent of everyone else on the team, or does not need to factor in what the other members are doing. While each member will have a distinct component of the transaction that is his/her primary responsibility, it is nevertheless a fact that the actions of one will affect the actions of the others. For that reason, each team member needs to be aware of the impact that his/her efforts will have on the others, and to keep in close communication with the others so that everyone's work product will ultimately integrate into one cohesive whole, and there is no duplication of effort.

If you do have a relationship with one of the professionals who will be on your team, that individual's assistance and input can be extremely helpful in selecting the other members of the team. While

ultimately the decision of who to bring on board is yours, you should listen carefully to your trusted advisor, especially if that advisor has worked with one or more potential team members on a previous transaction.

Provided the potential team member meets the criteria discussed above, the following are some useful suggestions when evaluating potential team members:

Pick someone with whom you feel comfortable and compatible. While obviously subjective, it is important to have a good rapport with your professionals.

Similarities in approaches and values are desirable. If you tend to be aggressive, you are going to want someone who shares that approach. Conversely, if you have a conservative, traditionalist style, the last thing you want is an aggressive professional demanding things on your behalf.

Accessibility was discussed above in the context of being available to handle your matter. It is additionally helpful, although not mandatory, that a professional also be geographically accessible. Sometimes these transactions take on national or even international overtones, but being able to meet face-to-face with your professional and discuss things directly can assist in the process.

The professional needs to be able to adapt to his/her role within the transaction. Some professionals are accustomed to being in charge of the team. Stated somewhat differently, such a professional wants to be the quarterback, and make all of the decisions. Many times, however, the responsibility falls to another within the team, and each professional needs to be able to adapt accordingly. While it is important that there be a "quarterback", that role will differ depending on each situation. As previously indicated, if the client already has a pre-existing relationship with one professional, that professional will usually become the quarterback. The others on the team need to adjust as necessary.

Roles of the Team Members

Now that you know who should be on the team, and what you should look for in making the actual selections, it is now time to discuss what role each of the professionals plays in the process. It is important to keep in mind that many times there is no bright line that segregates the role from one professional to another, as there can be an overlap in responsibilities and efforts. Therefore, keeping in mind that each professional may not have a monopoly on all of his/her responsibilities, the following is an overview of the role each professional should play in the merger or acquisition.

The Accountant

The accountant's responsibility generally falls into two categories, namely, tax advice and financial statements. While both areas are extremely important, the level of knowledge and sophistication required of a good tax accountant is irreplaceable.

One of the key criteria in determining how to structure your transaction is the tax consideration. Because there is often a conflict in the tax advantages from the buyer's and seller's perspective, the accountant must have the ability to understand both points of view, and find a mechanism whereby both parties derive the maximum benefit. Income tax, capital gains, sales tax, and occasionally, gift

and estate tax, are all at play in the merger or acquisition. The accountant's input in this regard will affect not only how the transaction is structured, but will ultimately impact the net amount a party will pay or receive in a transaction.

In addition to factoring in the tax considerations, the accountant's role also includes preparing financial statements and conducting audits. Because many agreements require that the books and records of the required entity be prepared in accordance with Generally Accepted Accounting Principles, the accountant must be intimately familiar with those principles, and know how to spot when they have not been applied. Furthermore, attention to detail is mandatory and the method and manner by which an acquired party's books and records are presented can significantly affect the likelihood of success in any transaction.

Depending on the size and complexity of the transaction, the roles of the accountant and the attorney often blur, as sophisticated law firms with experience with experience in mergers and acquisitions usually have the capacity to assist with the tax analysis. Furthermore, attorneys are often required to review financial statements for securities law compliance.

Although the team members usually adjust to each other as the transaction unfolds, it is often helpful, especially when there can be an overlap of responsibilities, to clearly define which professional will be responsible for what tasks.

The Attorney

As suggested above, an attorney's role permeates the entire transaction. He/she is often intimately involved in establishing the structure of the transaction, factoring in the risk consequences for the client, negotiating many of the tax and financial terms based on input received from the accountant, broker and banker, and coordinating the timing and sequence of events to effectuate a successful close of the transaction. The attorney will often find him/herself deeply involved in the drafting and review of the documentation, providing opinion of counsel letters to the lender, and working with the escrow holder to ensure that all of the pieces of the puzzle are in place prior to close.

Of all the professionals who need to be involved prior to commencing a transaction, the attorney probably needs the most lead-time. Having a good attorney involved at the very early stages can not only circumvent any unnecessary procedures, but can also increase the likelihood that the result will be to the client's liking. As many steps are required to properly position a company to be merged or acquired, having a competent, proactive attorney, who knows how to maximize the client's potential, is invaluable.

The Broker

Brokers and investment bankers often play some similar roles, such as exposing the business, generating interest in it, and bringing buyers and sellers together. Sometimes, depending on the nature of the industry, the reputation and tenure of the business, and the scope of the proposed transaction, a broker's services may or may not be necessary. Brokers typically are involved in smaller transactions, while investment bankers are involved in larger transactions.

Another difference between the broker and the other team members is that brokers generally work on a commission basis. While this is a general statement, and there are a number of exceptions, it is nevertheless important to understand how the broker is compensated, especially compared to how the other professionals are compensated. Brokers normally only get paid if the transaction is successfully completed, and therefore they are exceedingly motivated to ensure that the transaction does close. Ordinarily, that is a positive, but great care must be taken to be sure that the proposed transaction is right for the client, and not just right for the broker.

A broker can also be very helpful in providing the other team members with input on valuation issues. Often times brokers know a great deal about particular industries and how they are valued, especially compared to other industries. That input should be factored in by whomever provides the ultimate valuation of the business. If a broker is on the team, his/her role needs to be integrated by the other professionals. It is highly unusual for the broker to be the "quarterback" but there have been occasions where the broker is primarily in charge, and the results have been very successful.

The Investment Banker

Whether they are on the buying or selling end of a transaction, investment bankers play a very important role. It is often the banker's responsibility to assist on both valuation and funding. Raising funds, ensuring that there are adequate financial accommodations available, and helping to solidify the financial underpinnings of the company, whether as a buyer or a seller, are extremely important functions of the investment banker.

The role of an investment banker usually increases with the size of the transaction. In many of the larger acquisitions or mergers, it is the investment banker who may have initially suggested and developed the proposed structure for the transaction. If this is the case, and it often is in large transactions, the coordination amongst professionals becomes even more important. The sequence of bringing team members on board will often dictate the roles each will play.

As a general proposition, most clients know less about their investment banker than they do the other professionals. Accordingly, great care must be taken in interviewing bankers, not just for reputation and ability to perform, but also for compatibility with the remainder of the team.

Having the right team at the right time will definitely enhance the likelihood of a successful transaction. There is no question, however, that engaging these professionals is costly. Generally speaking, however, the cost of each professional is outweighed multiple times over by the enhanced results of the transaction, as well as the intangibles of knowing that you have people working for you who not only know what they are doing, but have made their way through the quagmire of a merger or acquisition many times before. This may be your first exposure to a transaction like this, and the chances of something going wrong are always very high. It is therefore helpful to have team members who can spot potential problems and deal with them before they adversely affect the transaction.

Related Attorneys

- Steven D. Siner