

Welcome and Introduction



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Kathryn is responsible for leadership of diverse practice areas within the law department. She oversees teams providing support across the corporation on matters involving international transactions, export and import compliance, environmental, health and safety, real estate, intellectual property, labor and employment, pension and benefits, supply chain, privacy and cyber security.



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Lauren focuses her corporate practice on advising clients with respect to mergers and acquisitions, internal restructuring, joint ventures, complex commercial transactions and general corporate governance matters. She regularly works with REIT, technology and government contractor clients. She was recently named an Emerging M&A Leader- Legal by *M&A Advisor*, and as a Rising Star-M&A by *Law360*.



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Charlie Katz is Managing Partner for the firm's Northern Virginia office and global M&A partner. He offers clients deep knowledge on mergers and acquisitions, joint ventures, private equity and venture capital transactions, and divestitures. He has been involved in all phases of these transactions, including initial planning, structuring, negotiation, implementation and advice. He is recognized as a leading corporate/M&A lawyer by *Chambers USA* and *Best Lawyers*.

Questions during the presentation are
welcome.



Agenda

1. Overview / Importance of Understanding Integration Objectives
2. Running an Effective Integration Process, including Considerations for each Stage of a Transaction
3. Managing Integration Post-Closing

1. OVERVIEW

Key Takeaways

- Integration planning starts from the very beginning of the deal – not at the closing – and continues well after the closing!
- Integration is critical to determining the overall success of an acquisition.
- Buyer should approach integration with clear and specific objectives.
- Goals for the transaction are critical to success.

Why is Integration Important?



What is the most important factor in achieving a successful M&A transaction for your company?



Deloitte, M&A Trends; Year-End Report 2016, p. 17, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-ma-mergers-and-acquisitions-trends-2016-year-end-report.pdf>

The Integration Challenge

Reasons that M&A integrations fail to meet expectations

Failure to articulate coherent vision and strategy	Failure to completely quantify and capture deal value	Failure of Control of the Integration process	Failure to understand the impact of significant change
<ul style="list-style-type: none"> ▶ Investment thesis and deal value drivers/value proposition not understood ▶ Failure to make key decisions about the newly created operating model ▶ Failure to prioritize (and mitigate) key integration risks ▶ Integration strategy and approach not aligned to the goals of the deal 	<ul style="list-style-type: none"> ▶ Areas of opportunity identified not exhaustive ▶ Sources of value not clearly defined ▶ Poor prioritization/ understanding of “Quick Wins” ▶ Insufficient involvement of line owners ▶ Lack of post close confirmatory diligence/ target updating ▶ Lack of ongoing value tracking 	<ul style="list-style-type: none"> ▶ Underestimating capability and capacity ▶ Lack of program leadership and target involvement ▶ Lack of standardized tools and approaches ▶ Inefficient decision making due to poor structure and governance ▶ Overly complex bureaucracy focused on integration for its own sake, rather than on operating the business and deal value 	<ul style="list-style-type: none"> ▶ Loss of critical talent ▶ Customer defection ▶ No plan to understand cultural issues ▶ Underestimating/starting Communications planning too late

Which Creates...

Organizational uncertainty

Missed synergy targets

Loss of current value

Loss of talent
Poor morale

2. RUNNING AN EFFECTIVE INTEGRATION PROCESS

Running an Effective Integration Process

- Understanding the business objectives
- Impact of Deal Structure
- Building an Integration Team
- Key Integration Workstreams
- Regulatory Considerations

Understanding Business Objectives

Understand the strategy behind acquiring Target



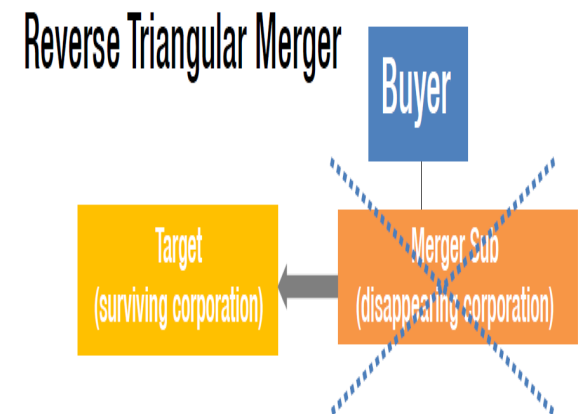
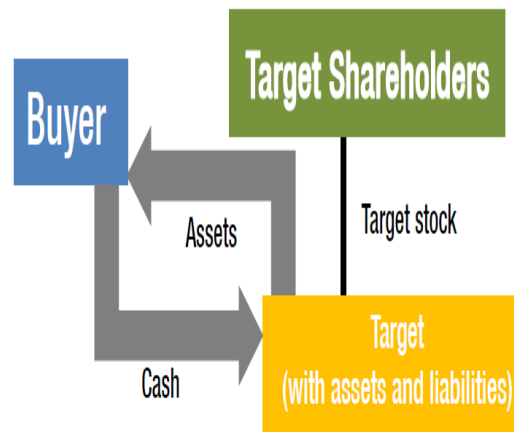
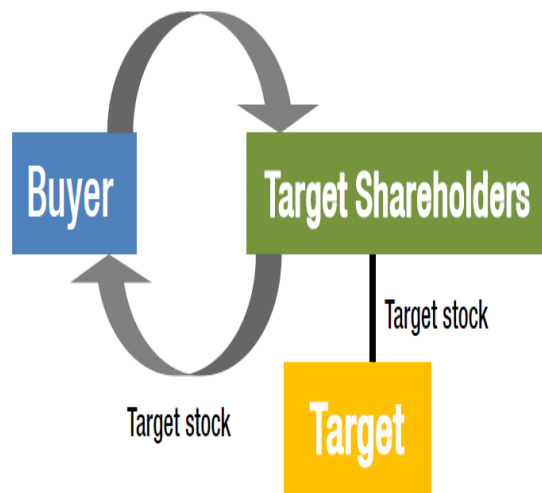
**“It’s not a great mission statement,
but we’ll revise it if things get better.”**

Understanding Business Objectives

- **Spectrum of Integration Models between light-touch and full integration:**
 - **Light-Touch Integration** – Intention to leave the target’s business and operations intact; generally market-based synergies were not the key objective in acquiring the target.
 - **Full Integration** – Full integration between the buyer’s business / business unit and the target’s business; generally operational synergies were a key driver for the deal.

Impact of M&A Transaction Structures

- Scope of integration will also be guided by legal structure.



Impact of Deal Structure

- Other aspects of deal structure:
 - Public target vs. private target
 - Strategic buyer vs. financial buyer
 - Regulatory considerations
- Assess these matters even at the earliest stages of the deal.

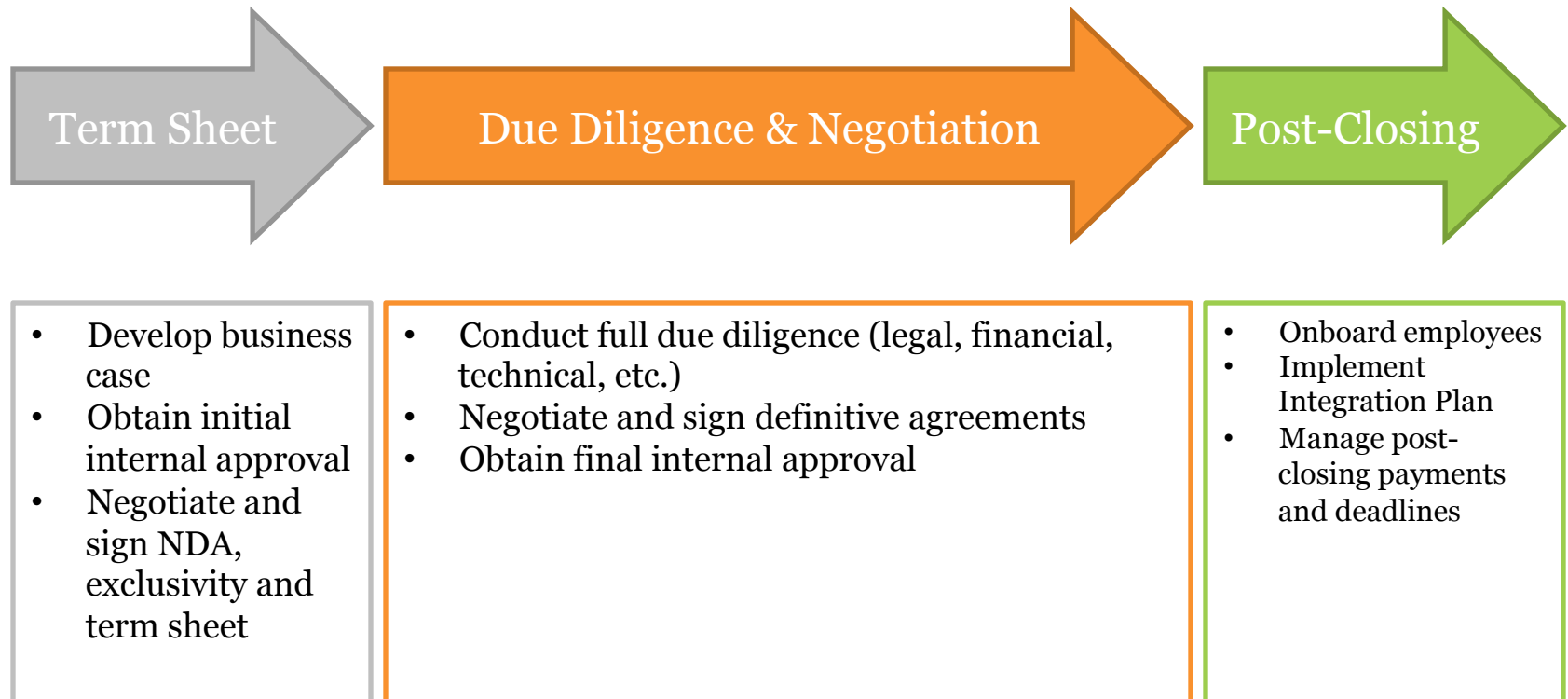
Building an Integration Team

- **Determine appropriate person or persons to lead the integration effort – both before and after signing**
 - BD Personnel
 - Head/VP of a Business Unit
 - Outside consultant or counsel
- **Role of Team Lead**
 - Understand the business strategy for the deal and work closely with the BD team
 - Act as the point person for each relevant workstream – e.g., IT, HR, contracts, finance, accounting, marketing, sales, tax, etc.
 - Know the correct contact person to escalate issues to
- **Additional Team Structure**
 - May further segregate into a core team, an integration committee and sub-teams
- **In-house counsel will play a critical role in numerous aspects of the integration project management team.**

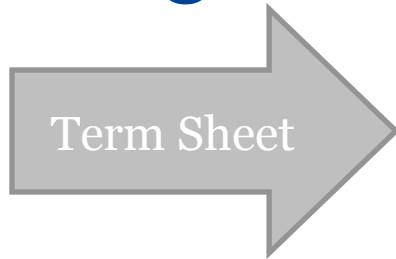
Integration Strategy

- **Choose light-touch integration, full integration or somewhere in between.**
- **Implement a timeline and project management/integration plan organized by work-stream and prioritizing closing date action items**
- **Determine key decision-makers**
- **Discuss internal and external communications**

Key Phases of M&A Transaction



Integration During Term Sheet Stage



- Limited available information
- Understand the business ***case*** →
integration assumptions and plan are vital parts of the business case
- If transaction is deemed favorable, concludes with execution of term sheet and exclusivity agreement →
often contain certain terms that bear on integration

Examples:

- Length of exclusivity
- Employment conditions
- Need for transition services agreement

Integration During DD & Negotiation



Due Diligence
& Negotiation

- Tension between deal confidentiality and integration planning
- Understand and assess the ***business*** →
good due diligence makes integration easier (but may be looking at the business through a different lens)
- Understand the business ***deal*** →
sharpens focus on integration planning
- Understand the acquisition ***structure*** →
integral to integration planning

Work Smarter, not Harder!

Gun Jumping Considerations

- HSR Act: “Gun Jumping” and Unlawful Pre-Merger Coordination
 - **Companies generally are prohibited from combining or coordinating their business activities prior to closing**
- **Planning:** Parties may jointly plan the integration of their operations, but (a) not implement those plans until closing, and (b) may not allow purchaser to begin directing business operations of target company
- **Information Exchange:** Parties may need to limit the exchange of their most competitively sensitive information during the HSR review period
- Significant fines for “gun-jumping”:
 - Qualcomm / Flarion – \$1.8 million
 - Smithfield Foods / IBP, Inc. – \$2.0 million
 - Manulife / John Hancock – \$1.0 million
 - Gemstar / TV Guide – \$5.67 million
 - Flakeboard America / SierraPine - \$5 million

Gun Jumping: Procedural Safeguards for Integration Planning

- **If the parties contemplate any joint outreach to customers or affected stakeholders:**
 - Limit the planning and joint communications to that which is absolutely necessary
 - Limit the number of individuals involved in the joint outreach and planning process
- **Conduct the planning in phases, and delay the more detailed or sensitive planning until as late as possible in the HSR review period**
- **Set up a record-keeping system that will enable the company to demonstrate that:**
 - Confidential information exchanged by the parties for the purpose of integration planning was secured and not misused for any other purpose
 - Confidential information exchanged by the parties was disclosed only to the limited number of individuals participating in its preparation and review
 - Confidential information exchanged by the parties was destroyed at the end of the process if the transaction is not consummated

Gun Jumping: Customer Communications Guideline

- Subject to the guidelines below, the parties can meet with customers or other stakeholders to discuss the proposed transaction and its benefits.
- Explain how the transaction, once consummated, will benefit customers, patients, and other stakeholders.
- Explain that any plans for the combined businesses are just plans, and cannot be implemented until the transaction is closed.
- Explain that the parties remain independent and will continue to compete as usual until the transaction is closed.
- Explain that customers and other third parties should continue to deal with each company independently until the transaction is closed.
- Do not treat any joint outreach efforts as a “joint sales call.” Treat it as a “get to know you” visit to explain the transaction.
- Do not discuss any pending competitive bid situations, contract terms or prices offered by either company.

Integration Planning During DD Phase

- Establish internal communication plan
- Embrace target employees who are critical to integration success
- Identify what memoranda and reports will be created and useful in integration process

BIG PICTURE

- Always have integration in the back of your mind when conducting due diligence.
- Key due diligence areas:
 - HR and Benefits
 - IP, Privacy and IT
 - Contracts / Corporate / Governance
 - Litigation

Key Workstream – HR and Benefits

- Address legal issues around downsizing/layoffs (including under foreign laws)
- Transition to your benefit plans – timing and messaging
- Addressing differences in personnel review practices and timing
- Relocation, severance or retention bonuses and applicable Internal Revenue Code Sections 409A and 280G analysis
- Change of control issues – single and double “triggers” on equity, severance rights
- Managing employment agreements/offer letters and messaging
- Managing option plan/equity awards integration
- Immigration issues; sponsorship for visa status

Key Workstream – IP, Privacy and IT

- Performing an audit of Target’s IP, including:
 - Confirming ownership of Target’s IP
 - Identifying measures to protect Target’s IP (including required filings; assignments of invention)
 - Reviewing key IP agreements
 - Assessing Target’s internal invention reporting process (how to capture new IP)
- Integration of IP databases
- Assuring proper assignment to Buyer of Target’s IP
- Understanding Target’s privacy policies (consumer vs. business)
- Reconcile Target’s and Buyer’s privacy policies
- Implement required revisions to Target’s privacy policies
- Learn about the Target’s technology profile

Key Workstream - Contracts

- Developing a landscape of target's contracts
 - Helping the deal team develop a “materiality” threshold understanding
 - How many require consents, notices or assignment?
 - What subset of those cannot be obtained pre-closing?
 - What is the post-closing plan to obtain them?
- Developing a plan for moving target's customers onto your standard paper
- Handling situations where you and target both have contracts with same customer or vendor
- Managing target's outstanding contract defaults, breaches, cures and claims
- Understanding limitations that Target's assumed contracts place on Buyer (e.g. exclusivity, MFN pricing)

Key Workstream - Litigation

- Assessing merits/risks of existing litigation and claims
- Interviewing/managing outside counsel handling litigation, replacing counsel
- Understanding timing; filing deadlines
- Confirming available insurance coverages
- Evaluating and managing the litigation in light of indemnification provisions (e.g., can you settle case without Seller's consent?)

3. MANAGING INTEGRATION POST-CLOSING

Integration Planning Post-Closing



Post-Closing

- **Administering the Purchase Agreement**
 - Key provisions of the Purchase Agreement survive closing and may require post-closing actions
- **Key surviving provisions include:**
 - Purchase Price Adjustments
 - Deferred Purchase Price Payments
 - Escrow and Indemnity Claims
 - TSAs
- **Depending on goals and strategies (and how much pre-closing integration has occurred), integration could last years**

Post-Closing Purchase Price Adjustments

- 1 Post-closing “true-up” of the purchase price
including for working capital, debt, transaction expenses, closing cash
 - 2 Deferred payment obligations
including “earn outs” (which provide for an additional purchase price to sellers in the event the target meets certain performance/ financial goals for a period after closing (e.g. net income, EBITDA))
- Potential role of legal department in this process:
 - Ensure **deadlines** are properly met
 - Understanding **unique terms** that were addressed in negotiation process
 - Understand and **communicate any limits** imposed on buyer on how to operate target’s business during earn-out period.

Escrow and Indemnity Claims

- Buyer typically has a set period post-closing to make certain types of indemnification claims
- Potential role of legal department in this process:
 - Be aware of the **process** required under the Purchase Agreement for making indemnity (damage) claims against the sellers for breaches of representations; covenants
 - Be aware of the **time limits** for various types of claims (“survival period”)
 - Understand the **indemnity package** (i.e. deductibles, caps, other limits on damage claims)
 - Keep operating departments (e.g. tax, HR, accounting) aware of time limits for making indemnity claims and **encourage timely reporting** of potential indemnity claims

Transition Service Agreements

- In some acquisitions, Buyer is not acquiring all of the functions needed to run target's business (e.g., shared IT or accounting infrastructure that is not being conveyed)
- Supporting this transition is often done with a Transition Services Agreement between Buyer and Target
- Potential role of legal department in this process:
 - **Involve** all relevant transition and operational teams in the negotiation of the TSA
 - Ensure all relevant operational and corporate groups are **familiar** with its terms
 - Keep track of the **TSA term**
 - Understand the **interplay** between TSA and acquisition agreement (e.g. impact on indemnity clauses; earn-outs)

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THANK YOU!

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