

The New Frontier in Mergers and Acquisitions

What you should consider and do before, during
and after a restructuring transaction.



Your Presenters

- **Karen Dean**
 - Vice President, Tax Planning & Controversy, Lumen Technologies, Broomfield, CO
 - Karen.dean@lumen.com
- **Leighanne Scott**
 - Partner, PwC, Washington, DC
 - leighanne.scott@pwc.com
- **David Machemer**
 - Managing Director, EY, Chicago, IL
 - David.Machemer@ey.com
- **Bill Backstrom**
 - Partner, Jones Walker LLP, New Orleans, LA
 - bbackstrom@joneswalker.com

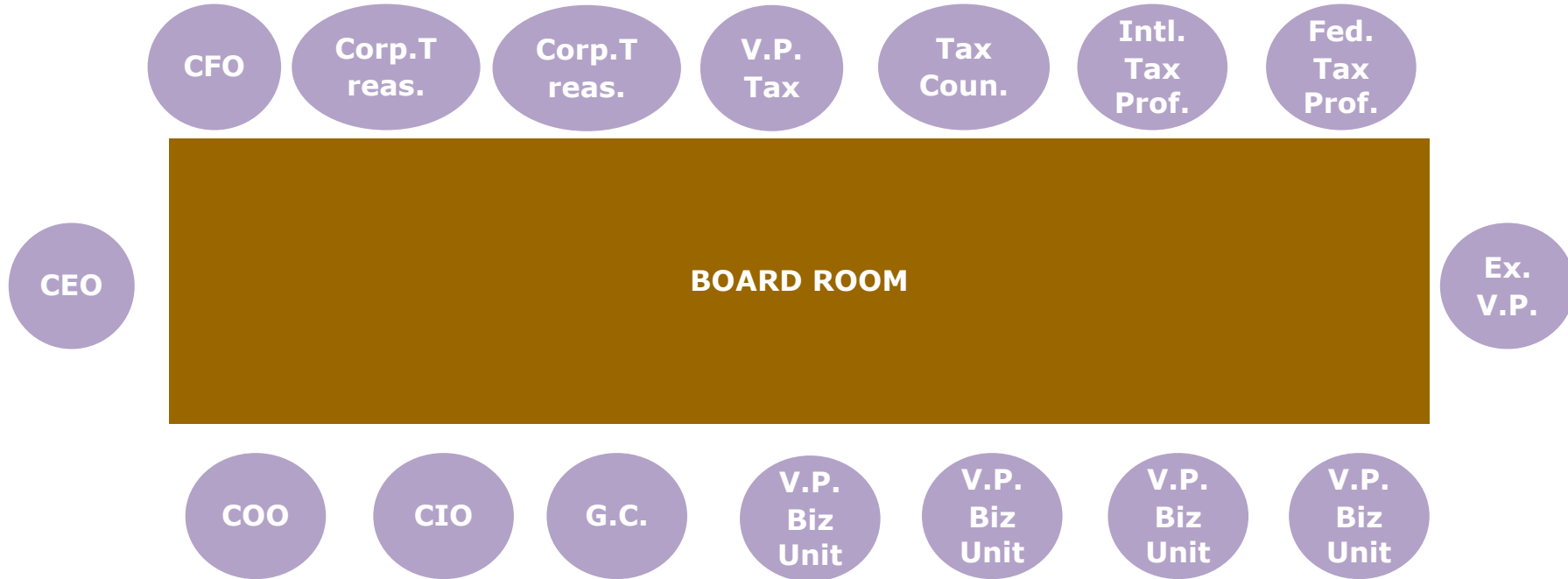
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- The information described in this presentation is general in nature and may not apply to your specific situation. Professional advice should be sought before taking action based on the information discussed in this presentation. No attorney-client relationship or other relationship is formed merely by your attendance at this event.
- Blah, blah, blah!

Agenda

- Overview
- Taxes and Fees Implications for Your Checklist
- Types of Business Restructuring Transactions
- Due Diligence
- Transaction Documents
- Post-Transaction Considerations – The First 100 Days
- But first, where do you, as a SALT professional, want to be when the restructuring transaction heats up?

The Deal Table



First Take Aways

- Get to the table early and stay there to the end
 - Be a part of the deal team
 - Be a facilitator to help the whole team get the deal done
- Understand the type of restructuring transaction
 - Often, types of restructuring transactions are discussed in terms of how they are treated for federal income tax purposes
 - Some restructuring transactions are internal organizational restructuring transactions

Types of Restructuring Transactions from a Federal Tax View

	Asset	Equity Interests
Nontaxable	Type A Type C Forward Triangular Merger Type D §351	Type B Reverse Triangular Merger (§368 (a)(2)(E)) §351
Taxable	Contractual Forward Cash Merger §1060 §338	Direct Stock Purchase Reverse Cash Merger §338

Taxes and Fees to Consider in a Restructuring Transaction

- Income/franchise and similar taxes
- Sales/use taxes
- Gross receipts taxes
- Occupational/business license taxes and fees
- Real estate transfer taxes
- Employment/withholding taxes
- Property taxes
- Business and tax credits and incentives (aka Treasures in the Attic)
- Unclaimed property – this acts like a tax....but beware its definition in SPA!
- Local fees and assessments

Second Take Aways

- All of the listed taxes and fees and probably others must be on someone's check list of things to do
- Every business restructuring transaction has state and local tax implications
- Don't forget business and tax credits and incentives

Due Diligence

- A SALT Professional who fails in the due diligence phase may end up on the menu rather than at the table
- Get involved early and stay involved until the end
- Due diligence is important for both pre-closing and post-closing
- Each due diligence project is different

Due Diligence

- Some Factors that Impact a Due Diligence Strategy
 - Form of the transaction
 - Time constraints
 - Human resources
 - Business reasons for the transaction (e.g., why is buyer acquiring the target or its assets?)
 - Size of transaction
 - Sophistication of parties
 - Prior transactions
 - Nature of parties' respective businesses
 - Risk exposure and tolerance level the parties

Primary Goals of Due Diligence

- Gather information (get to know Target management!)
- Identify, quantify, evaluate and address risks
- Identify, quantify, evaluate and address opportunities (refunds, incentives, etc.)
- Work with deal team to address material issues and risks in the deal negotiations and in the deal documents

Business Background

- Know the Form of the Transaction
- Understand the Business Operations of the Target
 - Organizational and operational structure
 - Business activities
 - Locations of people, property and sales
 - Software systems
- Review Prior Corporate Transactions
 - Review due diligence reports
 - Review transaction documents
- Understand Target's Records and Records Retention Policies

Nexus Evaluation

- Goal
 - Identify and evaluate risks, exposures and opportunities
 - Especially important in light of *Wayfair* and its aftermath
- Adequacy of Filings
 - Applies to all state and local taxes, licenses and fees
 - Don't forget regulatory licenses and employment/withholding taxes
- Presence in Unregistered Jurisdictions
 - Post-*Wayfair*, sales may constitute sufficient contact
- Evaluate Registration and Bonding Requirements
 - Vary from state-to-state and for different types of businesses

Return Filings

- Applies to All Tax, License, Fee, Employment, and Regulatory Filings
- Determine Filing Status
 - Jurisdictions (state and local) where returns are filed
 - Are returns filed and paid timely?
 - Address responsibilities for filing returns for pre-closing, post-closing and straddle periods
- Address Records Retention

Voluntary Disclosure Agreements

- Analysis Issues
 - Consider VDAs in jurisdictions where Target has nexus, but has not filed returns
 - Consider documentation necessary to file VDAs post-closing
 - Impact of VDAs on Acquirer/Acquiring Group and Target/Selling Group
- Transaction Documents
 - Address use of VDAs by Acquirer in transaction documents (avoid surprises!)

Audits/Refunds

- Determine Audit Status
 - Current, pending, and completed audits
 - Waivers issued and applicable statutes of limitations
 - How will pending audits be handled (record retention, information sharing)?
 - Testing, sampling of sales and purchases
 - Notice requirements
- Refund claims
 - How are they handled?
 - Who gets the money?
 - Notice requirements
 - Address decision-making process

Due Diligence Should Include

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- Tax and Business Credits and Incentives
 - Do they exist?
 - Are they transferable?
 - Requirements and/or documentation to transfer
- Regulatory Licenses and Permits
 - Do they exist?
 - Are they transferable?
 - Documentation necessary to transfer
 - Cancel old, non-transferable permits and licenses
- Unclaimed Property
 - Similar to SALT issues

Due Diligence Memorandum

- Components
 - Executive summary (At-A-Glance)
 - Business overview
 - Scope of review
 - What you looked at and what you didn't or couldn't look at
 - Assumptions utilized
 - Findings (clear findings are necessary...DD's don't function well in the grey)
 - Open issues

Transaction Documents – Key Take Aways

- Get involved early and stay involved until the end
- Always make sure you have the most recent, complete version of all of the relevant transaction documents
- Be aware of pitfalls when you review only some of the transactions documents or only some portions of some transactions documents

Definitions

- Definition of “Taxes” is critical to the entire agreement
- Is the definition of “Taxes” broad enough to cover all applicable state and local taxes, licenses and fees?
 - Make sure definition of “Taxes” includes relevant state-specific taxes, *e.g.* franchise taxes, gross receipts taxes, Ohio CAT, Michigan Business Tax, Texas Margins Tax
 - Should “Taxes” definition include quasi-taxes, such as obligations under state unclaimed property laws?
- Other key definitions to consider – “Tax Returns” and “Transaction Taxes”
- Definitions have different implications depending on whether you are on the sell side or the buy side; be sure you are wearing the right hat!

Tax-Related Representations and Warranties

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- What are Reps and Warranties and why are they in the transaction documents?
- Watch out for “Weasel Words”
 - Ex: all “material Tax Returns” have been filed and all “material Taxes” have been paid
 - What is the meaning of “material”? Who gets to decide?
 - Watch for reps regarding tax payment limited to Taxes shown on Tax Returns
 - What was not shown on the tax returns?
- Reps and warranties have different implications depending on whether you are on the sell side or the buy side; be sure you are wearing the right hat!

Tax-Related Representations and Warranties

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- Employment/Withholding Taxes
 - Reprs should include reps with respect to the Seller's withholding tax liabilities
 - Ex: a rep that Seller has withheld and paid all Taxes due in connection with any payment by the Seller to employees, independent contractors and other third parties
- Form of Transaction
 - Reprs generally need to be tighter and more extensive when acquiring stock than acquiring assets
 - Purchasers still need tight reps when business successor liability is a possibility

Other Tax-Related Reps and Warranties to Review/Consider

- Other Tax Reps:
 - Any ongoing extension of time to file Tax Returns
 - The existence of any assertions of nexus by any state or local taxing authority in jurisdictions in which Seller has not been filing Tax Returns
 - The existence of any liens for Taxes
 - Any ongoing or scheduled Tax audits or notices requesting the scheduling of a Tax audit
 - Any ongoing extension of the statute of limitations for assessment of Taxes
 - Any pending refund/credit claims
 - Tax and business credit and incentives

Reps and Warranties Insurance

- Traditional Path
 - Seller agrees to indemnify Buyer for breach of R&W
 - Indemnity terms are agreed upon, supported by a healthy escrow (10%-20%)
- Welcome R&W Insurance!
 - **Significant** number of deals are bringing R&W insurance with them
 - R&W Insurance is a policy that protects the Buyer from breach of R&W
 - Like any insurance policy—we see premiums cost, underwriting fee, and deductibles
- What does it cover?
 - DD Findings are almost always scoped out, making tax DD language/approach critical
 - Has limits and exclusions
 - Set policy length (like an expiring indemnity, i.e. 3-6 years)
- Who needs it?
 - Buyers like the coverage, Seller's like a clean exit with less contingent liabilities
 - Straight terms, less negotiation spend

Covenants

- What are Covenants and why do we have them in transaction documents?
- Are the covenants relating to the making of Tax elections broad enough to cover analogous state Tax elections?
- Who is responsible for transaction Taxes (if any) triggered by the transaction?
- Who is responsible for complying with state bulk-sale notification requirements or will compliance with such requirements be waived?
- Is Buyer responsible for providing Seller with resale or other exemption certificates?
- Are there any covenants regarding voluntary disclosures?
- Are there any covenants regarding post-closing matters?

Indemnifications

- What are Indemnifications and why do we have them in the transaction documents?
- Why are they important to a SALT professional?
- Are there special indemnifications related to Taxes or are all indemnifications “lumped together”
 - If they are separate, do they work properly?
 - If they are “lumped together,” what impact do they have on post-closing matters related to Taxes?
- Are there any caps or floors that apply to indemnification for state and local Taxes?
- Do the indemnification provisions survive as long as the statute of limitations for assessments of any pre-Closing Taxes?

Take Aways for Transaction Documents

- Get Involved Early
- Stay Involved Throughout the Deal
- Transaction Documents
 - Stay in the loop for all revised drafts of the transaction documents
- Add Value
 - Don't be the deal killer
 - Be a deal facilitator
 - Appreciate creative solutions to lack of information

Post-Closing Considerations

The First 100 Days – Opportunities and Challenges

Post-Closing Timing Issues

- Create your 100 day plan
- Action items may be immediate
 - Think sales/use tax collection, remittance and reporting vs. reporting for other taxes
 - Licenses and permits may need to be renewed
- Credits and incentives may be transferable, but have tight deadlines for approval of any transfer
- Transfer tax filings
 - May be due in as little as 10 days post close
 - Check your PSA for terms (50/50 is common)

Post-Closing Challenges

- Human resources
- Historical knowledge
- Antiquated software systems
- Hard-to-use software systems
- Integration of work force, processes, procedures and operations
- Revisit your DD
 - 382 Study
 - Tax mitigation...don't inherit the sins of the father...and take them with you to the Seller's table upon disposition

Post-Closing Opportunities

- Human resources
- Software applications
- Processes and procedures
- Best practices

Other Post-Closing Considerations

- Corporate Culture and Human Resource Issues
 - Especially important in the post-pandemic world
- Tax Department Structure
- Systems Issues
- Tax Policy and Government Relations Strategies
- Planning Opportunities and Pitfalls
 - Restructuring = changes = opportunities and pitfalls
 - Credits and incentives – old and new

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PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM

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Your Turn

- Questions
- Comments
- War Stories
- Best Practices