

Corporate Acquisitions

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INTRODUCTION

The purchase and sale of a business is one of the fundamental types of transactions for which corporate law firms are retained. This paper is intended to provide a basic overview of the process for a corporate acquisition, the key agreements involved and the role of lawyers and support staff.

It is hoped that by providing a basic overview of the process and agreements, support staff will have a better understanding of the parties and steps involved, the documentation they will typically be assisting in the preparation of and how to better assist in preparing for the closing of a purchase and sale transaction.

PARTIES AND TYPICAL TIMELINE

In any purchase and sale transaction, there will be a buyer (or buyers) and a seller (or sellers). The buyer is interested in acquiring a business from the seller. This business is typically carried on by a corporate entity that is referred to as the “target”.

A purchase and sale transaction typically begins with initial discussions between the buyer and the seller to determine if they can come to an agreement for the purchase and sale of the target business. If the buyer and the seller can come to an agreement of the basic terms or framework upon which they would be willing to make a deal, they will generally enter into a “letter of intent” (often referred to as just an “LOI”) or a “term sheet” that sets out the basic terms for the potential deal.

Following the signing of an LOI, the parties will generally spend a period of time conducting due diligence. Due diligence is a fact finding exercise where the buyer will do its homework to find out as much as it can about the target business in order to determine (a) if it wishes to pursue the transaction and (b) what the specific terms would be. Depending on how the transaction is structured, the seller may also conduct due diligence on the purchaser. This “reverse due-diligence” is typically done when the seller is paying all or a portion of the purchase price through the issuance of its own shares.

Either following or concurrent with the due diligence phase of the transaction, the parties and their lawyers will begin to negotiate the main purchase and sale agreement. The different types of transactions and agreements that are used are discussed in more detail below under the heading “Types of Acquisition Agreements”. The main purchase agreement is often referred to as the “definitive agreement”. Depending on how the transaction is structured, the definitive agreement

may be signed once the parties and their lawyers have agreed on all the terms of the agreement. In some cases, the agreement is negotiated and settled, but is not signed by the parties until the date of closing.

Prior to the closing, the parties will need to obtain all of the third-party consents required in order to closing the transaction. These may include:

- approvals from stock exchanges, such as the TSX, if the purchaser, seller or target are listed on an exchange;
- government approvals, such as any approvals required under the *Competition Act* or the *Investment Canada Act*; or
- consents from other parties to the target's contracts, including the target's lenders.

The next step in the process is for the lawyers to prepare all of the closing documents in anticipation of closing the transaction. There is more detailed discussion below on what is involved in this under the heading "Closing and Closing Documents".

Finally, once all of the documents have been prepared and the conditions to closing set out in the definitive agreement have been met, the closing of the transaction can take place. There is a more detailed discussion about the closing under the heading "Closing and Closing Documents"

TYPES OF ACQUISITION AGREEMENTS

There are several ways that a purchase and sale transaction can be structured and, depending on the type of structure chosen, different types of definitive agreements that can be used. The structure of the transaction will depend on things like the characteristics of the parties involved in the transaction, the nature of the target business to be acquired and the tax efficiencies of a certain type of transaction.

Share Purchase

A share purchase is generally the simplest method for a buyer to acquire a target business. Under the terms of a share purchase agreement, the buyer will agree with all of the shareholders of a corporation to buy all of their shares in the entity that carries on the target business. At the closing of the share purchase transaction, the seller will transfer all of their shares in the target company to the buyer in exchange for the agreed upon purchase price and the buyer will be the new owner of the target corporation. In a share purchase transaction, unless the parties agree otherwise, the buyer