



**METZ LEWIS**  
ATTORNEYS AT LAW

## Corporate Transactions and Securities

### Metz Lewis LLC Checklist for Structuring an Acquisition

The following checklist sets forth common considerations in structuring a business acquisition. This material should be seen as a starting point for addressing high-level structural issues.

- **Assess the Reason and Rationale for the Acquisition**
  - Consider fit with existing operations and synergies
  - Ease of operational integration
  - Market forces, opportunities, threats, and competition
- **Acquisition Financing**
  - Debt versus equity financing -- consider current debt levels, dilution, etc.
  - Impact on buyer's existing facilities and lending relationships
- **Transaction Structure**
  - Stock Sale
  - Asset Sale
  - Merger
- **Structural Considerations**
  - Stock Sale
    - Usually preferred by seller
    - Typically simpler and fewer transaction documents
    - Seller often enjoys favorable tax treatment
    - Contracts and licenses often can be transferred without third-party consents
    - All shareholders must be willing (or there must be a mechanism to force all shareholders) to sell in order for buyer to acquire entire company
    - Buyer is subject to all seller liabilities, except to extent seller indemnifies Buyer

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- Buyer generally assumes seller tax basis for assets, unless buyer files an election to step up tax basis in assets and buyer pays tax on step up amount (unless seller is an S corporation)
- Buyer cannot write off amount paid for stock
- Buyer may be able to make use of tax loss carry-forwards, subject to limitations
- Asset Sale
  - Usually preferred by buyer
  - Usually more complex transaction documents
  - Third-party consents to assign contracts and licenses will often be needed
  - Unanimous shareholder approval is typically not needed -- usually a simple majority will suffice
  - Buyer is generally able to limit liability to those liabilities it agrees to assume; there are significant exceptions (e.g., environmental, ERISA, etc.)
  - Less favorable tax treatment for seller
  - C corporation versus S corporation considerations
  - Allocation of purchase price among assets
- Merger
  - Variant of a stock sale
  - Similar considerations as a stock sale
  - Can typically be accomplished without unanimous shareholder approval being needed
- **Purchase Price**
  - Fixed price
  - Valuation formula
    - Comparable transactions considering metrics such as total enterprise value, sales, EBITDA, etc.
    - Asset-based valuation
    - Discounted cash-flow analysis
    - Industry specific valuation

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- Earnout or other contingent payment
- Determination of valuation (particularly in the case of a formula-based valuation and calculation of earnout and contingent payments)
  - Procedure
  - Dispute Resolution
- **Payment Method**
  - Cash, debt, equity securities, earnout, or some combination of these
- **Representations and Warranties**
  - Consider industry specific representations and warranties to include beyond the typical clauses
- **Indemnification Obligations**
  - Limitations
    - Time limit
    - Dollar threshold of obligation
    - Dollar cap on obligation
    - Set-offs, insurance benefits, tax benefits
  - Joint liability of shareholders
- **Escrow of Portion of Purchase Price for Claims**
  - Amount of escrowed funds
  - Timetable for release
- **Retention of Key Employees**
  - Employment / consulting agreements
- **Restrictive Covenants for Shareholders / Company Employees**
  - Non-competition
  - Non-solicitation of customers
  - Non-solicitation of employees
  - Confidentiality
  - Invention assignment

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