

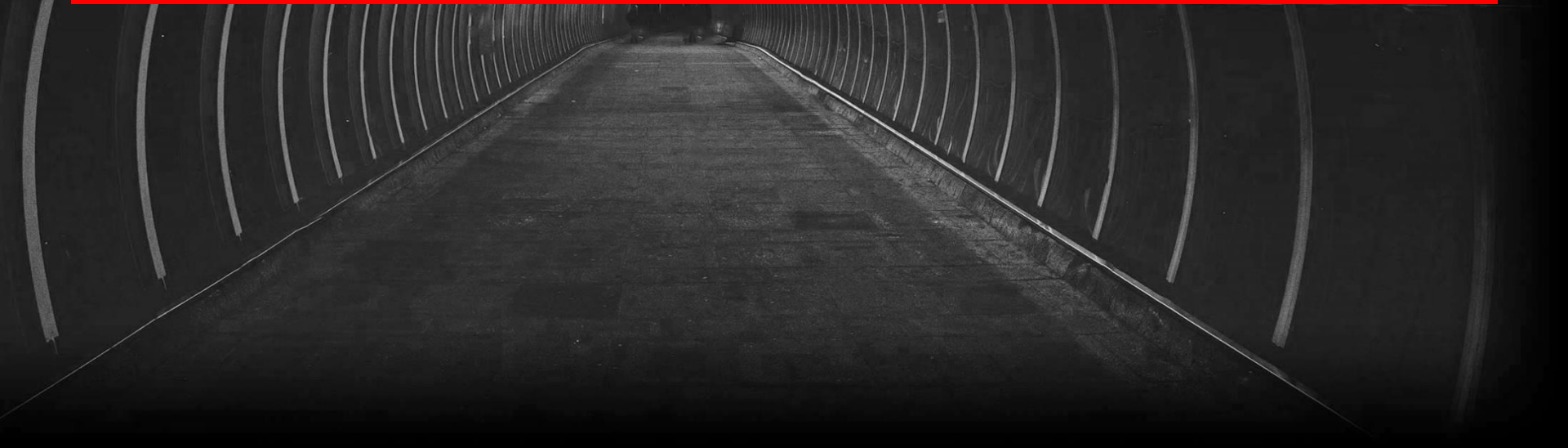
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 **NORTON ROSE FULBRIGHT**

M&A academy: The professionals' education series

Session one: An overview of an M&A deal

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Speakers



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Outline

Seller's goals

Pre-sale planning

Types of buyers

Types of sale processes

Key documents

Protecting value of after closing/vendor
retention of an interest

Goals (Show me the dollars or not)



Before you can find the right buyer, the seller has to determine its goals

- Highest sale price
- Retirement vs. continuing to work
- Protecting company, employees and culture
- Sale of 100 per cent or less
- Confidentiality
- Family dynamics

Pre-sale planning



Before you start the sale process, you must plan:

- Address gaps in management
- Diversify customer and supplier base
- Transfer out redundant assets
- Improve financial reporting and cash flow
- Legal clean-up

Types of buyers



- Strategic buyers
- Financial buyers
- Family offices and high net worth individuals
- Seller's family
- Management of the company
- Domestic vs. foreign

Or maybe a combination of some of the above

Types of buyers (cont.)



Strategic buyers

- In similar industry
- Usually want to buy 100 per cent
- If strategic buyer is public, then strict reporting
- Synergies

Types of buyers (cont.)



Financial buyers

- Private equity funds, pension funds, etc.
- Look to buy, grow business, sell at profit
- Keys are:
 - management depth
 - cash flow
 - EBITDA
 - growth story
- Seller and management keep a percentage of company

Types of buyers (cont.)



Family offices and high net worth individuals

- Generally will want vendor/manager to stay and operate the company
- Often do not re-sell their companies (unlike PE funds)

Types of buyers (cont.)



Seller's family

- A transfer to the next generation
- On what payment terms?
- Tax planning
- Does next generation have right skills?
- Emotional/personal issues

Types of buyers (cont.)



Management of the company

- Diligence is fast as they know the company
- Purchase price usually funded by debt and payment over time
- If negotiations are tough and deal doesn't close, the parties may not be able to continue to work together

Types of buyers (cont.)



Domestic vs. foreign buyers

- How to identify possible foreign buyers?
- Challenges of foreign buyers

Sale processes



What is the best process?

- Full auction
- Targeted auction
- No auction
- Unsolicited offer

Sale processes (cont.)



Full auction

- Broad group of potential buyers
- Competitive bidding
- Confidentiality issues
- Role of a banker in running auction
- What if auction fails?

Sale processes (cont.)



Targeted auction

- Narrower list of potential buyers
- Potential buyers more willing to invest time and money in bid process

Sale processes (cont.)



No auction

- Sometimes there is one obvious buyer

Sale processes (cont.)



Unsolicited offer

- Often catches the vendor unprepared
- How should vendor respond?

Key documents



- Confidentiality agreement/NDA
- Letter of intent/term sheet/MOU
- Purchase and sale agreement
- Disclosure schedules
- Ancillary agreements and closing documents
- Closing agenda

Key documents (cont.)



Confidentiality agreement/NDA

- Purpose
- Content and considerations
 - Non-solicitation
 - Term

Key documents (cont.)



Letter of intent/term sheet/MOU

- Purpose
- Content and considerations
 - What are the key deal terms?
 - Binding vs. non-binding generally

Key documents (cont.)



Purchase and sale agreement

- Allocation of risks
 - Legal, financial and business
- Disclosure
 - Disclosure of key issues and matters discovered during due diligence

Key documents (cont.)



Purchase and sale agreement (cont.)

- Key parts
 - Identification of parties, recitals, interpretation
 - Purchase and sale mechanics
 - Reps and warranties
 - Covenants (interim period and post-closing)
 - Closing conditions and deliveries
 - Indemnities
 - Termination and boilerplate

Key documents (cont.)



Disclosure schedules

- Purpose
- Content and considerations
- Updating schedules during the interim period

Key documents (cont.)



Ancillary agreements/Closing documents

- Documents required to effect the transfer of shares or assets
 - Bill of sale, assignment and assumption agreements, transfer forms, etc.
- Documents governing the relationship of the parties after closing
 - Non-competes, TSAs, employment agreements, etc.

Protecting value after closing adjustments



- Working capital
 - Based on a “peg” used for valuation, then adjusted at closing and then again post-closing
 - Can be one-way or two-way
 - Can be subject to limitations
 - Accounting principles
- Other metrics include cash, aged A/R, debt

Protecting value after closing indemnification



- Representations have a dual function:
 - Disclosure
 - Risk allocation
- Indemnity provides a **contractual** remedy for breach of representations
- Exclusive Remedy (other than fraud?)
- Subject to caps and other limitations

Protecting value after closing indemnification (cont.)



What is the scope of damages?

“Losses” means losses, damages, liabilities, actions, judgments, interest, awards, fines, costs or expenses, including reasonable legal fees and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers, **provided however that “Losses” shall not include special, consequential, multiple of earnings, indirect, punitive damages or other similar damages, including declines in value, lost opportunities, lost profits, business interruptions or lost reputation, except in the case of punitive damages, to the extent actually awarded to a Governmental Authority or third party.**

Protecting value after closing security



An indemnity is only as good as the person giving it.

- Escrow
- Holdback
- Set-off

Protecting value after closing insurance



An alternative or complement to security for representations on larger deals is:

- R&W insurance
 - Increasingly popular

Protecting value after closing earn-outs



- Purchase price can be varied based on post-acquisition performance
- Metrics are as broad as the parties' imagination (but often linked to EBITDA)
- Imperfect alignment of interests

Retention of interest structuring



- Incentives can be aligned by leaving a retained interest
- Purchaser's interest can be on the same terms as the current owners, or a preference can be created
- Settle on:
 - Governance
 - Transfer restrictions
 - Liquidity rights
 - Restrictive covenants

Questions



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The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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