

## Acquisition Task Checklist

Task	Comments/Notes
<b>A. Pre-Deal</b>	
<b>Acquisition Task Checklist</b>	
<b>1. Client Identification and Conflict Clearance</b>	
a) What entity or persons will be clients? See, <i>M&amp;A Manual</i> , Chapter 2 for a discussion entitled “Managing the Client Relationship and Other Ethical Issues.”	
b) Will the identity of the client depend on ultimate structure? For example, in an asset sale or merger, the entity owning the assets would likely be the client, but in a stock sale, some or all of the shareholders might be clients.	
c) Have necessary conflict checks and waiver clearances been obtained?	
d) Is the expected client a new or existing client?	
<b>2. Confidentiality</b>	
a) Is there a confidentiality or nondisclosure agreement in place?	
b) If not, is it to be included in a letter of intent or a stand-alone agreement? See <i>MSPA, Vol. II</i> for a model form of confidentiality agreement.	
<b>3. Preliminary Agreements</b>	
a) Is there a letter of interest signed or contemplated?	
b) Is there a letter of intent/term sheet signed or contemplated? Will a public announcement be required? See <i>MSPA, Vol. II</i> for a model form of letter of intent.	
c) Are the parties considering an exclusivity or “no shop” understanding?	
d) If there will be an exclusivity or “no shop” understanding, will it be included in a letter of intent or set forth in a stand-alone exclusivity agreement? What is the duration of the exclusivity period? Is the date on which the exclusivity expires clearly articulated? What is the contemplated recourse for a breach – breakup fee, reverse breakup fee or other recourse?	

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<b>4. Other</b>	
a) Is there more than one bidder?	
b) If an investment banker/finder is being utilized, has an engagement letter been executed? Will there be a need for a fairness opinion of any sort?	
c) Does the client have in-house lawyers? What will their role be?	
d) Are there other law firms advising the client on the deal and is it clear which firm has what responsibilities?	
e) Will a working group list be circulated? If so, who will take responsibility for creating and maintaining it?	
f) Will there be an internal kickoff meeting, either in person or by conference call? <i>See Pre-Deal Document No. 6—Deal Kickoff Meeting Checklist.</i>	
g) Are there any experts or consultants assisting with the deal? Should the law firm rather than the client retain them for confidentiality purposes?	
h) What role, if any, does the client expect the law firm to play in deal negotiations?	
i) Is there a scoping letter with the client? <i>See Pre-Deal Document No. 2—Initial Deal Scoping Discussion and Pre-Deal Document No. 3—Confirmation of Deal Scope.</i>	
j) Have the client and the law firm discussed and agreed upon deal management procedures? <i>See Pre-Deal Document No. 4—Deal Management Discussion Outline.</i>	
k) What is the strategy behind the deal? What does the client want out of the deal?	
l) What are the expected roles of those on the team?	
m) Is a project code name being used?	
n) Should a trading blackout be imposed?	
o) Should vacations be cancelled?	
p) Should any regulators be informed of the impending transaction? If so, who and when?	
q) What are the expectations as to timeliness of responses?	

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r) Will there be regular conference calls or update meetings? What arrangements have been made as to charging for those calls/meetings?	
s) Will negotiations take place in person or by conference calls? If in person, where?	
t) Will the closing be in person or by email exchange of documents?	
u) Will negotiations or closing require travel?	
<b>B. Due Diligence</b>	
1. Is there any particularly sensitive information that requires special treatment?	
2. What is the law firm's role in diligence? What is the role of the investment banker in diligence?	
3. Are there any antitrust concerns over the exchange of target's information with the buyer that should be reviewed?	
4. Is there to be a data room and if so, will it be physical or electronic? Has access been arranged for the reviewing team and will it be able to print relevant documents?	
5. Does the target have audited financial statements? If not, do its financial statements have deviations from GAAP? If so, how are such deviations to be addressed?	
6. Will due diligence require travel?	
7. Who will be preparing/conducting the diligence and how will it be coordinated? Which of target's employees are or will be in the loop?	
8. Will the target be setting up and populating a due diligence data room in advance of receiving due diligence requests from prospective buyers?	
9. Has a due diligence checklist been prepared/circulated by buyer's counsel?	
10. Have other lawyers or professionals also produced due diligence checklists?	
11. Is there data that should not be exchanged for confidentiality or antitrust reasons or because of contractual restrictions or business sensitivity? Can the release be deferred until the target has greater confidence in completing a sale?	

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12. Does the client expect written reports of due diligence findings? How are such due diligence reports to be coordinated and to whom are they to be delivered?	
13. Will buyer be allowed to meet or speak with target's employees, customers or suppliers? If so, when?	
14. Are any environmental studies or investigations to be conducted as part of due diligence, and if so by whom, retained by whom, and at whose expense?	
15. Will lenders need to be involved in diligence? If there are multiple lenders for each bidder, how will data room access be managed and controlled, particularly if there is a physical data room?	
16. Is there any need to protect attorney-client privilege with a "common defense" agreement?	
17. Do the prospective buyer and target compete or are they vertically associated in sales of products? Should antitrust concerns be explored?	
<b>C. Main Elements of Transaction</b>	
<b>1. Purchase Price</b>	
a) Will the ultimate structure selected by the parties impact the buyer's or seller's acceptance of the currently-agreed price? Tax impact on buyer or seller may differ depending on structure.	
b) Will the purchase price be financed in whole or in part? If so, what type of financing and what will be its source? Is there a commitment letter with the financing source?	
c) Is there an earnout agreement contemplated? What is the formula? See <i>MSPA, Vol. II</i> for a model form of earnout agreement.	
d) Is a note to the seller or other installment payment contemplated? Will it be secured by buyer?	
e) Is there an escrow or holdback of the purchase price contemplated? How much is it and how long will it be held? Is it to be released in stages? See <i>MSPA, Vol. II</i> for a model form of escrow agreement.	
f) Will there be a separate escrow for purchase price adjustment or working capital true up? If so, have the parties agreed upon a date for measuring the adjustment and the line items for measurement?	
g) Will a separate escrow be established for expenses?	

Task	Comments/Notes
h) If there is an escrow or escrows, who will act as the escrow agent(s) and who will prepare the escrow agreement(s)?	
i) Once the escrow agent is chosen, who will obtain “know your customer” information that is required by the escrow agent?	
j) Will there be a payment agent? If so, who will it be?	
k) Is buyer planning to issue securities as full or partial consideration for the acquisition? If so, is buyer a public or a private company? If private, how will buyer make due diligence available to the seller and its equity holders?	
l) Will seller/buyer require that the other party to procure a parent company guarantee of the obligations of the counterparty to the purchase agreement? Are there any other guarantors?	
m) If multiple parties are joining in the representations, is there any need for a contribution agreement among them? See <i>MSPA, Vol. II</i> for a model form of contribution agreement.	
n) Will sellers need to name one or more selling shareholders or a third party to serve as sellers’ representative? See <i>MSPA, Vol. I</i> , Section 12.5 of the model stock purchase agreement and accompanying commentary. If so, who will serve in that capacity? Should there be a mechanism for replacement of the seller representative?	
o) Do the parties contemplate naming an accounting firm to resolve any disputes relating to post-closing purchase price adjustments or earnouts?	
p) Will there be a need for a representative of multiple parties to deal with, among other things, post-closing dispute resolution?	
<b>2. Employees</b>	
a) Will buyer require employment agreements with any of target’s key employees? If so, what lawyer will represent such employees regarding these agreements?	
b) Are any of target’s employees unionized?	
c) Are there any employee benefits issues triggered by the transaction? If severance payments are to be made, who will bear the cost? Are there tax ramifications?	
d) Are there issues regarding key man life insurance that need to be addressed?	

Task	Comments/Notes
e) Are there any particular labor issues or notice requirements in the jurisdiction in which target's business is located?	
f) Who will inform target's employees about the transaction and when?	
g) If target's principals are to depart post-closing, will buyer seek to enter into consulting agreements with them?	
h) Will any of the employees be awarded stock options, restricted stock, or other equity-based compensation?	
i) Will vesting of outstanding options be accelerated?	
j) Are there to be hold harmless agreements for departing principals?	
k) Are there to be any releases from third parties in favor of departing principals or releases from the departing principals?	
<b>3. Other</b>	
a) Will any of the owners of target be required to re-invest in buyer?	
b) Will there be representations and warranties insurance? Which party will be protected and which party will bear the cost?	
c) Does target have its operations only in the U.S. or are there other countries involved?	
d) If other countries are involved, has local counsel been retained?	
e) Is there agreement between the law firm and local counsel as to which is responsible for what, (e.g., real estate)?	
f) Will there be a need to retain special counsel regarding specialty areas not covered by the law firm or the client's legal department?	
g) Will local or special counsel be asked to enter into retainer letters with the law firm or directly with the client?	
h) Are permits or licenses necessary for operation of the business and if so, are they transferable or must buyer apply for new permits?	
i) If a stock sale, shareholders of target should be reminded to locate their stock certificates or arrange replacements or sign affidavits of loss. Selling shareholders should be furnished with stock transfer powers.	

Task	Comments/Notes
<b>D. Approvals and Consents</b>	
<b>1. Internal</b>	
a) Will board approval be required of any party to authorize the M&A transaction?	
b) Are any board members conflicted and required to abstain? Should a special committee be appointed? If so, who will represent the special committee? Does the special committee have an appropriate mandate?	
c) Will shareholder approval be required of any party to authorize the M&A transaction? Any class votes by shareholders?	
d) Must there be a meeting of shareholders of any party to approve the M&A transaction with attendant proxy materials?	
e) Can all the options/warrants, convertible debentures, and other commitments to issue securities be terminated or exercised so that target can deliver 100% of target shares to buyer?	
f) Will dissenters' appraisal rights be available?	
g) Does the target have different classes of stock requiring resolution of sale proceeds distribution or "waterfall"?	
<b>2. Governmental/Regulatory</b>	
a) Will a Hart-Scott-Rodino (HSR) filing be required?	
b) If HSR reporting is required, has an "Item 4(c)" memorandum been circulated to relevant personnel?	
c) Is it likely that the transaction will raise significant antitrust issues or trigger a "Second Request" under HSR?	
d) Are there procedures in place to address and prevent the "gun jumping" problem in which the two companies make anti-competitive agreements before closing? Should a "gun jumping" advisory memorandum be circulated?	
e) Are there antitrust concerns over the due diligence exchange of information?	
f) Will pre-merger notification filings, other antitrust filings, or certain approvals be required in any other country in which assets or shares are being acquired?	
g) Will any U.S. (e.g., CFIUS/Exon-Florio) or foreign investment approval of the transaction be required?	

Task	Comments/Notes
h) Will the nature of the target’s business, if regulated (communications, defense, transportation, healthcare, etc.) require any other filing or approval?	
i) Will the transaction trigger a state or local “environmental transfer law” requiring a site assessment and cleanup before the transfer?	
j) Will the transaction trigger any federal or state WARN statute or similar plant-closing laws?	
k) Will the transaction trigger any “golden parachute” tax treatment under the Internal Revenue Code? Can and should a waiver be obtained from seller’s shareholders?	
<b>3. Third-Party Commercial/Material Contracts</b>	
a) Will any right(s) of first refusal be triggered by the M&A transaction? If so, what is the likelihood that they will be exercised?	
b) Will the M&A transaction trigger any anti-assignment or change in control provisions (e.g., rights of co-venturers in a joint venture, rights of landlords under leases, rights of intellectual property licensors or rights of lenders)? Is consent required from any third party?	
c) Will the failure to assign any major contract materially impact the value of target to buyer or the rationale for doing the deal?	
d) Are there any mission critical agreements that will need to be re-negotiated or replaced prior to closing?	
e) Are there government or other contracts, licenses, or grants that may require novation?	
f) Is there agreement between buyer and seller as to which contracts are “key” and whether a failure to obtain consent to a particular contract will be a breach that triggers walk rights on the part of buyer?	
g) Are there any target specific insurance policies that are to be transferred? Will it be necessary to obtain “tail” coverage under any insurance policy? Which party shall pay for such coverage?	
h) Will it be necessary to secure post-closing D&O insurance coverage for retiring or resigning directors or officers? Should there be any contractual protections to maintain indemnification rights for target directors post-closing?	
i) How will the following employee-related insurance be dealt with post-closing: health care, dental, life, disability, workman’s compensation?	



Task	Comments/Notes
j) Are there any significant contracts with suppliers and/or customers?	
k) Who is responsible for obtaining necessary consents or other items noted above? When?	
<b>E. Transactional Documentation</b>	
<b>1. Purchase Agreement and Disclosure Schedules</b>	
a) Who will be preparing the first draft of the purchase agreement?	
b) Does our client have a preferred format of purchase agreement?	
c) Is target's data in such a form as to facilitate the preparation of disclosure schedules?	
d) Who will be preparing the first draft of the disclosure schedules? Will the investment banker have a role? Who will be responsible for coordinating the conformity of the disclosure schedules and the materials in the data room?	
e) Is a signing/deferred closing or simultaneous signing/closing contemplated?	
f) Is a closing in escrow (to facilitate the recording of real estate documents or for other reasons) contemplated?	
<b>2. If an Asset Purchase: Asset Transfer and Ancillary Agreements</b>	
a) Are UCC, Tax Lien or other similar searches and litigation docket searches required? In which jurisdictions?	
b) Are payoff letters and/or lien releases required? Who is seeking them?	
c) How will disputes over quality of inventory be handled from both an accounting and operating standpoint?	
d) Will accounts receivable be transferred to the buyer? If so, how will defaults or failure to collect be treated? If the price will be adjusted post-closing to reflect the uncollectability of receivables purchased by the buyer, either by a specific price adjustment or indemnification for breach of warranties, will the seller have the right to repurchase or take an assignment back of the uncollected receivables? Should the agreement require the buyer to apply payments from an account debtor to the oldest receivables first?	
e) How will product warranty claims be handled post-closing?	
f) Who will prepare/review the asset transfer documents, including the following?	

Task	Comments/Notes
i. Bill of sale	
ii. Assignment and assumption agreement	
iii. Vehicle title transfers	
iv. Financings documents, if any	
v. IP right transfers (see 4 below)	
<b>3. If a Stock Purchase</b>	
a) Are there restrictions on the transfer of the subject shares in the target’s organizational documents or in various agreements that must be addressed (e.g., rights of first refusal or first offer, tag-along rights, drag-along rights, etc.?)	
b) Have all the shareholders been able to locate their share certificates, or must affidavits of loss be prepared and circulated and substitute certificates issued?	
c) Who will prepare appropriate stock powers or other instruments of transfer for the subject shares?	
d) What are the mechanics for ensuring delivery of all the subject shares?	
e) Are all the shareholders expected to be willing and able to deliver their shares? If not, should the transaction be restructured as a merger? Are any shareholders expected to exercise appraisal rights?	
f) Are there outstanding stock options of the target that must be exercised or bought out in connection with the closing?	
g) Will any of the target’s shareholders become shareholders in the buyer post-closing?	
<b>4. Intellectual Property</b>	
a) Will a patent assignment agreement be required?	
b) Will a trademark assignment agreement be required?	
c) Will a domain name transfer agreement be required?	
d) Will a copyright assignment be required?	
e) Have target’s employees and consultants properly assigned their intellectual property rights to target?	

Task	Comments/Notes
f) If technology was originally developed within a university, is consent, license, or outright transfer required from the university?	
g) Was technology developed through funding by grant, governmental or otherwise? If so, are consents required from the grantors?	
h) Are there critical trade secrets or know-how unprotected by patents?	
<b>5. Real Property</b>	
a) Is target's real property owned or leased?	
<ul style="list-style-type: none"> <li>• If leased, is the lease freely assignable to buyer? Will the lessor's consent be required?</li> </ul>	
<ul style="list-style-type: none"> <li>• If not, will a sublease to buyer be permitted by lessor?</li> </ul>	
<ul style="list-style-type: none"> <li>• Is the owner/lessor also a shareholder of target? Is there evidence that the lease is at a market rate? Should the lease be renegotiated with buyer?</li> </ul>	
<ul style="list-style-type: none"> <li>• Will an estoppel certificate (landlord) be required?</li> </ul>	
b) If owned, will a title search be conducted to identify any liens, encumbrances or easements? Will a property survey be conducted?	
c) Will title insurance be required? Will buyer's lenders require a mortgage policy?	
d) How will sales or document transfer taxes on the transfer of target's real and personal property be satisfied?	
e) Will a Non-Foreign Person (IRC Section 1445) "FIRPTA" affidavit be required?	
<b>6. Additional Closing Agreements/Actions</b>	
a) Will a legal opinion letter be required? If so, what opinions will be required? Who will prepare the first draft of such opinion letter? Will both buyer and seller be expected to deliver legal opinion letters?	
b) Are there any tax and corporate good standing certificates that are customary for M&A transactions in the relevant jurisdiction(s)?	
c) Will any resignations or releases be required from any directors, officers or key employees of target?	

Task	Comments/Notes
d) How will the allocation of purchase price be handled? If an asset sale, buyer and seller may need to file a Form 8594 with the U.S. IRS.	
e) Will seller be required to file with the appropriate Secretary of State a name change of the legal entity from which the assets are being acquired?	
f) If target business involves the sale of merchandise from inventory, is buyer willing to waive compliance with any applicable bulk transfer laws?	
g) Are there applicable bulk sales clearance procedures? Either UCC or state tax clearance?	
h) How will sales or transfer taxes be addressed? Are there any applicable state sales tax exemptions?	
i) Who will be executing the secretary's certificate?	
j) Who will be executing the officer's (bringdown) certificate?	
k) Who will be preparing the funds flow letter?	
l) Who will coordinate the obtaining of wire transfer instructions?	
<b>F. Post-Closing Matters</b>	
a) Will target, its executives and/or key shareholders be required to provide non-disclosure, non-competition and/or non-solicitation covenants post-closing and, if so, will they be set forth in the purchase agreement or in a separate stand-alone non-disclosure, non-competition and non-solicitation agreement?	
b) Is seller a corporate parent of target that directly or through an affiliate provides raw materials, goods, IT or administrative services that would necessitate buyer to negotiate a new supply agreement in place after closing?	
c) Is seller a corporate parent of target or does it have an affiliate that serves as a customer of target that would necessitate buyer to negotiate a new purchase or distribution agreement?	
d) Is seller a corporate parent of target or an affiliate that provides corporate services (e.g., accounting, IT, etc.) to target that cannot be replaced by buyer immediately after closing, thus making a short term transition services agreement (TSA) advisable? If there is an earnout, how will TSA expenses impact calculation of the amount? See <i>MSPA, Vol. II</i> for a model form of transition services agreement.	

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e) Are there pending investigations or litigation involving target or its assets? If so, who will be responsible for handling such matters after closing and responsible for any resulting liabilities and litigation costs post-closing? Does either party desire a voice in or veto over any settlement arrangements?	
f) Are there any environmental issues that might require an environmental remediation agreement with seller?	
g) Should the parties consider securing an environmental insurance policy?	
h) Should target be required to maintain its corporate existence for some period of time post-closing? Should target's ability to distribute the proceeds of sale be limited for some period of time?	
i) Will seller be required to file a name change of the legal entity from which the assets are being acquired with the appropriate Secretary of State?	
j) What plans have been made by buyer to integrate the acquired and existing businesses post-closing?	
k) Will the seller's law firm be expected to represent the seller or its equity holders post-closing with regard to disputes over indemnification rights or breaches of representations and warranties? Can appropriate consents and conflict waivers be agreed upon to enable such representation after the closing?	