



Alliances, Acquisition, and Merger

Dennis J. Sysko, Esquire
Telephone: 410.768.9300
E-mail: djsysko@henault-sysko.com

Introduction

Alliances, Acquisition, and Merger are several of the business strategies that developing companies use to immediately enhance products or services lines, augment personnel, acquire technology or facilities, or increase market share, presence or penetration. These strategies are particularly relevant to small, high technology companies to hasten product or service offerings, deliver existing products or services to new customers or to significantly reduce the new product or service development cycle. The implementation of one or more of these strategies capitalize on the strength and complementary attributes of the partners to satisfy predetermined business objectives. It must be a win-win situation for both partners. Sometimes there are regulatory issues which must be addressed. The remainder of this thumbnail summarizes the characteristics of these strategies.

Alliances

Alliances are formal collaborations which have a wide range of depth, intensity and interdependence. The scope of an alliance is only limited by the imagination. Alliances can be forged as casual, loosely structured, pilot arrangements up to the deadly serious strategic alliances, where the achievements of significant business objectives or even long-term survival are at stake. Alliances, sometimes termed joint ventures, are frequently unique to the partners which capitalize on the synergy resulting from the exploitation of the strengths of the partners to accomplish common, agreed business objectives. Joint ventures can be a powerful technique to accomplish technology sharing, directed and applications research, product development and cooperative marketing, and manufacturing and productization; the licensing of technology and intellectual property; and to provide sources of critical resources including funding. An emerging alliance in today's technically sophisticated marketplace is the technology/service partnership where the technology partner can provide a new and valuable service offering to the existing customers of the service partner.

The legal constructs which underlie alliances take on titles such as Teaming Agreements, Contracts, Joint Ventures, Affiliate Agreements, Mentor-Protege Agreement, Cooperative Research

and Development Agreements (CRADA), Memoranda of Understanding, Cross Licenses, and Development Agreements. Titles are incidental to the significance of the legal relationship. Generally, each strategic partner equally benefits from an appropriately structured alliance.

Acquisition

Conceptually, acquisition is the simplest and at the same time, can be the most complex to bring to fruition. A strategic acquisition is an acquisition by one company of all or part of the assets of another company. Defining precisely what is acquired, at what cost, and under what payment terms may require substantial efforts to define and refine and can frequently become very complex and interrelated. Equally important to ascertain is that all that is necessary is being acquired to ensure the business aspects of the transaction can be accomplished without delay or additional cost or risk. Acquisition can involve a stock purchase, with the purchase of the ownership interests of the entity to be acquired, which includes all assets and all liabilities some of which may not be easily identified or just the assets themselves. Generally, the more complex the assets to be acquired, the more sophisticated the documentation. The process frequently follows an iterative process which begins with a basic Letter of Intent which describes the fundamental terms without regard to implementation. The Letter of Intent is frequently revised as the companies better understand the emerging relationship. The process of understanding the precise assets to be acquired with all their nuances, entanglements, liabilities and limitations is the process of due diligence which is usually conducted by representatives of the acquiring company and usually involves technical, financial and accounting evaluations of the business or assets to be acquired so all its implications are understood. This is part of the process which determines precisely who owns precisely what. We have developed extensive due diligence categories for investigation and documentation which can be combined with transaction specific categories which will permit the identification and evaluation of the material aspects of the contemplated transaction and facilitate the development of transaction documentation. The next step of the process is to describe the evolving business relationship in definitive legal terms and begin the process of refinement, generally through iteration, until all the business aspects of an acceptable relationship are comprehensively documented.

The master document for an acquisition is an Assets Purchase Agreement which addresses all aspects of the contemplated transaction. Schedules are incorporated into the Assets Purchase Agreement which addressed the aspects of the assets being acquired and may contain the legal vehicles for specific aspects of the transaction, which can involve assignment of material contracts, licensing of technology or intellectual property, bills of sale, and extensive description of the specific assets to be acquired which may include client accounts, equipment acquired, or accounts receivable. These schedules also incorporate, as appropriate, resolve issues revealed by the due diligence process, host necessary affidavits, certifications, licenses, and the financial provisions including pledges of collateral as security for the funding portion of the transaction.

Although there are elements common to all acquisition, transaction-specific issues may arise which can include ascertainment and assignment of copyrights, trademarks or patents; resolution of taxation issues, export or import duties, or export or transfer limitations; and even escrowing, not only funds but technology developments, for example, software source code and development notes.

Merger

This is the legal process where one company acquires and absorbs generally, all of the assets of another company. An acquisition can be implemented through a merger. This process is a major action by both companies and involves not only the preparation of the necessary business transaction documents but the required documentation and authorities to alter the structure of the entities. Although usually described in the context of corporations, the process is applicable to all forms of business associations. Merger involves the absorption of the acquired entity into the framework and operational environment of the acquiring company. In large measure, the same investigative and evaluative processes used in Acquisition are applicable to merger. Thorough due diligence and a comprehensive investigation and evaluation of all facets of the company to be acquired is critical in a merger.

Implementation

Regardless of which strategy is implemented, it is critical that all aspects of the transaction are thoroughly reviewed, fully evaluated and all aspects of the transaction are completely documented by experienced professionals. Only then can the companies be assured that the contemplated transaction is the transaction which will occur, the transaction elements are achievable and the technical, business and legal risks are appropriately identified and bounded.