Negotiating an M&A Deal

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M&A BOOT CAMP

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Financial Poise Webinars

Meet the Faculty

Panelists

Bob Dekker - The Peakstone Group

Phil Buffington - Balch & Bingham, LLP

Allan Grafman – All Media Ventures

Michael Weis – Weis Burney LLC

Moderator

Robert Londin - Jaspan Schlesinger Narendran LLP

About This Webinar

Negotiating an M&A Deal

- This webinar focuses on the art of negotiating M&A deals, where legal expertise and market knowledge intersect. It requires both knowledge of the law and the "market." Panelists engage in mock negotiations of a variety of deal points that commonly arise in M&A transactions.
- Enter the conference room (or video conference) as buyer's and seller's counsel haggle over representations, warranties, indemnification, purchase price payment mechanisms and adjustments, and a host of other hotly negotiated terms.

About This Series

M&A Bootcamp 2025

This webinar series features leading M&A attorneys and other deal professionals speaking about private company M&A, guiding the audience through a conversation that spans from deal origination, the LOI (letter-of-intent) or term sheet, due diligence, document drafting and negotiation, closing, and post-closing.

Issues addressed include tax planning and structure; corporate governance; negotiating deal points and common pitfalls and challenges; closing conditions; representations and warranties; indemnification provisions; earn-outs; restrictive covenants; antitrust; intellectual property; and employment. While many of the topics covered apply also to public company M&A, the focus of this webinar series is on M&A involving a privately owned company or business.

Business transactions range from small matters (such as drafting a purchase order, a non-compete agreement, or myriad other single-purpose agreements necessary to document a legal relationship between two parties) to large multi-national acquisitions and financings. One of the most significant types of transactions a company can enter into, however, and the type that is commonly thought of as needing a "deal" lawyer and professionals, is a Mergers and Acquisitions transaction.

M&A (mergers and acquisitions), viewed broadly, includes buying or selling all or part of a business or company and business combinations, such as mergers. These transactions commonly require attorneys, accountants, and intermediaries (e.g., investment bankers, and business brokers) to work together.

Episodes In This Series

1. Structuring and Planning the M&A Transaction

   Premiere date: 09/03/25

2. Key Provisions in M&A Agreements

   Premiere date: 09/9/25

3. The M&A Process

   Premiere date: 10/7/25

4. Post-Closing Issues: Integration & Potential Buyer/Seller Disputes

   Premiere date: 11/4/25

5. Negotiating an M&A Deal

   Premiere date: 12/9/25

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Episode #5
Negotiating an M&A Deal

Each Financial Poise Webinar is delivered in Plain English, understandable to investors, business owners, & executives without much background in these areas, yet is of primary value to attorneys, accountants, & other seasoned professionals. Each episode brings you into engaging, sometimes humorous, conversations designed to entertain as it teaches. Each episode in the series is designed to be viewed independently of the other episodes so that participants will enhance their knowledge of this area whether they attend one, some, or all episodes.

Outline

- Purchase Price
- Representations and Warranties
- Post-Closing Covenants
- Closing Conditions
- Choice of Law/Venue/Dispute Resolution

A Couple of Quick Caveats

- Key provisions will vary from transaction to transaction. What we will be discussing today is not meant to be an exhaustive list, rather a survey of provisions of general importance to both parties
- There are important distinctions between stock transactions, asset purchases, and mergers (and even then, among different types of mergers). You should assume, though, for purposes of our presentation today, that our conversation will apply to all types of these transactions unless otherwise stated

Closing Conditions, Generally

- Closing conditions, like they sound, are an obligation (which can be waived) for each party to the other party's obligation to close the transaction
- Closing conditions will only be of importance in a two step transaction, that is, when the signing and closing are not simultaneous
- Closing conditions are more likely to put an onus on Sellers than Buyers
- Many of the conditions should be automatic, such as delivery and execution of ancillary agreements and corporate records and are firmly in the control of the party with the obligation
- Others, such as certificates of good standing, certified copies of articles or lien searches, require third parties, but should be things about which the Seller can feel confident; and some are outside the party's control (for example, Landlord consents)

Open-Ended Closing Conditions

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Gives a party, usually the Buyer, an “out” for something which may be amorphous and/or small

Examples are Buyer being satisfied with its due diligence in its sole discretion, Seller’s representations and warranties being true and complete in all respects, no material adverse change in Seller’s operations, and Buyer receiving financing for the transaction

Sellers may not be able to negotiate away these conditions, but they can push back against the number and scope of them, as discussed in the following slides.

The Due Diligence Closing Condition

- In its most extreme form, this closing condition permits a buyer to be able to walk away from closing the transaction without recourse for the seller if the buyer is not satisfied with the result of its due diligence examination of seller's operations in buyer's sole and absolute discretion.
- Buyer's position: It has an unfettered right to examine seller's records and to walk away if not satisfied right up to the closing.
- Seller's response: You had the opportunity to do this up until the agreement was signed; if you failed to do so, it's now your at your risk. You have other remedies for anything which arises between the signing and closing (as discussed in the material adverse change (MAC) slides).
- Seller's position is generally more compelling, but are there possible compromises?

The Due Diligence Closing Condition

(cont'd)

- The parties could change "sole and absolute" to "reasonable". While this is better for selle it possible recourse if buyer tries to walk away, the standard is vague and creates vulnera both parties.

- The parties can limit this right to matters which arose between signing and closing and/ the information was not provided to buyer provided to signing. This significantly narro range of what material buyer can use to call of the transaction, but may create ambiguity interacts with the MAC out.

- The parties can permit the buyer to walk away but stipulate some type of liquidated dat remedy for seller if buyer does so.

The Financing Closing Condition

When some or all of the purchase price seller is to receive is in cash payable at the closing, the buyer may need to finance this through a third party, most typically a commercial lender.

Buyer's position: unless it can procure such financing on commercially reasonable terms on terms acceptable to it in its sole and absolute discretion, it is under no obligation to close the transaction and faces no liability for not doing so.

Buyer is highly unlikely to be able to finalize financing until its agreement with seller is actually signed.

The Financing Closing Condition *(cont'd)*

Seller may be a bit more limited here than in regard to due diligence as buyer may not be able to close without financing, so compelling closing may not be an option.

Seller has the options of reasonableness or liquidated damages as discussed above in the context of due diligence.

Under any circumstances, even if buyer cannot get a firm commitment until after the agreement with seller is signed, seller should compel buyer to start this process, and apprise it of the results, prior to that time so it can gauge the likelihood of buyer's success.

The Material Adverse Change (or Effect) Closing Condition

- This condition provides that if seller suffers a material change in its operations, conditions, etc. after the signing, buyer will not be required to close the transaction.
- This is a logical provision in many transactions, particularly those in which a substantial amount of time may pass between the signing and closing and which the buyer could end up with a substantially different, and less advantageous, transaction than it envisioned.
- But this condition can be problematic for both parties because the concept of what constitutes a MAC is highly negotiated.

The MAC Closing Condition

What is "material adverse" must be considered in light of the size of the parties and transaction.

Subject to pro-buyer recent Akorn v. Fresnius Kabi decision, case law on this topic is scant but generally pro seller (IBP v. Tyson; Hexion v. Huntsman; but see Osram Sylvania v. Townsend Ventures).

In general, it's reasonable to have some type of MAC clause but probably to limit in the event of force majeure and perhaps even overall economic or sectoral events; be mindful of whether a target business' "prospects" affect whether a MAC occurs.

The MAC Closing Condition *(cont'd)*

More individually, for the certainty of both parties, the parties might wish to define by means of a percentage of transaction value and/or by certain actions, such as loss of a key customer, adverse outcome in a lawsuit, patent filing, etc.

Another possibility is to require the buyer to close but to give it indemnification rights for any loss it suffers relating to the MAC, or with the acquired business.

Be mindful of the negotiation of what constitutes an indemnifiable "loss"; particularly in respect of consequential damages, enterprise value and multiples of earnings.

Post Closing Covenants

Post-closing covenants require the action of one party, usually the Seller, to act in certain ways to assist the Buyer in transitioning the business it has purchased and/or to act or refrain from acting to help the Buyer preserve the value in the business it purchased

Many of these actions are non-controversial, such the Seller's assistance in transitioning customers, suppliers or employees or the parties working together on tax filings

Most contentious of the post-closing covenants are usually the covenant not to compete and the related non-solicitation covenants

Covenants Not to Compete

- Seller (in asset purchase transactions) and/or its shareholders (in stock purchase transactions and mergers) in a non-compete agreement agree not to provide services to or act as investors in enterprises which compete with the Buyer
- May be placed in purchase agreement or in standalone document
- Very much a creature of state law (see choice of law slide)
- Enforceability against small shareholders or non-shareholding employees needs to be considered closely; misuse of covenant could subject Buyer to damages for restraint of trade

Covenants Not to Compete *(cont'd)*

- Buyers' position: I need all seller employees with material knowledge of seller's business and operations not to compete against the acquired business anywhere seller has done or contemplates doing business for as long as possible so that I can get the benefit of my bargain by not having people with critical knowledge use it against the acquired business.

- Sellers' position: I understand this need for key, large shareholders but even then, it should be as short and narrow as possible. For non-shareholder/selling employees which are "key" to Buyer, Buyer should offer those persons employment agreements.

Covenants Not to Compete *(cont'd)*

- The internet has complicated geographical restrictions by making it easier for many kinds of enterprises to do business anywhere.

- If seller is taking back a promissory note, consider whether the covenant should be terminated if buyer defaults on the note.

Non-Solicitation Agreements

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Non-solicitation agreements or covenants are the slightly less obtrusive cousin to non-compete agreements

Non-solicitation agreements generally limit or prevent the selling company and/or its shareholders from seeking business from the selling company's customers and recruiting the selling company's employees

Also very sensitive to state law considerations

Key Boilerplate Provisions

- Found at the end of the agreement
- Most are non-controversial and provide common sense rules for interpreting the contract (e.g., entire agreement, severability, etc.)

Choice of Law

- Choice of law determines the substantive law to be used for dispute resolution
- While the laws of states are much more similar than different, there may be differences on interpretation of key provisions, such as disputes between a company and shareholders or between a company and its employees
- Parties sometimes choose the law of a neutral forum such as Delaware, with a well-established and well-known body of corporate law
- Some matters, particularly relating to employees, may not permit a contract's venue provision to be enforced; instead the parties may be compelled by where the employee is primarily based

Venue

- Venue is the physical locale where jurisdiction over disputes between the parties is to be resolved
- In transactions in which parties are from different states (or perhaps even more so, different countries), each party will generally want its home state venue to be the place where disputes are resolved for reasons of familiarity, advantage and cost.
- For a Seller, designating its home state can act as a de facto second basket, since the Buyer may not want to incur the cost and time of bringing a small action in a foreign setting
- Would a neutral forum without ties to the transaction accept jurisdiction?

Manner of Dispute Resolution

- Consider adding an initial provision mandating contractual mediation
- Arbitration (e.g., AAA or JAMS) often used because of perceptions of confidentiality, predictability and speed
- Litigation, either with or without compulsory mediation
- Waiver of right to jury trial

Questions or Comments?

If you have any questions about this webinar that you did not get to ask during the live premiere, or if you are watching this webinar On Demand, please do not hesitate to email us at info@financialpoise.com with any questions or comments you may have. Please include the name of the webinar in your email & we will do our best to provide a timely response.

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Meet The Faculty

Phil Buffington - pbuffington@balch.com

Phil Buffington is a partner in the Banking and Financial Services Team with Balch & Bingham LLP. He advises financial institutions throughout the United States on federal and state banking laws and regulations. For more than 30 years, he has served as a trusted advisor to community, regional and national financial institutions, helping them to assess and analyze regulatory and litigation risks. Phil counsels clients on a full range of issues, including federal and state regulatory matters, corporate governance, mergers and acquisitions, succession planning, strategic planning, capital planning and offerings, evaluating and assisting in the development of new products and services, and responses to examinations and enforcement actions. His practice also includes commercial lending transactions, health care and insurance. He serves on the Adjunct Faculty Staff of Mississippi College School of Law (Banking Law and Business Planning) and also serves as a Faculty Member at the Mississippi School of Banking (Commercial Lending I and II). He is a frequent speaker and presenter for CLE and other courses on topics related bank regulatory matters, commercial lending, secured transactions and other banking topics. Read More

Bob Dekker - bdekker@peakstone.com

Bob Dekker is a Managing Director at The Peakstone Group where he is responsible for transaction origination and execution with a primary focus on the Food & Beverage space. Bob has nearly 35 years of investment banking experience and has completed a broad range of M&A and capital raising transactions throughout his career. Prior to joining Peakstone, Bob spent six years as Managing Director and Head of Food and Beverage Investment Banking for Balmoral Advisors. Before joining Balmoral, Bob spent eight years with a boutique investment banking firm he co-founded, Insight Advisory Partners, that was focused exclusively on working with emerging growth companies in the food and beverage industry. Previously, Bob's investment banking career spanned working with large regional and international firms including Prescott, Ball & Turben, The Chicago Corporation and ABN-AMRO, where he oversaw that firm's private placement activities across North America.

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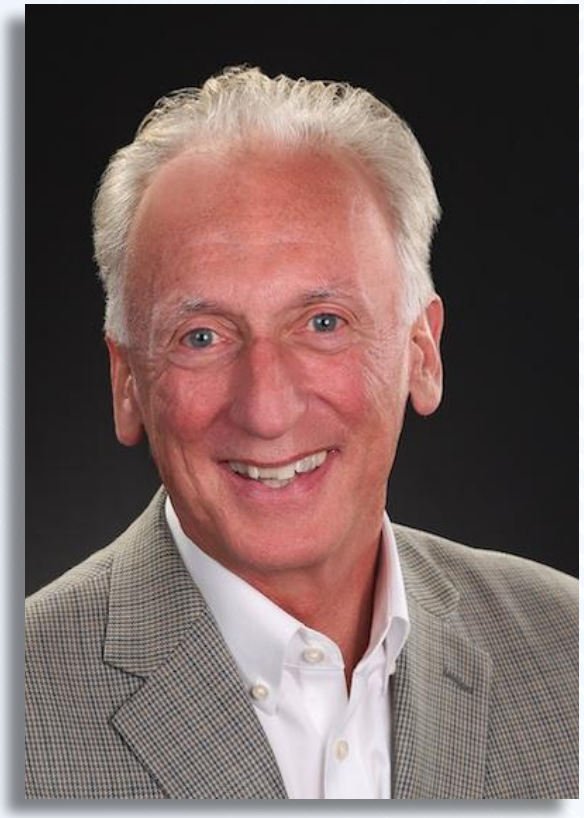

Allan Grafman is an investment banker at Oberon Securities, with over 30 years of experience raising capital and leading M&A transactions for media, licensing, and content technology companies. He has closed numerous transactions in all sectors of businesses driven by ownership and monetization of intellectual property.

Recently, Allan has served as CEO of IDW Media Holdings (NYSE) after serving for many years as Chairman of the Audit Committee. As CEO of All Media Ventures, he has been active in media advisory and served as a board director for both public and private companies. Allan is an expert in both media and technology, with a focus on intellectual property (IP) for consumer-facing and B2B companies in licensing, entertainment.

He has served as a fiduciary Board Director of over 12 companies. Other roles include Operating Partner at a private equity fund and CEO of a VC backed tech company. Allan's early career highlights include: President of Archie Comics; EVP & CFO of Hallmark Entertainment; VP & MD at Tribune Company; VP & GM at CCB/ABC/Disney; and Announcer and Salesman at KSHE Radio. Read More

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A partner in the Jaspan Schlesinger Narendran LLP Corporate and Commercial Transactions Group, Mr. Londin counsels numerous companies in connection with their mergers and acquisitions (both strategic and financial), financing needs and the execution of their business plans; financial concerns in capital markets transactions; emerging-growth companies; seed and venture capital clients in connection with the formation of their investment vehicles and making of their portfolio company investments; borrowers and lenders in secured financings; and companies and highly compensated executives in connection with their compensation and separation arrangements.

Jaspan Schlesinger Narendran LLP Is a full service law firm located in the NYC Metropolitan Area just outside of Manhattan.

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Michael is a Corporate and Commercial Transaction Lawyer at Weis Burney, LLC.

He has handled the negotiation and closing of hundreds of complex corporate and commercial real estate transactions both domestically and internationally. Michael's clients span a number of industries including manufacturing, distribution, real estate, health care, food and beverage, technology, and professional services. Armed with a wealth of knowledge and experience in corporate, real estate, and finance matters, including being a Certified Public Accountant since 1985, Michael helps his clients succeed personally and in business. His corporate experience includes all aspects of mergers and acquisitions, securities, and corporate governance.

Michael's legal career spans three decades. He focuses on mergers and acquisitions, "Outside General Counsel" representation, commercial finance, securities, real estate, tax and estate planning, and administration matters. Prior to joining Firsel Ross & Weis, Michael's practice included 10 years at a boutique firm in Chicago where he served as chair of the firm's business and transactional practice. Additionally, Michael was General Counsel for a long-term care organization. He began his legal career with a Chicago-based corporate and securities law firm, where he was an associate and then a partner.. Read More

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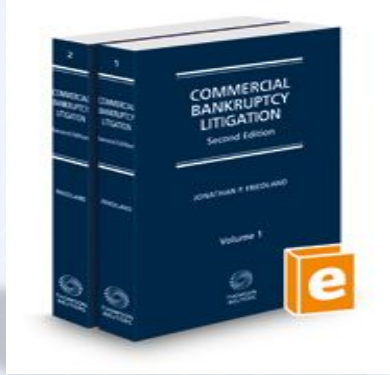

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