

Tax legislation to the rescue

By **SEAN KELLY** and **TOM FREEMAN**

In the wake of the economic downturn over the past two years, many companies revamped growth plans as a means of cutting costs to ensure their continued existence.

As cost-cutting measures have taken hold and the economy has begun to rebound, many companies are re-evaluating growth opportunities. With additional liquidity available on companies' balance sheets, plus slowly increasing access to credit, decisions will be made evaluating organic growth and growth-by-acquisition strategies.

Several passed and proposed tax law changes have been enacted during the past year that will impact the landscape of growth and acquisition decisions, including:

Tax breaks

A cornerstone of the 2001 and 2003 tax breaks was a reduction in the capital gain tax rates to a maximum of 15% for individuals. The tax cuts, set to expire at the end of 2010, caused a flurry of merger and acquisition activity in

the final quarter.

However, President Barack Obama on Dec. 17 signed into law the sweeping 2010 Tax Compromise, which extended capital gain rate reductions through 2012. Business owners will look to liquidate their investments prior to 2013 to take advantage of the low capital gains rate.

100% depreciation

This provision permits businesses to expense 100% of "qualifying" property purchased from Sept. 8, 2010, through Dec. 31, 2011. While this should spur some companies to increase capital expenditures during 2011, many companies already have capital-expenditure restrictions in place by their lenders and may look for outside equity to fund these purchases.

Estate and gift taxes

While death and taxes are certainties, they shouldn't necessarily coincide. Before the passage of the 2010 Tax Compromise, estate and gift tax rates were set to return to 55% with an exemption

of \$1 million.

The 2010 Tax Compromise provides an estate tax rate of 35% and \$5 million exemption through 2012. Like the capital gains rate extension, business owners may look to transfer investments to the next generation to take advantage of the low estate and gift tax rates. These types of transfers often require outside capital and should provide an opportunity for private equity.

Another pending legislative change of note is that Congress has had repeated discussions surrounding taxing carried interests as ordinary income. If passed, this measure would subject these interests to a much higher rate of tax. While nothing has been passed at press time, the issue will likely resurface. Industry experts fear that such legislation, if passed, will discourage future investment. ■

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Managing legal costs of M&A

By **JEFFREY A. FICKES**
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"How much is this deal going to cost me in legal fees?" Many executives

and business owners have asked this question, often receiving the answer "It depends." This answer is impractical when creating budgets or advising shareholders, investors and other stakeholders. To obtain a more comprehensive, useful answer, consider the following:

Where are the warts? While proper due diligence is critical to investigating a seller's organization, it also can be used to estimate legal fees. An environmental remediation business, for example, is heavily regulated, requiring a significant amount of due diligence. An initial review of the seller's permits and licenses and other environmental compliance matters provides counsel some level of predictability regarding legal fees. Additionally, product recalls, lawsuits, tax disputes and other business "warts" that increase legal costs can often be found, and related legal costs estimated, in early stage due diligence.

Attitude is everything. Buyers, sellers and their attorneys often directly correlate the purchase price of a deal to the anticipated legal fees. Instead, the sophistication and attitude of the buyer, seller and their respective counsel should be indirectly correlated to estimating legal fees. A buyer experienced in M&A transactions can perform due diligence on the seller's business with less involvement from outside counsel. An attorney without M&A experience may not be efficient or effective in representing a seller in negotiating key purchase agreement concepts. While this attorney should be involved in the transaction as the seller's trusted adviser, he or she should not have primary negotiating

and drafting responsibility. The seller could reduce legal costs and likely receive more qualified legal counsel by engaging M&A counsel. Finally, the parties' relative motivation to complete the transaction and level of trust is important. Lack of trust or professionalism can prolong or terminate deal negotiations.

Third parties. Banks, investment bankers, consultants, regulatory agencies, landlords, customers and other parties may be involved in any deal. Typically, counsel negotiates the terms of those arrangements, so the extent to which third-party contracts or consents are required affects fees. Finally, the negotiation of non-competition and/or employment agreements with the seller's employees and others impacts fees.

Alternative fees. Alternative fee arrangements allow the buyer or seller to manage M&A fees, particularly when the buyer or seller has multiple planned acquisitions or dispositions. Some examples include fixed/flat fees, capped fees and discounted hourly billing rates with a "results-based" fee or "success fee." Alternative fee arrangements are often fluid in nature, requiring open lines of communication between counsel and client.

While there may be additional factors specific to each deal that affect M&A legal costs, an analysis of the above factors with your attorney will help you plan for and better estimate your legal fees. ■

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The operating assets of



Akron, OH
have been acquired by
Total Distribution, Inc.
a subsidiary of



Canton, OH

The undersigned initiated the transaction, assisted in the negotiations, and served as financial advisor to Terminal Warehouse Incorporated.



The Hall China Company
East Liverpool, OH
has been acquired by



Newell, WV

The undersigned initiated the transaction, assisted in the negotiations, and served as financial advisor to The Hall China Company.



The assets of

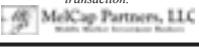


Thayer Power & Communication Line
Construction Co., Inc.
Fairview, PA
have been acquired by



Bloomfield Hills, MI

The undersigned initiated the transaction and acted as exclusive financial advisor to Thayer Power & Communication Line Construction Co., Inc., Debtor-in-Possession, in this sale transaction.



The operating assets of



STERIS Corporation's
Hausted® Patient Handling Business
Montgomery, AL
have been acquired by



Pittsburgh, PA

The undersigned initiated the transaction, assisted in the negotiations, and served as financial advisor to STERIS Corporation.



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