Asset Acquisitions: Buy the Business, Not the Liabilities

Buying a business by purchasing its assets is a flexible way to get exactly what you want and leave what you don't. Unlike a stock deal or merger where you automatically take everything the company owns and owes, an asset acquisition lets the buyer list the specific assets it's buying and the liabilities it will assume, which reduces the risk of inheriting unknown problems but increases the work needed to identify and transfer every piece needed to run the business.

That extra work shows up in the mechanics. Assets transfer with bills of sale, contracts move by assignment and assumption (or novation), real estate by deed, and certain intellectual property under specialized assignment requirements. Because many commercial contracts have anti-assignment or change-of-control clauses, third-party consents are common in asset deals even when they wouldn't be in a stock purchase. Expect more formal documents and more checklists than in other structures.

Before anyone drafts the definitive agreement, sellers typically organize the process: decide whether to run an auction or approach buyers directly, clean up records, and ensure diligence materials (financials, contracts, litigation, IP, leases) are complete. If a public company is the seller, Regulation FD can force disclosure of material non-public information shared without a confidentiality agreement, so NDAs are standard. Parties usually memorialize headline terms in a non-binding term sheet or letter of intent, make confidentiality (and often exclusivity) binding, and then open the data room.

Diligence is where buyers confirm what they're buying, e.g., title to assets, required consents, liens to release, employee and benefit plan issues, IP ownership and licenses, environmental risks, real estate condition, and the specific "must-have" assets for the business model. Findings inform price, the risk allocation in the purchase agreement (representations, warranties, indemnities), closing conditions, and the day-one integration plan.

Corporate approvals are straightforward but essential: boards (or managers) approve, and stockholders or LLC members may need to approve significant asset sales. Regulatory approvals may include Hart-Scott-Rodino premerger filings and waiting periods for transactions that clear size tests, industry-specific approvals (e.g., telecom, financial services), and foreign merger control if assets or operations reach outside the U.S. Contractual consents can include landlords, lenders (for covenant and lien releases), and key customers or suppliers. Start on consents early, they drive timetable risk.

Tax is where buyer and seller often want different things. Sellers in a C-corp generally face two levels of tax, once on the company's gain from selling assets and again when proceeds are distributed, so they often prefer stock deals. Pass-through sellers (partnerships/LLCs taxed as such, or S-corps) can avoid entity-level tax; C-corps may reduce it with NOLs or by retaining proceeds. State and local sales, use,

real estate transfer, or other transfer taxes can apply in asset sales (contracts often shift who pays). By contrast, buyers like asset deals for the basis "step-up" in acquired assets, which increases future depreciation and amortization; in some stock deals the parties can elect to get similar treatment (e.g., a Section 338(h)(10) election). Pre-closing income taxes of the seller generally stay with the seller unless expressly assumed, but some jurisdictions impose successor-liability statutes for certain taxes. Engage tax advisors early, including for purchase-price allocation.

Even with a careful "no assumed liabilities" clause, some obligations can follow the business by operation of law. Courts may impose successor liability in narrow circumstances, e.g., express or implied assumption, de facto merger, fraudulent transfer, or "mere continuation" theories, and specific regimes (pension/benefit and environmental laws) can attach liability to the buyer. Many states repealed old-style bulk sales laws, but some use revised versions that can still bite; buyers often waive formal compliance in exchange for robust seller indemnities.

The asset purchase agreement (APA) pulls it together. It names the parties (and any needed parent guarantees), precisely lists included and excluded assets and assumed liabilities, states the consideration (cash, notes, equity) and when it's paid, and spells out transfer mechanics (seller deliveries like deeds, IP assignments, UCC lien terminations; how receivables and payables are handled; and how contracts move over). Representations and warranties cover organization, authority, financials, absence of undisclosed liabilities, title to assets, IP, customers/suppliers, employment/benefits, environmental, taxes, and more; indemnities and caps/baskets allocate post-closing risk, and representation & warranty insurance is increasingly used to supplement or replace indemnity packages. When signing and closing are split, pre-closing covenants (operate in ordinary course, preserve assets, notify of material changes) and conditions (consents obtained, no injunctions, accuracy of reps) bridge the gap. Post-closing restrictive covenants, e.g., non-compete and non-solicit of customers and employees, protect what the buyer just purchased. Disclosure schedules are critical: they both qualify the seller's statements and often serve as the definitive list of what, exactly, is being transferred. Ancillary documents, including assignments, bills of sale, novations, deeds, IP assignments, lien releases, and UCC-3 terminations, finish the job.

Closing isn't the end. Buyers still need to finalize contract assignments and novations, establish insurance and payroll, make announcements, and track potential indemnity claims before survival periods expire. They also monitor the seller's compliance with restrictive covenants and tie out any post-closing purchase-price adjustments.

A few specialist topics deserve emphasis. Employee transitions may require offers to key personnel, careful review of union agreements and benefit plans, and WARN Act notices for qualifying layoffs orclosures. Real property diligence often includes inspections, surveys, appraisals, and title insurance. Environmental diligence and, where appropriate, formal assessments help quantify cleanup or compliance risk. IP transfers must confirm ownership, license rights, and any third-party consents for embedded software or data. Across all of these, antitrust compliance governs pre-closing information sharing and integration planning; for HSR-reportable deals, expect a filing fee and a 30-day (or 15-day for cash tender offers) waiting period before closing absent early termination.

Bottom line: asset deals let buyers tailor what they're buying and shed unwanted baggage, but they demand meticulous scoping, more paper, more consents, and disciplined tax and regulatory planning. Get the diligence right, map the consents, align on tax, draft a precise APA with smart risk allocation, and organize the closing mechanics, then integration will feel like execution, not triage.

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