

## Mergers & Acquisitions Due Diligence

*The first in a three-part series on Merger & Acquisition Transactions ("M&A")*

While your company may have put months of thought and planning into acquiring a company or agreeing to being acquired by another company, the handling of equity plans is typically something that must be sorted out and dealt with quickly, efficiently, and often at the last minute. Even in the best of cases, where the stock plan group is brought in early in the process, a lot of the data you need to work with may not be accessible or final until after the deal is complete. Therefore, you need to be ready to spring into action at a moment's notice, which makes due diligence critical. This article is intended to provide you with many of the critical questions to which you need answers BEFORE you get started. We will refer to the merger or acquisition as the "*Transaction*" in the sections that follow.

### What Can I Do Now?

#### 1) Ask Questions and Address Any Project Concerns

The best place to start is to understand the timing of the Transaction. When is the Transaction going to close ("Closing Date") or when does Management expect it to take place? What might cause the Transaction's Closing Date to be delayed or accelerated? What is the likelihood that a change will happen and how (and how fast) will you be notified? How quickly will you be expected to complete your portion of the project? The answers to these questions will allow you to begin setting up your timeline. It is crucial that you immediately compare the required M&A timeline with your other regularly-scheduled activities. You may find yourself working some unexpected late nights or working the weekends to meet the requests of lawyers, auditors and other advisors working on the Transaction. If the expectations of you and your team are not realistic, make that clear earlier rather than later. Make your concerns and solution clear - do you need more time, more help or more what? Once the process begins, it is too late and you WILL BE held accountable for meeting those improbable/impossible deadlines. Open communication is key and if for some reason you are not on the project team or you are not getting the communication on the Transaction, raise your hand and seek input from your management chain in Legal and HR. Advise or remind them what you can do related to equity and what kind of value you can provide to the project.

#### 2) Read the Transaction Documents

The next step is to understand the key terms of the Transaction and how they apply to each equity plan. At this juncture, it is not just about asking questions it is key to do your own due diligence or homework. Read the actual Transaction documents from start to finish. For publicly traded companies, these material documents are required to be filed with the United States Securities and Exchange Commission ("SEC") via the SEC's EDGAR website (<http://www.sec.gov/edgar/searchedgar/companysearch.html> - You will need to know the ticker symbols of the acquiring company and/or the target company being acquired and the Form Type (i.e. Current Report on Form 8-K (8-K Item 1.01) or Definitive Merger Proxy Statement (DEFM14A))). For private companies, obtain these documents from the Legal Department or external legal counsel. Highlight any areas that apply to the treatment of equity securities and company equity plan awards (i.e. stock options, restricted stock awards/units, ESPP, insiders, conversion ratios for shares/prices, rounding methodology for shares/prices, etc). The devil really is in the details! It is critical that the processing of the Transaction proceed in exactly the manner it was documented and communicated, and according to the agreed-upon terms. There is no "close enough" in this situation! Lawyers will likely run the process but they will need assistance and data from you and your team. We suggest that you compile a document that outlines what needs to happen and have legal counsel confirm that you have all the details correct.

### 3) Dig A Little Deeper

Once the general terms are confirmed, you need to dig a little deeper. What kind of equity plans does the acquired company have? Will there be accelerations or vesting extensions? Will there be immediate terminations/forfeitures? Who are the SEC Section 16 filers and how will that list change? Who will be filing any Section 16 Forms 3 and 4 filings in connection with the transaction? Will there be a final ESPP purchase and who will be responsible for processing it? Which equity database system/platform is the other company using? How/when will new employee IDs or grant numbers be assigned and how will you be notified? You now need to use all of this information to flesh out your timeline with each and every necessary step. The key is to be prepared and think ahead before the request is made!

### 4) Know your System Capabilities

Talk to your equity vendor/provider to understand what support they can provide and what their system is able to handle. Can they perform a cash out? How does it work? Can they perform any of the work and take that off your plate? How is the current contract impacted? Do they have a busy calendar already or would they be able to provide support? Being able to have your vendor involved early can make for a smoother transition of the data and maybe take some work off your plate.

### 5) Confirm the Details When They Are Available

During this Due Diligence/Planning Phase there are likely some details you won't know until you can actually see the data which with you will be working on. Your detailed timeline might have a couple of areas marked "TBD". For instance, you may not know how many ISOs will need to be accelerated which means you won't know if there will be ISO limit recalculations and/or how many, which means you don't know how much time that will take, etc. You may, therefore, need a few different paths planned out so that you will know exactly what to do when the time comes.

In the [next step](#) of this three-part series, we will walk you through some of the actual processing steps of the Transaction including how to get through some of the most common TBDs. 'Till then...

Questions or comments? Please email us at [xtra@sos-team.com](mailto:xtra@sos-team.com)

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