



Blair Horn

Q&A

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Q: What do today's markets mean for mergers and acquisitions in 2009?

ASK A LAWYER

A: Unprecedented declines in asset values, combined with highly restricted credit markets, will shift bargaining power from sellers to buyers. If you are involved in M&A, you can expect some or all of the following trends to occur:

- Strategic buyers with cash will be more prominent than leveraged financial buyers. Access to capital will be vital.
- The venture capital and IPO markets will be almost non-existent (other than follow-on rounds of venture funding), which will push smaller companies to the M&A market.
- Use of earn-outs, vendor take-back financing and retained equity will increase to close valuation gaps and price expectations between buyers and sellers.
- Given the uncertainty around credit availability, buyers will return to insisting on "financing out" conditions to ensure they are not obligated to close on transactions they can't finance. Some buyers may insist on delaying the execution of a definitive purchase agreement until the buyer is able to simultaneously execute definitive documentation with its lenders.
- Buyers will want to conduct due diligence around the impact of the current market conditions on the future operations and prospects for the target business.
- Recent litigation involving buyers terminating transactions prior to closing will lead to greater focus on termination rights in the drafting of purchase agreements.
- Sellers should expect longer survival periods for representations, warranties and indemnities, reduced "baskets" on indemnity claims, extended escrows to backstop indemnities and increased focus on post-closing purchase price adjustments to ensure protection from breaches of representations and warranties.
- Buyers will push to expand material adverse change-outs to go beyond seller-specific changes to more general market and industry based changes.
- Buyers may have multiple targets to choose from so sellers should begin the preparation process early to ensure the buyer's due diligence goes smoothly ("reverse due diligence").
- Sellers may be more willing to enter into exclusive negotiations with buyers that can demonstrate arranged financing and the ability to close quickly. The uncertainty and risks relating to the dislocation caused by running an auction process in these difficult markets may cause sellers to be more inclined to pursue exclusive, confidential negotiations with a single buyer.

Whether you are a buyer or a seller, you will likely be affected by a number of these trends. An experienced M&A lawyer can help you navigate through these issues.

Blair Horn is a partner at Fasken Martineau. His practice focuses on mergers & acquisitions and corporate finance.

2900 - 550 Burrard St, Vancouver, British Columbia, Canada V6C 0A3

T: 604 631 3131 F: 604 631 3232

www.fasken.com