

Mergers and Acquisitions — Are They for You?

The equipment industry has undergone many changes during the past decade. We have all seen large manufacturers acquire other large manufacturers, as well as acquire short line manufacturers. The latest transaction is the merger of New Holland N.V. and Case Corporation resulting in a company with a \$1.6 billion market cap. The trend for many of the manufacturers has followed the old saying “bigger is better.” Regardless of whether a person agrees with that old saying, the trend in favor of consolidation is trickling down to the dealership level. Thus, mergers and acquisitions (M&A) are becoming more common for equipment dealers. It is likely that this trend will continue on a rapid pace due to the consolidation of the manufacturers. The question then becomes, are mergers and acquisitions for you?

Reasons for Consolidation

The reasons dealers enter into M&A transactions may vary. For example, it could be to eliminate competition in a particular market area, to create economies of scale, to diversify in different agricultural or geographical regions, to protect against adverse weather conditions, or simply to diversify into different types of markets, such as heavy farm equipment in rural areas versus lawn and garden equipment in metropolitan areas. Regardless of the reasons for dealers to enter into M&A transactions, there are many factors dealers should consider before attempting such a transaction. This article will address preliminary issues of M&A transactions.

Step One

The first step in the process is that the dealer should establish its goals for the M&A transaction. What is the dealer trying to achieve? Is it increased sales? Cost sharing? Less competition? Diversity of markets or market places? Potential exit strategies for implement dealers who are nearing retirement? The goals should be determined in a clear and thoughtful manner. After all, if the goals are not established at the beginning, the dealer may be destined for disaster.

Step Two

The next step in the process is to locate and evaluate potential M&A partners or targets. Which other dealership would help to accomplish the dealer's goals and yet be compatible in a business setting? Once a partner or target is determined, the dealer will necessarily need to approach the target to determine whether any interest exists in entering into a transaction, and whether the goals of the target or partner dealership are compatible.

Step Three

If interest exists, the business structure will need to be determined. For example, will it be a purchase of assets or a purchase of stock of another corporate dealer? Will a limited liability company be used or a traditional corporation concept? On the other hand, would the two corporate dealers simply merge their businesses under corporate laws? Assuming the dealers are organized in the corporate form, the decision relating to the structure is often guided by whether the transaction is characterized as a taxable or non-taxable event. The structure may also be driven by non-tax factors such as unknown liabilities, contract assignment restrictions with manufacturers, shareholder participants, secured assets, existing financing or financing availability, and the exit strategies the dealers desire to employ. Often an attorney and/or a tax accountant is useful to help structure the transaction.

Step Four

After determining the structure of the transaction, the parties should perform due diligence. Due diligence is useful in determining whether each side is obtaining the benefit of its potential bargain. Due diligence can include obtaining and analyzing financial records, receiving or reviewing customer records, evaluating assets and liabilities, determining and evaluating management and staff, determining whether contingent liabilities and lawsuits exist, and, last but not least, determining whether ownership and management of the two companies are compatible. Conducting due diligence is essential to determine whether the transaction will be successful for both parties.

Step Five

Once the first three steps have been completed and step four has been preliminarily completed to the satisfaction of the parties, full attention should be turned to preparation of appropriate documentation to complete the transaction as agreed upon between the parties. Successful completion of an acquisition or merger transaction requires careful planning and coordination among the parties. In addition to planning and coordinating the preparation of a definitive agreement, parties may need to complete the following before a definitive agreement may be executed: obtain consents from owners, creditors and other parties, file required documents with regulators, transfer property located in other states, qualify to do business in other states, establish procedures for cancellation and issuance of share certificates, protect tradenames and other business names, and select and engage professionals to assist with the transaction. The key document in the transaction is a definitive agreement, which, although it will vary depending upon the structure of the transaction, specifically sets forth the consideration to be exchanged by the parties, any conditions precedent to consummation of the transaction (for example, completion of due diligence to the satisfaction of the parties), covenants and agreements for pre-closing and post-closing activities, representations and warranties regarding the parties' respective businesses, indemnification, events of termination and schedules and ancillary agreements and documents. This can often be a frustrating and time consuming part of the process, but it is far better to focus on detail at this stage of the transaction, rather than after the transaction has been completed.

Conclusion

In conclusion, there are many other steps that a dealer will desire to implement if he determines that an M&A transaction is appropriate. Regardless of whether a dealer likes the concept of mergers and acquisitions, it is beginning to occur on a frequent basis throughout the United States on the dealer level. Be prepared!

Clay Christensen is a shareholder/director of Day, Edwards, Propester & Christensen P.C., located in Oklahoma City, Oklahoma. He represents equipment dealers and distributors across the nation in business transactions as well as litigation. He grew up assisting in operating a family owned equipment dealership in Oklahoma. If you have any questions about the article, please do not hesitate to contact the author at 210 Park Avenue, Suite 2900, Oklahoma City, Oklahoma 73102, (405) 239-2121 or jclay@oklawyer.com.