Structuring an Acquisition:
Stock Purchase or Asset Purchase?

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The threshold question in the purchase or sale of a business is one of structure. Should the transaction purchase the entire business or just its assets? At first blush it may not seem to make much of a difference to the parties. It is at this early stage in the acquisition process, however, that some pertinent questions must be asked and a thorough analysis undertaken.

A stock purchase (or a membership unit purchase if a limited liability company is the target) means that the buyer is acquiring the business entity itself from the owners. As the ownership interests of the entity are being purchased, the buyer acquires all of the assets and liabilities of the entity. A stock purchase may be attractive to a buyer if the business holds several permits and licenses, is a party to many contracts, and has several assets that are titled with state or federal agencies. Assigning or obtaining such items with a different entity can end up costing the buyer significant time and expense, and can interrupt the operation of the business purchased. Sellers generally prefer stock purchases because of the ability to walk away from the entity and a typically favorable tax treatment.

As the name implies, in an asset purchase the buyer is acquiring only select assets of the seller. The buyer will use an existing entity or form a new one to purchase and hold the acquired assets. In some cases all assets are purchased, in others the buyer "cherry-picks" the assets it wants to acquire. Liabilities are not automatically assumed as part of the purchase, but the parties may negotiate the assumption of some of seller's liabilities as part of the deal. As the buyer is not stepping into the seller's shoes, all licenses, permits, contracts and titles related to the assets purchased must be assigned or obtained. As stated above, this process may serve to hold up the closing of the deal or, if the buyer agrees to close beforehand, the buyer's ability to use the assets affected may be significantly delayed. On the tax side, buyers typically prefer an asset purchase as its basis in the assets is "stepped-up" to the amount of the purchase price. In addition, the buyer may allocate the purchase price among the assets to reflect their fair market value. Tax treatment for the seller in an asset sale is often not as favorable as in a stock sale, but this can be offset by the higher purchase price typically commanded by the seller for the asset transaction.

When looking at entering into a business purchase/sale transaction, a party should take care to spend a sufficient amount of time determining the structure of the deal. An experienced transaction attorney should be consulted at this stage to provide counsel regarding structure on the legal side. The party should also consult with its accountant or tax advisor to make certain that it understands the ramifications, both beneficial and non-beneficial, on the tax side regarding structure. If you are considering buying or selling a business or substantially all of its assets, please contact the attorneys at Morrison Sund PLLC at (952) 975-0050.