



Tips for Those Considering the Shareholder Representative Role

Review and Mitigate Risks

Tax Expertise

- Be prepared for the responsibilities associated with the preparation, filing and review of pre-closing and straddle period federal and state corporate income tax returns. It is important to review returns from the perspective of the potential risks and benefits to the selling holders, and correspond with the buyer regarding these matters.
- Consider the time commitment to identify and pursue refunds potentially owed to shareholders.

Personal Liability

- Determine if actions you would take as a representative are covered by insurance. The D&O policy may not apply since you are not an acting officer or director.
- Know your rights and obligations. Have your own legal counsel review the merger and escrow agreements to assure your interests as shareholder representative are properly protected.

Lawsuit Risk

- Consider the implications of being named in a lawsuit. If a dispute related to the transaction goes to litigation, the representative is usually named as the defendant. According to our research, this occurs in about 12% of transactions with claims.
- Determine the impact of a lawsuit on your personal credit. Applying for a personal loan, mortgage or even health insurance in the years following closing could be jeopardized.
- Assess the impact of a lawsuit on your firm's fundraising efforts. Most funds are required to disclose to potential investors all lawsuits to which the fund or its partners are a party.
- Decide how you will fund litigation if it arises. Will you pay all expenses upfront and hope to be reimbursed later? Will an expense fund be available?

Indemnification and Exciupation

- Review the indemnification terms of the merger agreement. Ensure you understand the terms as they relate to you as shareholder representative. If you are not comfortable with them, consider engaging separate counsel.

Conflicts

- Review potential conflicts that may exist between the buyer and stockholders you represent. This is especially relevant if you will be employed by the buyer after closing or want to sell another portfolio company to them.
- Consider potential conflicts with other stockholders. If you hold a different class or series of stock, might they assert that you were not adequately looking after their interests?

Prepare for the Time Commitment

Claims

- Issues arise on most transactions. According to our 2022 M&A Claims Insights Report, 64% of transactions have post-closing issues.
- On average, claims take 7 months to resolve. Once a claim starts, it will require your time.
- Claims can happen at any time. Be prepared for last minute issues—30% of indemnification claims are made during the last week of the escrow period.

Date and Term Tracking

- Track future important dates and terms in the merger agreement. Missing a key future date could subject you to personal liability.

Administrative Tasks

- Even when no claims are made, you may be subject to tax reporting related to foreign accounts or escheat laws if any stockholders cannot be located.

Anticipate Required Resources

Independent

- All tasks will be your responsibility. As shareholder representative, you are no longer part of a board or management team.

Limited Access to Contacts and Files

- Identify who your resources are. Access to your former teams may be limited after closing if they continue to work for the combined company.
- Plan how you will obtain resources you need. Conflict issues may prevent access to the law firm and diligence materials, such as emails and documents, that represent your side in the transaction.

Tax Expertise

- When tax matters arise on a deal, they often require in-depth analysis to determine potential liabilities, as well as tax benefits to selling holders.
- Decide how you will manage hiring and overseeing the appropriate tax experts to perform these analyses.
- Consider the mental load of highly scrutinized tax issues.

Expense Funding

- Determine how expenses will be paid. Accountants, attorneys, and advisors, including former employees, will need to be compensated for their time spent on post-closing matters.

POST-CLOSING FACT

12% of deals with claims end up in litigation

POST-CLOSING FACT

2/3 of deals have post-closing issues

ALWAYS REMEMBER

You can be made party to a lawsuit even if you do nothing wrong