

## Ten Tips for Avoiding Delays in M&A Payments

*Once an M&A deal has closed, merger parties are looking for a few crucial things from their paying agent: They want the process to be as simple as possible to complete, the payees want their money in their account as fast as possible, and the buyer wants timely reports on completed payments. Post-closing payment challenges and payment delays can be avoided with these considerations:*

### 1. Eliminate Need to Collect Certificates

Stock certificates are often misplaced, and the process of searching through file cabinets or safe deposit boxes, filling out affidavits of loss, and potentially paying for a bond wastes time and money. Also, the process of printing, mailing, filling out, returning, and processing a Letter of Transmittal (LOT) is similarly wasteful.

In some transactions, the collection of physical stock certificates and paper LOTs may still be required. Often, however, this is not the case, and the payments process can be significantly simplified with online management. With merger transactions, under **UCC § 8-207**, buyers can rely on the target company cap table when making payments, eliminating the burden of collecting and keeping track of physical certificates. M&A professionals can significantly speed up the timing of payments from days to hours with the shift to online. This can be readily accomplished by: (1) eliminating the requirement of collecting physical share certificates as described in the article, **Legal Opinion Paves Way for Paperless Closings**; and (2) considering an online LOT process to facilitate the payment process in an expedited manner at the time of the merger transaction.

### 2. Identify Compensation Payments Early

Merger consideration classified as employee compensation can be a hassle for the buyer, particularly post-closing payments like escrow or earnout distributions. Buyers must keep track of hundreds or thousands of payees who may receive post-closing payments, even if they are no longer employees, at an additional cost. It can be complicated and time consuming for buyers to manage tax reporting for compensation payments.

Identify compensation payments early in the process so they can be accommodated. Paying agents that can handle compensatory payments help acquirers avoid adding staff or implementing new systems to make post-closing compensation payments to current or former employees.

### 3. Mitigate Human Error

Illegible handwriting on paper LOTs can lead to errors or payment delays. An online M&A system enables holders to enter information directly—removing the risks of deciphering handwriting or improperly completed forms—resulting in fewer errors, eliminating the possibility of the user editing the terms of the LOT, and faster and more accurate payments. An online M&A system can also streamline the experience for returning users.

### 4. Taxes are Taxing: Keep Tax Documents Current and Define Tax Treatment in the LOT

Timely submission of a complete LOT and a complete tax form is the key to receiving an expedited payment. Check with the IRS website to ensure that the tax forms you are soliciting are current and anticipate any additional documents necessary to transmit payment for your foreign or domestic deals. If you are uncertain about the tax requirements, consult a tax advisor before closing a transaction.

Define in the LOT which tax documents will be required for holders to receive payment. This starts with assessing the shareholder base, especially for foreign holders and non-employee option holders. Having clear instructions about how to complete and where to find tax forms can prevent unnecessary delays or shareholder phone calls.

Clarify in the payments agreement the tax reporting to be done by the paying agent (or other parties) for all payments. This eliminates uncertainty months later at tax time and allows for collecting additional information needed for tax reporting, like cost basis or date of acquisition for covered securities, at the time of closing.

### 5. Update Contract and Payment Information

Typically, post-closing payments are processed using the same payment instructions used for closing payments. Inquire how payees can update this information with the paying agent after closing.

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## 6. Clarify Closing Payment Calculations & Cap Tables

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Ensure that payees are aware of the net amount of closing and post-closing payments they should expect to receive. Some payees may only hear or read about the gross transaction value and not realize that it is typically adjusted by things such as escrows and transaction expenses, which can cause confusion or consternation if their payment amount differs from what they were expecting.

Payees may also be exposed to changes in the cap table and will want to understand changes. It is also essential to maintain the cap table and keep it updated throughout the company's life to avoid last-minute, rushed fixes that are prone to error. In addition, when pro rata percentages are subject to change post-closing because of the effect of escrow releases or milestone payments, it is important to identify how the various possible percentage calculations are to be made.

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## 7. Avoid Joint Instruction Delays

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Most escrow agreements require joint written instructions from the buyer and the shareholder representative for the escrow agent to release funds to the shareholders. However, M&A deal parties may become frustrated if the other side does not move quickly to execute the requisite instructions. Even on deals with no claims against escrow, tracking down parties without a vested interest in receiving funds can be painstaking and time-consuming.

Consider including in the merger or escrow agreement specific time frames of when the parties must act. For instance, a merger agreement may provide that each party must deliver its signature to joint instructions to release the escrow portion not subject to outstanding claims within two business days of the expiration date. The parties could also consider providing for an automatic release of escrow funds by the escrow agent after a specified period. In addition to building in contractual terms, preparation and planning for the escrow release is the best way to avoid delay.

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## 8. Define Payment Options for Payees

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Understand which payment methods are available to payees and the pros and cons of each. ACH is often a free option but can take one to two business days to become visible in a payee's account. Wire transfers process immediately but are often accompanied by a processing fee. Checks are usually the slowest option but are still preferred by some merger parties.

Another consideration is whether shareholders will require payments in their native currencies, which typically require foreign exchange (FX). Consider finding a paying agent who not only allows deal parties to select settlement currencies but can also allow shareholders to select their preferred currencies. Integrated FX in a deal-management system can optimize settlement currencies for all payees in the currency they choose. Look for a paying agent with technology that can manage seller payments, debt payoffs, and transaction expenses in a wide range of global currencies with institutional exchange rates.

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## 9. Think Ahead: Streamline Paperwork and Compliance

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Consider every type of payment and the documents needed from each M&A deal party for a clearer path to closing. Different paperwork may be required for warrant holders, vendors, creditors, and holders of various classes of shares. Be aware of paperwork habits that can bog down a negotiation as well as necessary compliance needs, such as:

**Complicated LOTs:** Avoid complicated letters of transmittal (LOTs) that can divert attention and cause delays with simple, more intuitive LOTs that fulfill all legal requirements and have been designed expressly to be easy to understand. Even better, do all this with an online paying agent, so shareholders enter information directly to ensure that all fields are correctly completed and simple transcription errors are avoided.

**KYC/ AML:** U.S. Patriot Act requirements—also known as Know Your Customer, or KYC requirements and anti-money laundering (AML) procedures—may delay payment or become a pre-closing hassle—costing time, money, and resources. To streamline this process, start collecting the necessary documents early to clear your bank's KYC process. Find a paying agent whose KYC process is catered to M&A and specific entity types (such as a corporation, limited liability company, or limited partnership).

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## 10. Use a Single Provider for Payments and Escrow

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Finally, bundle payments and escrow services with one provider for a smoother process. Treat your paying agent as a toolbox to make your closing and post-closing payments run smoothly. For an even more streamlined process, find an administrator who also provides escrow options. Doing so can streamline the coordination of the closing and post-closing tasks.