

# What's Next?

## A Path Forward in Uncertain Times



### Top 10 Questions to Ask When Considering Distressed M&A

#### **What Do I Need to Know?**

A challenging economic environment creates ever increasing opportunities for identifying value-added transactions notwithstanding ongoing financial uncertainty. With distressed M&A activity on the rise, now is the time to target stressed or distressed companies and their assets. When the complexities and risks of distressed M&A transactions are properly navigated, outsized returns can be realized. Institutional and strategic purchasers of troubled companies and assets can manage the potential pitfalls of distressed M&A transactions, and realize the benefits from doing so, when best practices are followed.



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### Question 1

What is the nature of the Target's distress?

- **Identify the Distress.** Financial, operational, litigation, regulatory/governmental, macroeconomic forces, etc. Then, propose a solution.

### Question 2

What is my edge?

- **Differentiation and Execution.** Relationships with Target; strategic v. institutional perspective; purchasing existing debt, claims or interests and providing forbearance; accelerated due diligence; fewer closing conditions, and a clear transaction runway; cash consideration; facilitating process with pre-closing financing (DIP financing).

### Question 3

How do I win the pole position?

- **Cash is King.** Distressed sellers and their lenders will likely prioritize return of capital over sharing in potential future upside.
- **Information Advantage and Efficient Diligence.** Purchasers with information advantages and efficient diligence strategies can obtain first mover advantages.
- **Commit Resources and Reduce Process Friction.** Acquirers should convey willingness and ability to commit resources and act quickly.
- **Strategic.** Hire professionals familiar with the process. Be the "stalking horse" in bankruptcy process and shape the in court sale or in court sale process (most of the time for diligence, access to management, design sale procedures and bid protections).

### Question 4

What do I need to know and how do I learn that quickly and efficiently?

- **Identify Assets.** What entity owns them? Are they encumbered? Can assets, including contracts and contract rights, be legally transferred to the acquirer? What consents are needed?
- **Identify Liabilities.** Secured and unsecured debt; statutory liens; rent; pending and potential litigation; pensions and employee benefits; trade obligations.
- **Identify Operational Concerns.** Employee retention; customers; deferred CapEx.
- **Runway.** What are the Targets' runway and immediate financing needs? Provide the needed solution.
- **Forum.** Can the transaction be consummated out of court, or is an in court sale or in court sale process needed?
  - Consider the timing of critical events such as loan or bond defaults, payments due under critical agreements and production schedules.
  - An acquirer that provides DIP financing can provide the Target with a runway to conduct an in court sale or in court sale process, position itself as a stalking horse bidder and "credit bid" its debt for the assets.
- **Planning.** Know the competition and anticipate competitive bidding. Solidify factors and alliances that differentiate your bid.

### Question 5

What are the risks I cannot undertake and how are they eliminated?

- **Timing.** Starting diligence as early as possible militates against abbreviated sale timeline.
- **Fewer Contractual Protections.** Representations and warranties may be narrowly tailored. Remedies against the distressed Target may be of little or no value.
- **Insolvency.** The Target may file for insolvency protection.
  - **If before closing**, the Target may reject the sale agreement.
  - **If after closing**, the Target may become unable to provide transition services, or satisfy indemnification requirements.
    - Acquirer may seek a lien on other assets of the Target to secure indemnification, damages and other claims, or structure the transaction to include a holdback note, escrow account or parent guaranty and/or indemnity.
    - Obtain M&A / reps & warranties insurance.

## Question 6

What is the preferred structure, out of court or in court, and what are the action items, timeline, costs and benefits of each?

### Out-of-Court Sale

- **Benefits.** Cost-savings compared to insolvency sale and avoidance of potential negative insolvency stigma. More likely to contain exclusivity, no-shop covenants and closing-outs than insolvency sale.
- **Structure.** Asset Purchase Agreement—all liabilities not specifically assumed by the purchaser are left with the Target.
- **Action Items.**
  - Be prepared to quickly identify diligence needs.
  - Deploy legal and financial advisors. Consult with tax advisors early.
  - Seek immediate access to schedules of assets by category and legal owner, as well as contracts and leases.
  - Identify contracts with anti-assignment clauses and seek waivers.
  - Consider required consents and approvals (e.g., lender consents under credit agreement and indentures and board and shareholder approvals under the corporate governing documents).
- **Timeline.** Timing will depend on the transaction structure and negotiations with major constituents—obtaining necessary creditor consensus and shareholder approvals.
- **Costs.** With third-party consents/objections minimized or hurdled, costs can be significantly less than an in court sale, and competitive bidding may be avoided.

### In Court Sale

- **Benefits.**
  - Relative purchase prices potentially lower.
  - Can bind non-consenting parties.
  - Does not require shareholder approval.
  - Except for specific circumstances, contracts not subject to third party consent.
  - Court order approving the sale “free and clear” of claims, liens and interests, including successor liability claims (if proper notice), and shielding purchaser from fraudulent conveyance risk.
  - Ability to credit bid secured debt and claims.
- **Structure.** Optionality to consummate transaction through Pre-Packaged or Pre-Negotiated Plan, in court sale or in court sale process, Chapter 11 Plan, UK administration or French pre-insolvency and insolvency proceedings. Asset Purchase Agreement for sale of assets on an “as-is, where-is” basis with limited representations and warranties, indemnity rights and post-closing recourse for the acquirers.
  - In court sale or in court sale process usually subject to marketing, auction and court approval.
  - Duty to obtain the highest or best value.
- **Action Items.**
  - Consider stalking horse bid and bid protections (break-up fees / expense reimbursement).
  - Identify diligence requirements and deploy professionals. Consult with tax advisors early.
  - Negotiate bid procedures.
  - Identify contracts and leases to assume (and negotiate cure amounts).
  - Negotiate form of court order approving sale.
- **Timeline.** May depend on Target’s liquidity, DIP financing, RSA terms, friction from other parties-in-interest. In court sale or in court sale process may be achieved expediently and within a few months from bankruptcy filing.
- **Costs.** In court sale or in court sale process may be more expensive and may take longer to consummate than an out of court sale, and are subject to competitive bidding, objections by third parties, and approval by the court.

## Question 7

To what extent does special attention have to be given to management, key employees, executory contracts, leases and intellectual property (IP)?

- **Management and key employees.** Retention of management and key employees may be critical for maintaining steady operations and a seamless transition.
- **Executory contracts, leases and IP.** Acquirer may “cherry pick” contracts and leases for assignment.
  - Bankruptcy law generally overrides anti-assignment provisions. Contracts requiring performance by a specific individual, and certain IP licenses are exceptions to the general rule.

## Question 8

Who are my competitors and how do I win?

- **Identify the players.** Identify the Target’s secured lenders, fulcrum security, potential strategic buyers and opportunistic investors—they may all be circling the distressed Target.
- **Strategies.**
  - Consider strategies to employ with counsel familiar with the process.
  - Success can depend on the unique facts and circumstances of each opportunity; identify them and define them.
  - Consider DIP financing, debt purchases, strategic asset acquisition or financing, PIPE investments, credit bidding, stalking horse bids, rights offerings, exchange offers and foreclosure sales.

## Question 9

To what extent does the public narrative matter?

- **Strategic Communications.** Tailored, broad and nuanced communications to an ever-growing list of constituencies matters. It can provide positive long term corporate reputational benefits. Communications should be adjusted for specific locales with particular legal, regulatory and cultural sensibilities.
- **Narrative.** Messaging should address potential impacts on relationships with customers, vendors, service providers, management and employees.
- **Be Positive.** For going concern sales negative tactics and messaging may disrupt key relationships with customers, vendors, and employees.
- **Be Specific.** Targeted assets may require a specific communication to yield cost savings and acceptable terms.

## Question 10

Are there governmental, regulatory or litigation risks that need to be addressed?

- **Antitrust Review.** Acquisitions of assets in bankruptcy are not immune from the HSR Act or antitrust scrutiny. However, the process may be expedited in bankruptcy.
- **CFIUS.** Any transaction in which a foreign purchaser invests in a U.S. business or U.S. infrastructure, technology or energy asset, or certain real estate or that results in a foreign person obtaining access to material nonpublic information that affects national security, may be subject to review by the Committee on Foreign Investment in the United States.
- **Regulatory Approvals and Fraudulent Conveyance.** Certain out-of-court transactions may expose the purchaser to a subsequent fraudulent conveyance attack by the Target’s creditors.
- **Successor Liability.** When assets are purchased out of court, there may be risk that the acquirer will succeed to certain liabilities of its seller by operation of law. An in court sale or in court sale process (with appropriate notice) may shield the acquirer from the Target’s liabilities and successor liability claims.

# Contact Us

Each M&A transaction is fact intensive, and even more so in a stress or distress context. Goodwin has the expertise and experience to help you navigate these questions and position you for success.

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