Virginia

Regulatory Hot Tip 2010 –One

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REVIEW THE DEAL *BEFORE* THE HONEY MOON IS OVER!

We have spent time in recent Hot Tips talking about doing deals: the need to make sure you know who you are dealing with, the necessity for being able to articulate (on one side of a single sheet of paper!) the critical aspects of each transaction and how to use your lawyer and keep legal bills down. These points sound simple, indeed obvious, but believe me, they are important concepts for you to keep in mind in your day-to-day business transactions. And, as I have observed over many years in my law practice, they are often harder to do than they look!

Another important step but one often lost in the excitement of getting a business transaction closed, is the need to take inventory and review the **implementation** of each deal in a timely manner **after closing.** Too often, we find that this critical step is not done. Unfortunately, failure to perform this step frequently causes problems down the road.

OK, the deal is done. The contracts are signed. The champagne is history. Now, it's sometime down the road. Is the deal delivering for you as promised? Do you know?

The way to know the answers to these questions is to schedule a formal "deal review" sometime after closing. Put it on your calendar. Then sit down with the deal documents and review the transaction. The date for your deal point review may be 30, 60 or 90 days after closing, depending on the nature of each particular deal. The goal of the review is to make certain that implementation of the deal is going smoothly and as agreed, or whether the logistics of implementing the deal that was agreed upon needs some tweaking.

Some questions that immediately come to mind that should be taken into consideration in this review are:

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(1) Is implementation of the transaction going at a pace consistent with your original expectations?

(2) Is the implementation process taking more or less time by your personnel than planned?

(3) Should you put more employees on the implementation tasks or take some off?

(4) Are implementation costs exceeding expectations, and if so, what can be done to get project costs back on track?

(5) Are you happy with the outcome of the implementation process? Is it moving you where you wanted to be when you closed the deal?

(6) Has the other party performed all actions originally agreed to, and have those actions been done in the time frame envisioned by the agreement?

Again, each deal is unique and you have to come up with your own list of questions specific to each business transaction, but this follow up review is as important as the closing of the deal because it can bring money to your pocket or take it away. It can also help eliminate future contract disputes and save you some legal costs.

For example, I have had folks tell me that implementation was going along as expected, but that the cost of implementation so exceeded original expectations as to make them rethink the value of doing the deal unless some means of reducing implementation costs could be found.

Others have questioned whether implementation, even if successful from a cost standpoint, could be implemented in a timely fashion so as to take advantage of whatever "market void" was originally identified as something for which they wanted to take advantage.

And, of course, I often hear that the other party to a transaction may not have delivered everything agreed to in the contract documents, or may not be doing so on the schedule originally agreed. Believe me, the earlier such discrepancies are brought forcefully to the attention of the other party, the more likely full performance is to occur. Letting things go until later is a recipe for unhappiness and possible deal failure. Indeed, by your delay in bringing contract performance issues up right away, you provide the other side with an argument that, by your failure to object, you "agreed" to altered performance terms.

All of this is to say, a careful review, early in the implementation stages of each transaction-before the "bloom is off the rose," can help eliminate disputes as to deliverables or timeline that can produce future headaches and legal expenses. It can also be a good barometer as to whether a deal is a valuable one for your business, or one that perhaps should be jettisoned as a good idea, but perhaps at the wrong time. A savvy business person must be able to read the tea leaves and perhaps modify the deal as necessary.

After the contract is signed, don't rely upon inertia to make a business deal work.