

How to Negotiate an ESG M&A Transaction



Amy Wojnarwsky | Thursday, November 11, 2021

In [our previous blog](#), we discussed how buyers and sellers can prepare for mergers and acquisitions with an internal review of a company's performance on ESG metrics as well as methods to improve ESG performance. This emphasis on ESG early in the diligence and preparation stages can continue in the actual negotiations of an M&A transaction.

As we mentioned [in our first blog post](#) of this series, the most successful companies develop an M&A strategy that focuses on their business objectives, and ESG considerations are becoming an increasingly important aspect of these goals.

After completion of ESG diligence, counsel should document the relevant ESG findings identified during the due diligence process and provide an analysis of potential legal risks and exposure associated with any ESG-related issues. Once completed, this analysis can assist the buyer in evaluating the transaction as a whole and negotiating certain representations in the deal.

As an initial matter, some red flags identified during due diligence may lead to a reassessment of the potential value and price of a transaction. In [a recent PRI/PWC study](#), 69% of companies assess potential acquisitions for compliance with local regulations and will proceed if only minor non-compliance issues are identified that can be tackled post-acquisition. However, a large proportion of the interviewees stated that they would refuse a target if there were serious implications to non-compliance and poor performance on ESG factors and would create a substantial risk or cost to the acquirer.

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Rather than walking away from a deal when substantial risk factors relating to ESG are identified, parties and their counsel can negotiate [alternative deal structures that may have an economic impact on the transaction](#).

In negotiating the economic impact that ESG factors can have on a transaction, [1/3 of the companies surveyed](#) indicated that they consider the cost of compliance for ESG factors for up to two years, and [more than half of respondents](#) consider the cost of ESG compliance for up to five years post-deal. This consideration may result in negotiations for a reduction in the purchase price, a change in transaction structure (equity versus asset), increased holdback for risk factors, allocation of funds as transaction expenses to improve ESG performance, transition services relating to the same, or earn-outs or contingent consideration based upon meeting certain ESG metric thresholds. While each of these negotiated structures may differ from the original deal and have an economic impact on both buyer and seller, these strategies can be effective to complete a transaction and provide the selling entity with the resources needed to improve ESG performance of the company on a going-forward basis.

[Click here to read the full article on the EPOCH Pi website.](#)



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