Corporate Counsel Summit
The Organization for Corporate Counsel Leaders

EXECUTIVE SUMMARY

FOR MEMBERS

OVERVIEW

Reflections on a Merger of Equals

by Matt Broad, former executive vice president and general counsel, OfficeMax

Matt Broad handled the 2013 merger of OfficeMax and Office Depot. He says a lot of things were done well, but others could have been done better.

OfficeMax and Office Depot completed a high-profile merger in November 2013, becoming a $17 billion company.

Matt Broad worked for OfficeMax for 29 years. He started as Counsel directly out of the University of California, Hastings College of Law and served the last nine years as Executive Vice President, General Counsel and Chief Compliance Officer. Broad handled more than 60 acquisitions during his tenure, including the merger of OfficeMax and Office Depot. He left OfficeMax at the end of 2013.

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"A true merger of equals…means that it's a true combination of lots of parts of both companies…but, ultimately, the question is does one company's culture or one company's executive team … end up continuing on and does it end up being sort of more an acquisition than a merger of equals."

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Throughout the merger process, there was concern that the FTC would not sign off on the deal, and that concern played a big role in the decisions that were made. Decisions on a name and location for the merged company (OfficeMax was in Illinois and Office Depot in Florida) and other defining considerations were made late to prevent employee flight from one company or the other. Both organizations needed to remain sufficiently intact to survive if the merger collapsed.

Antitrust clearance was the biggest hurdle faced. The selection of outside counsel and an economist turned out to be critical. The antitrust counsel had to have significant experience at the FTC and be able to navigate relationships there. The economist had to understand the companies' industry very well. The economist ended up costing more than the lawyers.

The companies hired an integration planning consultant to help them work up synergies and integrate processes. It is important to find the right consultants, one who will help equally with process and substance – deciding what is and is not important. And you don't want the consultant owning the process, you want that to be managed in house.

This merger was a transaction between competitors and boundaries were set early in the process to define who could talk to whom and what they could talk about. There was worry about violating the provisions of the Sherman Act.

It was important to look early on at compensation plans, standards by which performance is judged and the like. In the throes of a merger requiring people to perform to traditional standards could have them working against the interests of the future common company. The companies used a consultant to help their boards and upper management decide these issues across both companies so there were no winners or losers. It paid off. There were few defections.

Broad studied the failed merger in the 1990s of Office Depot and Staples and favored deferring decisions on social issues until late in the process. Office Depot and Staples did not do that and an entire real estate department walked out. But waiting led to frustration and made the companies look foolish because so many questions remained unanswered at the end. If he had to do it again, he would advocate nailing everything thing down early on, naming a CEO from one side and a chairman from the other, picking a headquarters location and so on.

The companies should have planned better for a board transition to a merged entity. Board members needed information about the other company, processes and their own compensation.

It is critical that counsel prevent the creation of documents that would become smoking guns in the hands of the FTC because they included statements about competitors, market share or similar topics. "Be diligent and unwavering."

The executive summary above was written by staff from watching the presentation and many other ideas were presented. Members may watch the full presentation if wished by logging in.