



Mergers and acquisitions – key insurance issues

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The Harrogate Local
Committee



Introduction / housekeeping

Welcome and thank you!

Webinar format – muted and video off. Interactive features – polls, Q&A

60 minutes including short period of Q&A

Diane Jenkins

- Background in Insurance Broking Sector – technical programme design, M&A due diligence, BI reviews
- Former chair and education secretary of London Business Interruption Association

Nick Thomas & Associates

- Specialist training, coaching and consulting to the UK Insurance Sector
- Technical insurance, sales, business and soft skills, compliance training , performance, resilience and wellbeing training



Objectives

- Be aware of the key insurance considerations during a client merger or acquisition
- Understand how additional liabilities may be acquired
- Know the additional insurance products available to deal with M&A risks

Some M&A terms

Due diligence – process during which buyer asks seller for information and buyer reviews what it is seeking to buy

SPA = sale and purchase agreement – contract for the purchase of the assets or business

Carve out / spin out – a part of a larger company is being sold – often but not always a subsidiary

Cratered – deal has collapsed

Data room – Actual or virtual space where information about a target is located – due diligence advisors request information that is added to data room



Some M&A terms

EBITDA – Earnings Before Interest Tax Depreciation and Amortisation – measure of value of business

IM/Information Memorandum – briefing document prepared by the seller as a sales document for prospective buyers.

LBO – Leveraged Buy Out - a leveraged buy-out is an acquisition that is largely funded by debt

Trade Sale – sale to another company in the same industry

Warranty – statement in SPA that must be true - made by both buyers and sellers - will have redress if warranty untrue/breached

Warranty cap – financial and time limit imposed in SPA for cost /period of breach of warranties



Types of mergers / acquisitions

Management buy-outs

Private equity investment

- share deal
- asset deal

Refinancing

Spin out/sale of subsidiary

Restructuring

Insolvency



Types of mergers / acquisitions

Share deal

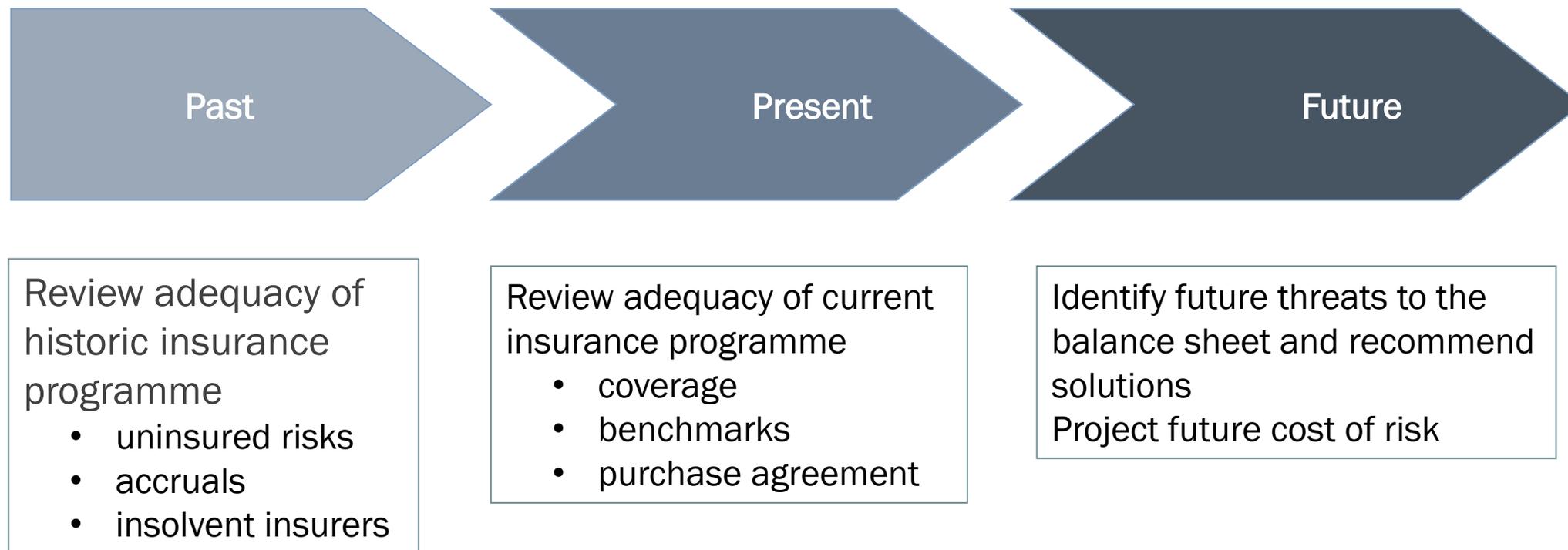
- will acquire all liabilities (unless contract for sale/purchase (SPA) says otherwise)
- will acquire most of existing policies BUT insurers MUST be informed of deal
 - material fact
 - some policies have change of control clause – go into run-off e.g., D&O
- key issue is uninsured liabilities



Asset deal

- will only acquire some liabilities e.g., environmental
- insurance policies not assets/ are not assignable without insurers' agreement

Due diligence - process



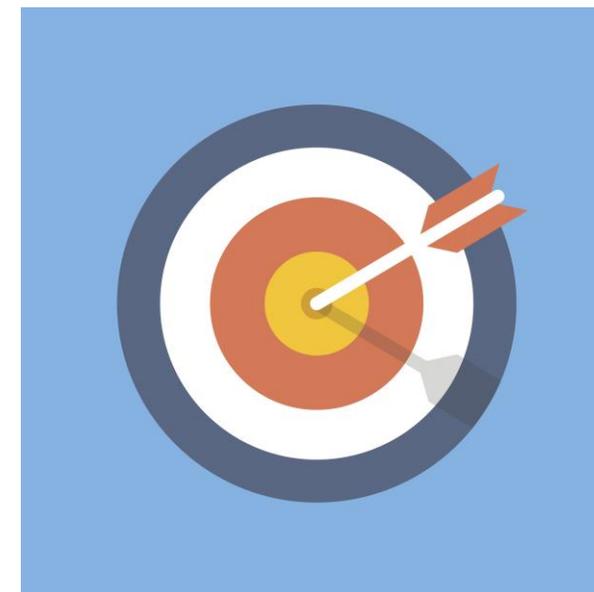
Key issues – historic programme

Investigate past/hidden liabilities

Buyers forget to check their targets' past liabilities

Areas that should be included:

- past activities/discontinued products
- previous M&A activities
- Insolvency of past insurers especially EL
- business descriptions
- past / current/ future policy triggers and how they dovetail
- hidden accruals (past deductibles or captive involvement)
- contracts



Key issues – historic programme -TUPE

Transfer of Undertakings (Protection of Employees) Regulations 2006

- acquiring company acquires liability of employment
- liability in tort /breach of statutory duty transfer
- insurance under ELCI also transfers



Key issues – historic programme -TUPE

BUT

- share deals are NOT subject to TUPE – seller can prevent access to past UK EL policies
- not all employers required to buy compulsory insurance
- liability still transfers but no insurance transfers
- joint and several liability of both parties – employee can sue either
- need retrospective EL cover extension



Key issues – historic programme

Always need a deductible history

- sellers might reduce deductibles to make business seem more attractive
- this can hide accrual issues
- check for letters of credit required by insurers
 - these will be needed for as long as claims arise
 - past parent guarantees no longer valid = cost to buyer



Check for any past captive involvement

- very important for occurrence policies
- can buyer access any captive policies

Key issues – current programme

Liabilities

- check for significant outstanding claims (all will be covered – reserves need to be up-to-date)
- any claims made policies extensions - run-off
- products liability
 - policy triggered when injury/damage occurs
 - BUT only covers products made by insured
 - what about products already sold, made before acquisition
 - check what is in SPA
 - if liability has been acquired, how will this be insured – retrospective products liability



Key issues – current programme

D&O

- change of control clause
- what does SPA say about D&O
- run-off issues
 - who is paying for run off
 - is existing policy being run off adequate
- acquisitions may be added to existing policy
 - ensure prior /pending dates maintained
 - check adequacy of limits



Key issues – current programme

Property /business interruption

- will outstanding claims be paid in full
- incorrect business interruption sums insured
- inadequate territorial limits
- lack of cover – perils, extensions, limits
- what happens between signing and completion?
 - how are the buyers protected - contracted purchasers' clause is for buildings only
- In carve outs - seller's BI claim ceases when the subsidiary sold



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Key issues – current programme

Current total cost of risk

- includes premiums, estimated retained losses, expenses, fees, taxes etc
- NB seller may have cut insurance cost to make business seem more profitable
- if current programme will be cancelled
 - are return premiums available (notice periods)
 - who gets RPs
 - who pays APs



Key issues – future programme

Check SPA

- no legal advice – insurance issues only
- does it require insurers to do/agree anything

Future cost of risk

- provide an estimate of future total cost of risk
- say why changing

Recommended additional cover

- justification and estimated cost
- not all risk is insurable so provide estimated cost of uninsured loss (e.g. retrospective EL for asbestos)



Transaction insurance

Warranty & indemnity insurance

- protects the seller or buyer from a breach of a seller given warranty given in the sale agreement
- each SPA includes a warranty cap and time limit for claims
 - warranty cap may be low
 - buyer may not consider time limit long enough
- insurance also used to increase warranty cap/extend time limit
- either buyer or seller takes out policy
- not all warranties can be covered



Other transaction insurance

Tax /legal opinion

Litigation buyout

Prospectus liability (IPO)

Legal indemnities

Environmental liability



Revisit Objectives

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Thank you! Questions?

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