31st Annual Technology Law Conference

Key Considerations in the Acquisition of Private Technology Companies

May 2018

Topics to be Covered

- Preparing for an M&A event
- Key deal terms
- Ethical issues

Preparing for an M&A Event

General Timeline (Sell-Side)

- **Positioning for Successful Transaction**
  - Begin 2-3 years prior to the event (or more)
  - Organize corporate records esp capitalization / maintain “data room”
  - Review management structure & competencies
  - Focus on upgrading infrastructure
    - Financial reporting
    - Audits, controls
    - Legal
    - HR
  - Management estate planning / wealth management strategies
  - Identify and establish relationships with potential strategic partners and acquirors
- **Planning for the Event**
  - 6-9 months prior to commencing the event
  - Review market/industry conditions and transactions
  - Update legal/diligence documents, data room
  - Financial/strategic review and assessment
  - Prepare key managers
  - Retain advisors (legal, accounting, banking)
  - Connect and align core deal team
- **Executing a Transaction**
  - For a “marketed” transaction
  - 1-3 months
  - Prepare materials
  - Identify interested parties
  - Present opportunity and materials
  - Conduct sale process
  - Design/implement integration
  - Close the transaction
  - Post-closing: monitor payment, indemnification claims, working capital
  - Note: Buyer activities ongoing for months to years after transaction, including review for indemnity and business and employee integration

Corporate Records Maintenance by Seller

- Diligence files / data room should be maintained at all times
  - Leverage from prior financing events
  - Permits rapid response without notifying entire organization
- Maintain stockholder lists and addresses
  - Frequent communication updates
  - Also helps to avoid surprises
  - Ability to email documents to stockholders
- Understand and maintain liquidation model
  - Include all equityholders and individual payouts
  - Be prepared to proactively implement incentives depending on realistic valuation estimates even if no sale process looming
  - Management carve-outs and incentives
  - Equity grants must be distanced from event / commencement of sale process, receipt of offers, indications of value, LOIs

Contractual Diligence Issues

- Exclusivity
- Most Favored Customer (MFC) or "MFN" clauses
- Uncapped future support / indemnity obligations (esp IP indemnity)
- Overbroad or unrealistic ongoing obligations (e.g. data privacy)
- Where applicable, inadequate or overburden some data privacy provisions
- Exclusions from limitations of liability and waiver of consequential damages
- Assignability issues
- Non-terminable leases
- Bank prepayment penalties
- Sole source suppliers
- Non-compete / non-solicits against the company
- IP assignments (e.g. work for hire in service agreements), co-ownership of IP
- Overly broad or restrictive confidentiality agreements
- Warrants that do not automatically terminate upon a change of control
- Continuing (or ambiguous) investor agreements

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