

31st Annual Technology Law Conference

Key Considerations in the Acquisition of Private Technology Companies

May 2018

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Topics to be Covered

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

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Preparing for an M&A Event

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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

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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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