

PRESENTED AT

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Deal Breakers: Navigating Due Diligence in Technology Transactions

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May 26, 2017

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Deal Breakers: Navigating Due Diligence in Technology Transactions

Outline of Topics

- Commencing the Due Diligence Process
- Seller Ethical Considerations
- Buyer Due Diligence Objectives
- Conducting Due Diligence - Red Flags/Deal Breakers
- Best Practices and Trends
 - Diligence of Open Source Code
 - Diligence of Cybersecurity and Privacy Risks
 - Trade Compliance
- Termination of Due Diligence Process - Ethical Considerations

Commencing the Due Diligence Process

- Confidentiality Agreement
 - Timing
 - Mutual or One-Way; Term
 - Often covers both confidentiality and use restrictions, as well as non-solicitation obligations
 - Residuals
- HSR Considerations - "Clean Room" Procedures
 - When needed
 - How to implement
- Exclusivity Period
- Assembling the due diligence team

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Seller Ethical Considerations

- Disclosure and Timing
 - Obligation to provide requested information
 - Ethical considerations surrounding disclosure
- Potential "Bad Facts"
 - FCPA violations
 - State tax issues
 - Import/export compliance
 - Cybersecurity breaches
 - Ethics violation trends
- Compliance with Exclusivity Obligations

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Buyer Due Diligence Objectives

- Business Approach
 - Private Equity Buyer
 - Strategic Buyer
- Risk Analysis
 - Depends on size of acquisition and strategic objectives
 - General risk position of buyer
- Budget
 - Often impacts amount and scope of resources allocated to diligence
 - Internal review
 - Outside advisors (legal, financial, tax, IP, etc.)

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Conducting Due Diligence- Deal Breakers

- Contract Review - Customers and Suppliers
- Potential Red Flags:
 - MFNs ("most favored nation" provisions)
 - Non-competition obligations
 - Non-solicitation obligations
 - Failure to limit liability
 - Broad indemnities
 - Long-term exclusivity arrangements
 - Other
- Confidentiality obligations in customer/supplier contracts

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