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Hogan  
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# NEGOTIATING THE ACQUISITION OF A TECHNOLOGY COMPANY

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## Overview of presentation

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- Introduction
- Negotiating the confidentiality agreement
  - “residuals” clause
  - “clean room” procedures
  - employee nonsolicitation provision
- Negotiating the acquisition agreement
  - “re-vesting” founders’ equity
  - “earn-out” provisions
  - “no IP infringement” representation
  - other IP representations
  - “accuracy of representations” condition
  - limitations on buyer’s indemnification rights applicable to breaches of IP representations
  - dispute resolution and related provisions

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# INTRODUCTION

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## Introduction

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- What explains the significant growth in M&A activity involving U.S. technology targets?
  - Blurring of the lines between traditional technology verticals
  - New or expanding sources of demand for U.S. tech targets; U.S. tech companies are not the only currently active buyers. Additional categories of buyers include:
    - strategic tech buyers **outside the U.S.**
    - **financial (PE) buyers** inside and outside the U.S.
    - strategic **non-tech buyers** inside and outside the U.S.
- What makes tech M&A different from other categories of M&A?
  - Non-tangible nature of technology assets
  - Importance of HR “assets” — key engineers and technical employees
  - Provision of equity incentives to a broad swath of employees
  - Different valuation metrics

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# CONFIDENTIALITY AGREEMENT — GENERAL ISSUES

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## **Confidentiality Agreement — General Issues**

- When signed?
- M&A-style confidentiality agreement (vs. confidentiality agreement for other, less significant transactions)
- Unilateral vs. bilateral
- The two basic restrictions included in confidentiality agreements:
  - disclosure restriction
  - use restriction
- Standard of care applicable to buyer
- Liability of buyer for actions of buyer's representatives

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## Title search: Negotiating the Acquisition of a Technology Company

First appeared as part of the conference materials for the  
14<sup>th</sup> Annual Mergers and Acquisitions Institute session  
"Mock Negotiation of the Tech Company Acquisition"