

31st Annual Technology Law Conference

Key Considerations in the Acquisition of Private Technology Companies

May 2018

1

Topics to be Covered

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

2

Preparing for an M&A Event

3

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

4

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

5

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

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/eLibrary\)](https://utcle.org/eLibrary)

Title search: Key Considerations in the Acquisition of Private Technology Companies

First appeared as part of the conference materials for the
31st Annual Technology Law Conference session

"Key Considerations in the Acquisition of Private Technology Companies"