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NEGOTIATING THE ACQUISITION OF A TECHNOLOGY COMPANY

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Overview of presentation

- 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

INTRODUCTION

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Introduction

- 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
14th Annual Mergers and Acquisitions Institute session
"Mock Negotiation of the Tech Company Acquisition"