Preparing For and Surviving an M&A Transaction

Understanding the Process and Avoiding Traps for the Unwary

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Understanding the Process and Avoiding Traps for the Unwary

• Sales Process Considerations Generally
• Maintaining Confidentiality
• Letters of Intent and Term Sheets
• Due Diligence Process
• Structure and Purchase Price
• Earnouts
• Negotiating Indemnity Obligations
• Board and Shareholder Issues
Sales Process Considerations Generally

• Starting a Process - Single Bidder, Market Check or Auction?
• Engaging a Banker
• Types of Buyers and Impact on Process and Timing
• Board Oversight and Duties
• Public company issues
Maintaining Confidentiality

• Keeping a possible transaction confidential is critical.

• Think about the process and how to maintain “business as usual.”

• Decide who should be in the cone of silence.

• Non-disclosure agreements are not all created equal.
Letters of Intent and Term Sheets

• Letters of intent and term sheets allow the parties to come to a meeting of the minds on price and basic terms before each side devotes substantial effort.

• These documents should be non-binding; binding agreements are reflected in the definitive acquisition agreement and ancillary agreements.

• Seller will see buyer’s style and approach with respect to deal points, and vice versa.

• Key terms to consider beyond structure, valuation and nature of consideration:
  – Purchase price adjustments and earnout terms
  – Treatment of options and warrants
  – Conditions like MAE
  – Indemnification terms
  – Non-competes and employee retention
  – Exclusivity
Due Diligence Process

• Diligence will be an intense process.

• An electronic data room provides a good record and efficiently delivers information.

• If competitors are potential buyers, the process is more complex.

• Responsiveness and full disclosure builds trust.

• Think about the disclosure of inevitable business “warts.”

• What can go wrong?
Structure and Purchase Price

• Structure
  – License/Collaboration and Option to Buy
  – Merger or Stock Purchase or Asset Purchase with Earnout
• Consideration – cash or stock or other?
• Treatment of options and warrants
• Management bonus plan
• Deductions for costs of transaction
• Purchase price adjustments
  – Outstanding debt
  – Working Capital or Net Worth
  – Dispute Resolution Process
Earnouts

- Earnouts allow parties to bridge the gap in event the business has an expected near-term value inflection point, but often result in post-closing disputes.

- Examples of milestones include pending FDA approval, or revenue targets for products being rolled out.

- Earnouts work best when there is close alignment between buyer and seller as to value produced by milestone event. Retention bonuses can be tied to same event.

- Are the milestones objectively determinable? Are the triggers too complex? How are derivative products handled?

- Are there reporting obligations? Is there any right of setoff?

- What is the dispute resolution process?

- Is obligation to act in good faith express or implied, or disclaimed? Are commercially reasonable efforts required, and if so, is this term defined?

- What is the impact of an acquisition of buyer or seller’s business? Other changes?
Negotiating Indemnity Provisions

- Techniques to Shift Post-Closing Risk
  - Escrow as sole and exclusive remedy
  - Threshold or deductible
  - Caps
  - Materiality and knowledge qualifications
  - Survivability of representations
  - Definition of Loss or Liability
  - Third party claims
  - Anti-sandbagging
  - Rep & Warranty Insurance
  - Releases
- Fraud and intentional misrepresentation
Board and Shareholder Issues

- Are there related party transactions?
- Are there “golden parachute” payments that must be approved?
- Is there debt of founders/major stockholders to be repaid?
- Are some shareholders receiving nothing?
- Are all shareholders subject to escrow or indemnity pro rata?
- Is management receiving a bonus?
- Are some shareholders rolling over stock into the buyer?
- Disclosure is important disinfectant.
Diane Holt Frankle

Diane Frankle represents publicly traded and privately held companies engaged in a wide variety of US and cross-border mergers, acquisitions, strategic alliances and joint ventures. Diane has completed more than 100 M&A deals with a total value exceeding $12 billion during the last 25 years. Her focus clients include companies in the technology, life sciences and health care industries, including those in software, internet security, storage, biotech, medical device, semiconductor, pharmaceutical and other sectors.

Diane also regularly advises boards of directors and board committees on fiduciary duties, corporate governance and disclosure issues, crisis management and internal investigations. In addition, she represents public companies and management on executive compensation issues, and she also represents companies in public and private offerings of equity.

Diane is a member of the ABA’s M&A Committee and co-chairs the ABA’s Joint Task Force on Governance Issues in Business Combinations. She chaired the ABA’s Subcommittee on Public Company Acquisitions and a related Task Force from 1997–2011, and was the editor of the ABA *Model Merger Agreement for the Acquisition of a Public Company* (2011). She co-chaired the ABA’s Delaware Business Law Forum from 2011-2014. She also served on the State Bar of California Business Law Section Corporations Committee from 1992–1996, was co-chair of that Committee from 1995–1996 and was the editor-in-chief of the State Bar’s *Guide to California Securities Law Practice*.

Diane was chosen by *The Recorder* as one of its 2014 Women Leaders in Tech Law. She was named one of the Top 25 Transactional Women Lawyers in California in 2014 and has been consistently ranked in the Top 100 Women Lawyers in California by *The Daily Journal*. She is also listed in *The Best Lawyers in America* and was named the *Best Lawyers’* 2014-15 San Francisco Corporate Governance Law “Lawyer of the Year.” Diane was honored as Lawyer of the Year for Mentoring (Private Practice) at the 2014 Chambers USA Women in Law Awards.
Nick O’Keefe is a Partner in the Corporate Department of Kaye Scholer’s Silicon Valley office. He has 20 years of corporate law and M&A experience, with an emphasis on buy-side and sell-side work and takeover defense, including domestic and cross-border deals. His clients include strategics, private equity funds, sovereign wealth funds and financial advisors. He has completed more than 50 publicly announced deals ranging in value from a few million dollars to several billion dollars. Nick also advises emerging growth and mature issuer clients with respect to general corporate work, corporate governance matters, federal and state securities law matters and securities transactions (registered and exempt, including equity, convertibles and high yield).

Nick has worked extensively with clients in the health care, life sciences, medical device, fintech, technology, media and telecommunications industries, among others. He has also worked with numerous private companies in these industries and has represented several venture capital and private equity funds making investments, acquisitions and dispositions in the industries.

Nick also has a deep understanding of emerging markets, having spent three years working in the Middle East. His practice in the Middle East included regional and cross-border deals involving Middle East private equity funds, sovereign wealth funds and regional and US issuers investing in the Middle East.
John Selig is Managing Partner of Mavericks Capital. He advises life sciences companies on M&A, licensing and financial strategy. He also frequently speaks on topics in valuation, deal term benchmarking, and strategy.

Prior to joining Mavericks, John was a Managing Director at Woodside Capital Partners, a boutique investment bank. Previously, he was a Partner at Keelin Reeds Partners, a life sciences management consulting firm, where he advised dozens of VC-backed and small to mid-cap biopharmaceutical, medical device, and diagnostics companies on M&A, licensing strategies, portfolio management, valuation and strategic direction. While at Keelin Reeds, John led a partnership and M&A deal term benchmarking effort and has extensive experience in applying that data to yield market-value deal terms for dozens of assets, using the results to inform product strategy and to provide ongoing support during deal negotiations. John also combined his expertise in valuation, deal term benchmarking and decision analysis with his background in law to help companies make optimal decisions in litigation and settlement.

Previously, John was a senior consultant with Strategic Decisions Group, a global management consulting firm, where he advised many of the top 20 pharmaceutical and medical device companies, as well as Fortune 500 companies in other industries on valuation, business strategy and M&A. Prior to consulting, John was an attorney with Weil, Gotshal and Manges LLP where he focused on M&A and corporate finance. John holds a JD from Stanford Law School, where he was an Associate Editor of the Law Review, and a BA, magna cum laude, from Brown University, where he was a member of Phi Beta Kappa. (FINRA 79, 63)