

Executive Team Leads: _____

Bankers (if any): _____

Company's Outside Counsel: _____

M&A Committee (if necessary): _____

Company's Accountants: _____

Company Hygiene and Process Items

- Assess key due diligence deal risk exposure areas.**
 - o Confirm that employee and contractor agreements are organized and that all have signed PIAs/contractor agreements with proper IP assignment language. If there are missing agreements, then (i) have current personnel to sign proper documentation and assess the ability of the company to have former personnel to sign a confirmatory assignment, and (ii) assess the importance of the work product of former personnel to the company's current technology/products.
 - o If the company has ongoing litigation, work with company counsel to draft summaries and come up with a strategy to explain/resolve.
 - o Identify any corporate and other internal clean-up items that should be undertaken (e.g. corporate records and option grant paperwork).
 - o Identify any unresolved oral or written demands as to stock ownership. Confirm that any settlements relating to stock ownership are in writing.
 - o Have any senior executives recently departed? If so, understand the reasons for the departure(s) and determine whether the departure(s) could be an issue in diligence.
 - o Consult with the company's tax advisors and conduct a general tax assessment to identify any potential issues.
 - o Review material contracts for change of control/anti-assignment restrictions.

- Establish clear and cohesive communication protocol among the deal team.**
 - o The deal team should be limited to the executive team and other key employees.
 - o Emphasize confidentiality and communicating with the buyer with "one voice".

- Identify who will lead the company's diligence efforts and establish clear protocols with deal counsel and the bankers (if any) for responding to diligence requests and populating the data room.**
 - o Leverage the company's data room from its last financing.
 - o Meet with deal counsel and bankers to coordinate responses to diligence requests and questions received from the buyer.
 - o One or two people should control the data room. This might be the banker, the deal counsel, or a member of the company's deal team.
 - o Annotate the diligence request list so that all parties are clear as to the requests to which the company has responded and those that the company believes are not applicable.

- Identify key stakeholders early in the process and develop a plan of communication.**
 - o Obtain early buy-in from the company's board and major stockholders.
 - o Determine if any of the company's major stockholders plan to retain separate counsel. If so, deal counsel should communicate with the stockholder's counsel regarding purchase agreement review and deal process.

- Establish transaction strategy and process with deal counsel and bankers (if any) from the outset.**
 - o Understand who will take the lead on communications and negotiations with the buyer.
 - o Establish a process for the review and discussion of the letter of intent (at the beginning of the transaction) and the purchase agreement and ancillary transaction agreements.

- Establish with deal counsel the process for drafting the disclosure schedules.**
 - o The disclosure schedules will be much more extensive in an M&A transaction versus those drafted in connection with a financing transaction.
 - o Whomever is leading the company's due diligence efforts should likely lead the company's efforts in respect of the disclosure schedules.
 - o Depending on timing and resource constraints, deal counsel may take the lead on drafting the schedules, with heavy input from the company.

Certain Material Transaction Terms

A full review with deal counsel of all material terms should be done at the LOI stage as terms are hard to change and leverage decreases thereafter; below is only a synopsis of certain material terms.

- Form of consideration – tax implications (e.g., ST vs. LT capital gains, QSBS) and marketability of any stock received is paramount**
- Treatment of vested and unvested stock options –**
 - o Is the value of the assumed unvested options outside of purchase price?
 - o Treasury method treatment for aggregate strike price? (can be a large dollar issue)
 - o Are optionholders participating in the escrow and indemnification obligations? (if not, stockholder obligations are effectively increased by having to “backfill” any hole)
- Is there a retention/incentive plan for management?**
- Is there a founder re-vest or a request to waive acceleration?**
- Is there an earn-out? (define material terms, protective covenants and who participates)**
- What are the adjustments to the purchase price (e.g., transaction expenses, indebtedness, working capital, cash and cash equivalents, payroll taxes)?**
- Is an HSR or other regulatory filing required? What are the timing and deal certainty implications?**
- Material closing conditions and deliverables – ambiguity increases closing timeline and risk of adverse events occurring between sign and close.**
- Material Indemnification Terms:**
 - o Determine whether the buyer is willing to acquire a R&W insurance policy.
 - o Identity of indemnifying parties – ensure several and not joint liability.
 - o Material indemnification terms with respect to third-party claims – what are they?
 - o Representations and warranties – which are “fundamental representations” (which often go beyond the escrow and may be uncapped) and which are general representations?
 - o Survival period – a customary range for the survival of non-fundamental representations is 12-24 months.
 - o Escrow/holdback – a customary range is 10-20% of the purchase price.
 - o Limitations of liability:
 - Which indemnification obligations are limited to the escrow/holdback amount?
 - What is the limitation of liability for breaches of intellectual property reps?
 - Which indemnification obligations are limited to purchase price proceeds received?
 - Do any indemnification terms go beyond purchase price proceeds received?
 - It is customary to have a threshold (“tipping basket”) or a deductible of between 0.5% to 1% of the purchase price.
 - Is the escrow/holdback first recourse for all indemnified matters?
 - Discuss with deal counsel treatment of fraud, intentional misrepresentation, willful misconduct, willful breach or similar concepts that could expose stockholders to higher liability for a prolonged or indefinite period of time.
 - o What are the terms of any non-compete restrictions and other material employment terms?

Notes: