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United States
Technology M&A

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This country-specific Q&A provides an overview of technology m&a laws and regulations applicable in United States.

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United States: Technology M&A

1. Describe the typical organizational form (e.g., corporations, limited liability companies, etc.) and typical capitalization structure for a VC-backed Start-up in your jurisdiction (e.g., use of SAFEs, convertible notes, preferred stock, etc.). To what extent does it follow U.S. "NVCA" practice? If so, describe any major variations in practice from NVCA in your market. If not, describe whether there are any market terms for such financing VC-backed Start-ups. If venture capital is not common, then describe typical structure for a startup with investors.

Form:

In the U.S., companies have two key decisions on entity formation: (1) state of incorporation and (2) form of legal entity. The prevailing structure is a Delaware C-corporation.

On state of incorporation, investors prefer Delaware because of its well-established corporate laws and case law, and experienced judiciary. Recently, certain companies have explored alternative states, e.g., Nevada and Texas, due to complaints around recent Delaware jurisprudence, particularly around controlling shareholders.

On form of legal entity, C-corporations are typically used because of streamlined default rules and market familiarity. C-corporations contemplate a three-tiered structure: shareholders, which elect a board of directors, which in turn appoints officers. C-corporations are designed to easily issue different classes of stock (like common stock and preferred stock), notably, for VC funds, preferred stock, which gives them specific rights that protect their investment, such as:

- Liquidation Preference: They get their investment back (or a multiple of it) before common shareholders (founders and employees).
- Protective Provisions: VC funds get veto rights over certain major company decisions.

The other alternative, limited liability companies, offers much more flexibility in terms of both governance structure and tax treatment (particularly in early stages when the company is loss making). However, that flexibility results in less standardization and makes the entity form more costly to implement in the VC context.

As the home of the "NVCA" forms, which are available on NVCA's website and are applicable to C-corporations, deal terms in venture investing have become very standardized, with a focus on lowering transaction costs. Deal terms are typically spread across five or more major agreements: Stock Purchase Agreement, Investors' Rights Agreement, Voting Agreement, Co-Sale/ROFR Agreement, and Amended Charter.

Raising Capital:

The first round of external financing for Start-ups often involves raising capital through convertible instruments such as convertible notes or SAFEs (Simple Agreements for Future Equity). A convertible note is a debt instrument (can be secured or unsecured) that converts into equity in a future priced round. Convertible notes may include interest, a valuation cap, discounts, and a maturity date. On the other hand, SAFEs are not debt instruments and do not have a maturity date or bear interest. SAFEs are contractual instruments granting the right to equity upon future financing. They may have a discount or valuation cap or both. Although both are used to bring in equity financing without having to ascribe an enterprise valuation, SAFEs recently have become more common than convertible notes, due to lower transaction costs.

After the first round of external financing, a Start-up will typically issue preferred stock to investors – starting from Series Seed or Series A round and going alphabetically. Convertible notes or SAFEs are typically converted into preferred stock as part of the priced round. Preferred stock is not available to common stockholders and provides key protections, such as voting rights, that give investors power to veto significant corporate actions. By the time of a Series Seed or Series A round, the Start-up's ownership structure typically includes a combination of preferred stock held by investors and common stock held by founders and employees. Each subsequent round of financing typically involves a new, senior series of preferred stock with negotiated terms. Startups often issue SAFEs or convertible notes between priced rounds as "bridge financing".

Startups may also raise venture debt. Unlike traditional debt, venture debt can be available even where the borrower has little hard assets or cash flow as security. Lenders may take warrants or other equity to generate upside, given the heightened risk.

2. Describe the typical acquisition structures for a VC-backed Start-up. As between the various main structures (including an equity purchase and an asset purchase), highlight any main corporate-law and tax-law considerations.

The typical acquisition structure for a VC-backed Start-Up in the U.S. varies depending on the purpose and size of the deal. Reverse triangular mergers are the most common structure, particularly for targets with dispersed cap tables. In a reverse triangular merger, the buyer forms a subsidiary that merges into the target company. Ultimately, the target company survives as a wholly owned subsidiary of the buyer. In exchange for their shares, the target shareholders receive either cash or stock or a mix of both. This structure is efficient because it only requires 51% vote to exercise (absent higher thresholds in shareholder agreements or charters). Each shareholder is taxed on their respective portion of the consideration, typically as capital gains.

Another common acquisition structure is an asset sale. An asset sale is used where a Start-up wants to sell only a portion of their company, the Start-up has substantial liabilities that buyer does not want to inherit, or buyer wants to avoid fully diligencing the legal entity. Here, the buyer purchases specific assets and assumes select liabilities rather than acquiring the entity. Asset sales are typically taxable at two levels. The first level is at the corporate level on any gains from the sale of assets, and the second level is at the shareholder level upon distribution of proceeds if the Start-up is a C-corporation. This tax structure is beneficial for the buyer because it allows for a step-up in basis of the acquired assets. However, since the seller is being taxed at both the corporate and shareholder levels, it serves as a disadvantage for them.

Stock purchase is a common structure used when there is a limited number of shareholders. In a stock purchase, the buyer purchases shares directly from the shareholders. The acquired company's liabilities and assets remain intact. A stock purchase requires individual shareholder consent and does not require board approval, and thus, it is a preferred method for Start-ups that do not have many shareholders – since drag-along provisions are not universally used in Start-up organizational documents and thus removing holdout shareholders is difficult. This structure is also used where shareholders want to reallocate the proceeds in a way that departs from the "waterfall" prescribed by the charter.

Two other acquisition structures worth noting are *waiver-and-release* and *acqui-hire.* A waiver-and-release is an informal acquisition structure used in small exits. Because it is commonly used in distressed exits, shareholders typically sign a general release of claims in exchange for nominal consideration. On the other hand, an acqui-hire is used when the buyer is interested in hiring a Start-up's employees and leaving behind the business. This structure is commonly used because the buyer can hire employees directly. Often it also includes an acquisition of the IP by asset purchase or license.

3. Describe whether letters of intent / term sheets are common in your jurisdiction. Are they typically non-binding or binding? Is exclusivity common? Are deposits / break-up fees common?

Letters of intent and term sheets are very common in the U.S and are typically non-binding because they serve as an expression of intent that outlines a proposed transaction rather than an enforceable contract.

Market practice differs significantly regarding the level of detail in a LOI / term sheet – ranging from only basic economic terms such as price, to detailed listings of closing conditions and indemnification terms.

Although the letter of intent and term sheet are non-binding, there may be certain provisions that are binding, such as exclusivity, confidentiality, expenses and governing law. In particular, exclusivity provisions that require the target company (and often its founders) to cease negotiating with any other potential investors or buyers for a defined period (e.g., 30–60 days) are very common.

Lastly, deposits and break-up fees are not common at the LOI / term sheet stage, and are generally seen only in special situations.

4. How common is it to use buyer equity as consideration in purchasing a VC-backed Start-up? Please describe any considerations or constraints within the securities laws of your jurisdiction for using such buyer equity.

Buyer equity as consideration in purchasing a VC-backed Start-up is common in the U.S. Due to the constraints imposed by the U.S. securities laws, issuing stock as part of the purchase price requires additional regulatory considerations. In the U.S., any issuance of stock in exchange for equity is considered a securities offering and needs to either be registered with the SEC or qualify for an exemption from registration under the Securities Act of 1933 and state blue sky laws.

Registration (Form S-4)

If the buyer is a public company and is issuing stock to a large, potentially diverse group of shareholders (including non-accredited investors), one path is to file a Form S-4 Registration Statement with the Securities and Exchange Commission (SEC).

- **Process:** Filing an S-4 is a time-consuming and expensive process, but it allows the issued stock to be immediately freely tradable (by non-affiliates) upon closing, which is attractive to sellers.
- **Disclosure:** The S-4 requires comprehensive disclosure about the buyer, the target, the terms of the transaction, and the risk factors involved.

Exemptions from Registration (Private Placements)

If the buyer is a private company, or a public company that wants to avoid the cost and time of an S-4, they must rely on an exemption, most commonly under Regulation D (Rules 506(b) or 506(c)).

Rule 506(b) Private Placement

- Standard for Private Deals: This is the most common exemption used when the buyer is a private company.
- No General Solicitation. General solicitation or advertising to market the securities is not permissible.
- Accredited Investors: The buyer can issue stock to an unlimited number of accredited investors (VCs, large institutions, individuals meeting wealth/income thresholds) and up to 35 non-accredited but sophisticated investors.
- Disclosure: If non-accredited investors are participating in the offering, the buyer must give any non-accredited investors disclosure documents that generally contain the same type of information as provided in Regulation A offerings, must give any non-accredited investors financial statement information specified in Rule 506 and should be available to answer questions from prospective purchasers who are non-accredited investors. Because of the burden related to the disclosure requirements, buyers often prefer to offer cash to non-accredited investors.
- Restriction: Securities issued under 506(b) are “restricted securities” and are generally subject to a six-month or one-year holding period before they can be resold (under Rule 144), even if the buyer is public. This is a key constraint for the sellers.

B. Rule 506(c) Private Placement

- General Solicitation: Allows the use of general solicitation (advertising), but all purchasers must be accredited investors, and the issuer must take reasonable steps to verify that status.
- Restriction: Securities issued under 506(c) are “restricted securities”, similar to those issued under Rule 506(b).

Note for U.S. acquirors buying non-U.S. targets, Regulation S is also available if all buyer securities are being issued to non-U.S. persons.

5. How common are earn-outs in your jurisdiction? Describe common earn-out structures, and prevalence of earn-out related disputes post-closing.

In the U.S., earn-outs are fairly common in VC-backed Start-ups, particularly in life sciences transactions. Earn-outs are typically used when parties to a deal disagree on valuation or when part of the target's value is dependent on a significant and uncertain event (e.g., FDA approvals).

Performance-based and milestone-based earnouts are the two common forms of earn-outs.

Performance-Based – Performance-based earn-outs are typically tied to net income or revenue or another financial metric over a certain period of time.

Milestone-Based – this structure ties payment to specific, measurable, non-financial events. Examples: successful launching a new product line or a specific feature; receiving regulatory approval (e.g., FDA approval for a drug); or securing a key strategic customer or completing a specific integration goal.

Depending on negotiated terms, earn-outs can be one-time payments or spread over multiple triggers or time periods, and they can be paid in the form of buyer equity or cash.

In most agreements, there is typically a covenant that highlights the buyer's obligation to support the agreed upon earn-out. This provision is one of the most heavily litigated and negotiated provisions in M&A deals because the buyer may want flexibility in their operations while the seller wants to ensure that the buyer is fulfilling its agreed upon performance. Earn-out disputes are one of the most common post-closing litigations in the U.S.

6. Describe any common purchase price adjustment mechanisms in purchasing a VC-backed Startup and/or are lock-box structures more common.

In the U.S., purchase price accounting structures are very common and lock-box structures are seldom used.

In purchase price accounting, the overall valuation of the Start-up is expressed as an enterprise value. In order to arrive at the equity value paid to shareholders, the cash of the startup is added to the enterprise value and the debt is subtracted. There is also typically an adjustment for working capital. Typically any target-side transaction expenses are also subtracted.

Of note: the definition of debt and the setting of the working capital target are typically heavily negotiated, and both debt and current liabilities can include items beyond pure financial debt or working capital items.

7. Describe how employee equity is typically granted in your jurisdiction within VC-backed Start-up's (e.g., options, restricted stock, RSUs, etc.). Describe how such equity is typically handled in a sale transaction.

The three most common forms of employee equity are: (1) restricted stock, (2) stock options, and (3) restricted stock units.

Restricted stock is typically common stock, with a forfeiture or repurchase restriction upon termination of employment. Start-up founders typically obtain restricted stock, as well as employees that early exercise their stock options.

Stock options are rights to purchase shares at a pre-specified exercise price. Employees usually receive incentive stock options (ISOs) while non-employees like consultants are given non-qualified stock options (NSOs), which have slightly different tax treatment. Stock options must be issued at the fair market value of the company shares at the time of issuance.

Restricted stock units are contractual rights to receive stock or cash once certain conditions, such as time-based vesting, are met. The most notable difference from stock options is the lack of an exercise price. And the difference from restricted stock is that, until settled, RSUs do not have any shareholder rights (e.g., voting and dividends).

In an M&A acquisition, the treatment of unexercised options, vested shares, and unvested equity is critical and is handled one of two primary ways: cash-out or conversion/rollover.

Cash-Out Equity awards can be converted into the right to receive cash (or acquiror stock, in a stock deal) equal to the per share price minus the exercise price. This treatment is typical for vested equity awards, but is also seen for unvested equity awards where the buyer does not want to use the retentive value of the unvested equity.

Unvested equity awards can also sometimes be cancelled for no consideration.

Conversion/Rollover (Stock Deals) In transactions where the buyer wishes to preserve the retention value of the equity awards, it can assume / roll-over the equity awards. In such a case, the employee's outstanding options or RSUs in the target company are converted into economically equivalent options or RSUs in the buyer. The spread value on the conversion is based on the deal price (e.g., the target shareholders still get the benefit of the higher deal price), but remain subject to (typically) the original vesting conditions.

8. Describe whether there are any common practices for retaining employees post-acquisition (e.g., equity grants, re-vesting of employee equity, cash bonuses, etc.).

For Start-ups in the U.S., retaining employees is often a top priority. Strategies include:

- Assuming equity awards of target (see response #7)
- Bonus pools: Bonus pool are separate cash or equity pools set aside by the buyer for granting to target employees. Such pools are typically allocated in consultation with target management and subject to employees remaining.
- Revesting: A portion of the already-vested equity, typically of the founders, is made subject to new vesting conditions post-closing (e.g., instead of being paid out at closing). In

certain deals, the buyer may condition part of the founder's payout on continued service of a certain period. See also response #10.

9. How common are works councils / unions in your jurisdiction, among VC-backed Startups or technology companies generally?

Work councils and unions are not common in the U.S. in the technology startup sector.

10. Describe Tax treatment of founder / key people holdbacks. Are there mechanisms for obtaining capital gains or equivalent more preferable tax treatment even if continued service is a requirement for the holdback to be paid out?

In the U.S., founder and key people holdbacks are typically treated as capital gains if certain conditions are met. Buyers and sellers must carefully highlight whether the holdback is a continuation of share sale consideration and not a payment for future services or an incentive tied to employment. If holdbacks are for future incentives, then the Internal Revenue Services may classify them as ordinary compensation, which is subject to a different tax treatment.

See: https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/using_purchase_price_pp_64102_a.pdf for a full discussion of this topic.

11. Describe whether non-competes / non-solicits for key employees / founders are common. Describe any legal constraints around such non-competes / non-solicits.

Non-competes and non-solicits are nearly universal for key employees and founders in the U.S. Buyers almost always require these covenants as part of the deal to protect the value of the acquired company. These provisions exist to prevent the sellers from starting a competing business, joining a competing business, or poaching employees and customers after the deal is closed.

These provisions are governed by state law and thus, vary across all states in the U.S. Every state allows some forms of restriction, but the standard for enforceability also differs. (Courts blocked an effort to regulate non-competes at the federal level, at time of writing.) The enforceability of these covenants also varies based on whether the agreement is tied to employment or the sale of a business.

12. What are typical closing conditions for the acquisition of a VC-backed Startup? How common is a "material adverse effect" concept as a closing condition?

In the U.S., typical closing conditions include accuracy of the seller's representations and warranties, breach of covenants between signing and closing, shareholder approval (as needed), absence of any legal injunction that prohibits the transaction, receipt of required third-party and regulatory consents, and acceptance of new employment or equity offers by a certain percentage of employees.

Material Adverse Effect clauses are very common in US acquisitions. This clause plays a fundamental role in buyer risk allocation because it allows the buyer to terminate the deal if the target suffers a serious adverse change between signing and closing. Note that the exact criteria for what constitutes a MAE is typically not precisely defined, and usage of exact financial metrics is rare.

13. With respect to representations and warranties: (a) Is deemed disclosure of the dataroom common? (b) Are "knowledge" qualifiers common? Is it common to make representations that are "risk shifting" (e.g., where sellers cannot completely validate the accuracy of such representations)?

a. Is deemed disclosure of the dataroom common?

Deemed disclosure of the dataroom is not common in the U.S. Most deals are done using a written disclosure schedule, which serves as the sole source of potential exceptions to the reps and warranties.

b. Are "knowledge" qualifiers common? Is it common to make representations that are "risk shifting" (e.g., where sellers cannot completely validate the accuracy of such representations)?

Knowledge qualifiers are very common in the U.S., especially regarding representations that are difficult for the seller to confirm with certainty, but knowledge is typically defined as imputing the knowledge obtainable by reasonable inquiry. It is also common for sellers to make risk shifting representations. These representations are typically used to allocate risk to the seller and provide the buyer with post-closing remedies if the representations agreed upon during signing turn out to be untrue.

14. Describe the typical parameters of seller indemnification, including: (a) Coverage (fundamental, specified, general reps, covenants, shareholder issues, pre-closing Tax, specific indemnities, employment classifications, etc.) (b) Liability limit (c) Survival periods

a. Coverage (fundamental, specified, general reps, covenants, shareholder issues, pre-closing Tax, specific indemnities, employment classifications, etc.)

Indemnification provisions are typically negotiated between the parties and coverage ranges depending on the details of each deal.

Breach of covenants, general representation and warranties ("R&Ws") breaches are commonly subject to negotiated caps (typically at the amount of an escrow fund), and fundamental representation breaches are commonly subject to higher liability limits.

Fundamental Representations These are the most critical R&Ws, as they go to the very legal existence and ownership structure of the company. A breach of a fundamental rep typically has an unlimited or high indemnification cap and a longer survival period (often 5+ years or until the statute of limitations expires). Some of the typical fundamental R&Ws are: Organization and Standing, Capitalization, Authority and Enforceability, Related Party Transactions, Taxes, and Brokers' Fees.

General Representations (Specified Reps) These cover the general operations, assets, and liabilities of the business. Breaches are subject to the general indemnification cap (typically 10-20% of the purchase price) and a short survival period (typically 12-24 months). Some of the general R&Ws are: Financial Statements, Absence of Changes (MAE), Material Contracts, Intellectual Property (IP), Compliance with Laws, Privacy and Data Security. Because of the centrality of IP and privacy for technology, these reps are sometimes subject to a higher cap and survival period.

Covenants Covenants typically have liability caps up to the purchase price, and survival periods that are negotiated. Examples of common covenants include: interim operating covenants govern the target company's business activities between the signing date and the closing date, regulatory covenants, tax cooperation, publicity, and confidentiality.

Line-item Indemnities Parties will also typically negotiate for certain indemnities, most of which go up to purchase price liability. Typical ones include: shareholder claims, appraisal claims, 280G issues, pre-closing taxes, errors in the payment spreadsheet, and fraud.

15. Describe background law that might impact the negotiation of indemnification, including those that may constrain recoverability of losses (e.g., can lost profits or multiples be awarded as damages? Is mitigation required?).

The negotiation of indemnification in a private M&A transaction is governed by state common law of contract (commonly Delaware) unless the contract expressly modifies those default rules. The background law in most situations can be overridden by express contractual language.

Damages The primary goal of contract damages in the U.S. is to award expectation damages—to put the non-breaching party (the buyer) in the position they would have been in had the breach not occurred.

- Direct Damages: These are losses that naturally and necessarily flow from the breach itself (the cost-to-fix or out-of-pocket loss). For example, if the seller misrepresents a tax liability, the direct damage is the amount of the unexpected tax bill.
- Consequential Damages: These are losses that result indirectly from the breach due to the buyer's special circumstances. Consequential damages are only recoverable if they were reasonably foreseeable or within the contemplation of both parties at the time the contract was signed.
- Diminution in Value. When a breach of an R&W fundamentally changes the value of the acquired business (e.g., a material customer relationship was misrepresented and is immediately lost), courts may award damages based on the diminution in the value of the business. This is the difference between the business's warranted value (what the buyer thought they were buying) and its true value (what they actually got). This is where the concept of a "multiple" arises. If a breach reduces the target's annual earnings (EBITDA) by $1 million, and the business was valued at a 10x EBITDA multiple, the diminution in value

damage could theoretically be $10 million.

Mitigation of Damages Under the common law of contracts (including Delaware and New York), the non-breaching party (the buyer) has a duty to mitigate damages. This means the buyer must take reasonable steps to minimize the losses resulting from the seller's breach.

Sandbagging The background law of indemnification also includes rules regarding the buyer's knowledge of a breach prior to closing. "Sandbagging" – this occurs when the buyer knows about a breach of an R&W before signing or closing but proceeds with the acquisition and then files a claim against the seller for the breach after closing. States differ in whether sandbagging is permitted or barred, and thus, it is common for agreements to have provisions that specify.

Fraud As a matter of public policy and established law in the U.S., you generally cannot contractually exclude or cap liability for a party's own fraud. What constitutes "fraud" can be specified in the contract.

16. How common is Warranty & Indemnity (W&I) insurance / representations and warranties insurance (RWI)? Describe any common issues that arise in connection with obtaining such insurance for an acquisition of a VC-backed Startup. Is Tax coverage obtainable from RWI/W&I policies? Are there any common exclusions?

Representations and warranties insurance is commonplace in M&A deals, especially in deals involving private equity.

Pricing fluctuates around 3% of the amount of the amount of coverage, and retention is around 1% of the enterprise value of the deal.

Common exclusions in insurance policies include forward-looking statements, covenant breaches, and known issues. Insurance will typically cover unknown pre-closing tax issues.

Known issues are also obtainable as separately underwritten topic-specific policies.

17. Briefly describe the antitrust regime in your jurisdiction, including the relevant thresholds for filing. Describe whether there has been any heightened scrutiny of technology companies.

In the U.S., the primary antitrust regime is the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).

A transaction must be reported under the HSR Act if it meets the Size-of-Transaction Test and, in some cases, the Size-of-Person Test (though these thresholds are adjusted annually based on Gross National Product).

As of 2025, the HSR filing threshold is $126.4 million. If the deal value exceeds this threshold, a filing is generally required unless an exemption applies. Parties must file pre-merger forms with the Department of Justice (DOJ) and Federal Trade Commission (FTC). After filing, there is a standard 30 days waiting period to give regulators time to review the deal for any potential antitrust issues, which can be extended for regulatorily complex transactions.

As the tech industry is rapidly growing, there has been heightened antitrust scrutiny of tech companies, especially in deals involving data consolidation and acquisition of competitors. The DOJ and FTC have been more aggressive in reviewing tech acquisitions, and in some instances, they have reviewed tech acquisitions that do not trigger the HSR threshold.

For more information, visit: https://www.ftc.gov/enforcement/competition-matters/2025/02/new-hsr-thresholds-filing-fees-2025

18. Briefly describe the foreign direct investment regime in your jurisdiction, including the relevant thresholds for filing. Describe whether there has been any heightened scrutiny of technology companies.

The Committee on Foreign Investment in the United States (CFIUS) governs the U.S. foreign investment review regime. CFIUS is the main body authorized to review transactions involving foreign investments for potential national security concerns. There is no monetary threshold for triggering a CFIUS filing. Although CFIUS filings were voluntary in the past, some transactions involving infrastructure, personal data, and technologies are required to file for CFIUS review.

There has been heightened CFIUS scrutiny in the tech industry, especially in areas that involve semiconductors, cybersecurity, and AI, and biotechnology. If a foreign investor acquires certain governance rights (e.g., consultation rights, information rights, veto rights), the investment it may trigger CFIUS review.

Separate from CFIUS, the U.S. government has imposed restrictions on U.S. outbound investment in China in sensitive technologies, including semiconductors, AI, quantum, biotechnology, hypersonics, aerospace, advanced manufacturing, directed energy, and other areas implicated by China's military-industrial sector. Those rules apply to U.S. persons, such as U.S. technology companies.

19. Briefly describe any other material regulatory regimes / approvals that may apply in the context of an acquisition of a technology company.

For U.S. tech companies, a material regulatory regime to consider is the U.S. export laws, particularly the Export Administration Regulations (EAR) administered by the Bureau of Industry and Security (BIS). If a target company uses or develops export-controlled technology, a foreign buyer may need to obtain an export license. Export control issues are often incorporated into CFIUS review. Under the Foreign Investment Risk Review Modernization Act of 2018, if a U.S. business produces or designs critical technologies and the buyer is from a certain country, a CFIUS filing may be mandatory.

20. Briefly describe any common issues that arise with respect to intellectual property, in the context of an acquisition of a technology company.

In the acquisition of a technology company, intellectual property ("IP") is typically the most valuable asset and thus a central focus of due diligence and negotiation. Common issues include:

IP Ownership and Assignment Buyers must confirm that the target company has clear title to and properly owns or has rights to use all IP it purports to own or it has incorporated into its products. This includes verifying that all current and former employees, consultants, founders, advisors, and third-party collaborators have executed valid invention assignment agreements, particularly those who may have contributed to development of core IP and technology. Gaps in assignment agreements or improperly effected transfers can raise red flags. Certain states, such as California, have statutory notice requirements for employee invention assignments to be valid. Buyer should also review public records (e.g., USPTO, Copyright Office) to confirm that the target company is in fact the registered owner of its registered IP, as well as check for any liens or security interests that may be filed against it.

Third-Party Rights and Restrictions Many technology companies rely on third-party IP, which may take the form of exclusive or non-exclusive licenses. It is essential to review material IP licenses and commercial agreements for the scope of the grant, and also for assignment restrictions or change-of-control provisions, as these may require third-party consent for the transaction to proceed. Other key terms to look for in these agreements are royalty obligations, exclusivity provisions, duration of the licenses, and enforcement rights. Attention should also be given to "springing" licenses (especially cross-licenses) that may be triggered by certain events, as well as any minimum purchase or milestone requirements, audit rights, termination rights, and restrictions on sublicensing or transfer. Any covenants not to sue, settlement agreements, or encumbrances on IP must also be identified. Failure to identify and address these issues can materially affect the value and transferability of the target company's IP portfolio.

Open Source Software The use of open-source software is ubiquitous in technology companies. Buyer should pay particular attention to the use of open source software, especially those under "copyleft" licenses and in any products that are distributed or made commercially available, as these licenses may trigger requirements to disclose proprietary source code or adhere to other restrictive conditions. As part of diligence, buyers should ask the target company for a list of open source software used in the business and the respective license terms for review. Buyer should also ask the target company about its open-source compliance policies and practices.

Infringement Risks Buyer should assess the risk of the target company infringing third-party IP and review any ongoing or threatened IP litigation. Pending or threatened IP litigation, or the potential for infringement of third-party rights, can materially affect valuation and deal structure. Buyers should also consider risks arising from employees or contractors with concurrent or prior engagements at other similar technology companies, which can lead to conflicting IP obligations or misappropriation of third-party IP. Furthermore, companies with unclear or undocumented IP origins—such as a lack of proper invention assignment agreements or incomplete development records—pose heightened risks regarding IP ownership and enforceability.

IP Protection The robustness of the target's IP protection is reviewed, including the scope and status of patent, trademark, and copyright registrations, as well as trade secret protection practices (e.g., use of NDAs, access controls). Weaknesses in patent prosecution, lapses in trademark renewals, or inadequate trade secret protection measures may diminish the value of the IP portfolio.

Deal Perimeter and Transferring IP The parties must clearly define which IP assets are being transferred in the transaction. This includes specifying whether the seller will retain any rights in the transferred IP, such as through a "license-back" arrangement. If so, it is important to establish the criteria used to determine which IP will be transferred versus retained—such as whether the assets are "exclusively used," "primarily used," or otherwise necessary for the ongoing business of the seller. Clear definitions and standards help avoid ambiguity and future disputes regarding the scope of the IP transfer.

Data Usage and AI The way in which companies use data continues to evolve and become more valuable. This is an especially prominent issue with respect to artificial intelligence. Understanding how a company has collected and processed data, especially in development or deployment of any artificial intelligence is essential to having a complete understanding from an IP perspective.

Proactive, thorough IP due diligence is critical to identifying and mitigating these risks.

21. Briefly describe the regulatory regime for data privacy in your jurisdiction and highlight any common issues that arise in the context of an acquisition of a technology company.

The U.S. lacks a single federal privacy law, relying instead on a patchwork of state and federal regulations, including:

Federal Laws These include sector-specific statutes such as the Health Insurance Portability and Accountability Act (HIPAA), the Gramm-Leach-Bliley Act (GLBA), and the Children's Online Privacy Protection Act (COPPA).

State Laws The California Consumer Privacy Act (CCPA), as amended by the CPRA, is the most prominent and has inspired similar laws in other states (e.g., Virginia, Colorado, Connecticut, Utah). These laws grant consumers rights over their personal data and impose obligations on businesses regarding data collection, use, and sharing.

Other Requirements Industry-specific standards (e.g., PCI-DSS for payment card data) and contractual obligations (e.g., data processing agreements) may also apply.

Common privacy issues the acquisition of a technology company include:

Compliance Gaps Buyers assess the target company's level of compliance with applicable privacy laws and regulations. Typically, this starts with reviewing the target company's online privacy notice, internal policies, and responses to diligence questions. It is not uncommon for startups and fast-growing technology companies to operate without fully developed privacy compliance programs.

Data Security Diligence often includes reviewing penetration test results, security audit reports, incident response plans, and cyber insurance coverage. Buyers should also investigate any history of data breaches or security incidents, which could trigger legal exposure or reputational harm.

International Transfer If the target company collects or processes data from non-U.S. residents (e.g., EU, UK), compliance with international data transfer rules (such as the GDPR) must be considered. Transfers of personal data outside the U.S. may also be subject to contractual or regulatory restrictions.

Contractual Restrictions Customer and vendor contracts may limit the use, transfer, or disclosure of data, and may require consent or notice in connection with the transaction. In some cases, contracts may lack appropriate data privacy obligations, indicating potential gaps in the target company's data protection practices and increasing the risk of non-compliance with applicable laws.

CCPA CCPA is notable for its broad scope, including coverage of employee and B2B data. In addition to asking the target company for its assessment, buyers should independently assess whether the CCPA applies to the target company, based on factors such as revenue thresholds (>$25M), California-based operations, and volume of personal data processed. Employee and HR data compliance is a particular area of focus for CCPA.

Cross-Border Data Transfers Understanding how companies transfer data across borders is an essential aspect of identifying potential data privacy compliance issues. European and other jurisdiction privacy laws have long included requirements for cross-border data transfers. This is a prominent issue in the U.S. as well, especially given the DOJ Final Rule restricting certain data transfers to countries of concern, including China.

A comprehensive privacy and cybersecurity due diligence process is vital to identify liabilities and ensure business continuity post-acquisition.

22. Briefly describe any common issues that arise with respect to employment laws, in the context of an acquisition of a technology company (e.g., contractor misclassification).

In M&A transactions involving technology companies, employment law considerations do not typically drive the deal, but they are critical to deal value, deal execution and post-close integration. These issues are magnified in cross-border deals, where legal frameworks, cultural expectations, and regulatory scrutiny vary widely. Tech companies' reliance on contingent labor, proprietary innovation, and global mobility makes employment diligence and planning essential to mitigating risk and preserving value.

Here are a few common issues that arise with respect to employment laws and compensation benefits in the context of an acquisition of a technology company:

Contractor Misclassification Tech companies frequently rely on independent contractors, gig workers, and consultants, both domestically and globally. Misclassification risks—especially in jurisdictions with strict employment definitions—can lead to significant retroactive tax, benefits, and wage liabilities, as well as, equity, IP and permanent establishment issues, that should be reviewed in diligence for historic liability and to determine go-forward planning.

Co-Employment or Joint Employer Liability Use of Professional Employer Organizations (PEOs) or co-employment structures can create joint employer liability, especially in the U.S., Latin America, France, Germany and Spain, among other jurisdictions and regions. These arrangements must be carefully reviewed during diligence.

Non-Competition Restrictions The landscape for noncompete agreements in the U.S. has become increasingly complex. The lack of a federal restriction continues to cause states to create a patchwork of restrictions, requiring companies to stay ahead of the shifting landscape and distinguish between sale of business and employment non-competes in transactions.

Diversity, Equity & Inclusion (DEI) DEI commitments are increasingly scrutinized in M&A due diligence, particularly in public or high-profile deals. Buyers must assess whether DEI programs align with local laws and stakeholder expectations, and whether integration could trigger backlash or compliance gaps. Reviewing compliance with applicable equal pay and pay transparency laws will become an even greater priority as the one-year countdown to the EU Pay Transparency Directive has begun.

Equity Compensation. Equity compensation is a critical issue that arises in M&A transactions involving technology companies as equity is often a key element of employee compensation in tech and depending on how equity awards, such as stock options and restricted stock units, are treated in the transaction, this will determine the value realized by founders, key employees and others with respect to their equity award holdings. There are a variety of approaches to dealing with equity awards in transactions. For example, in many transactions, vested equity awards are cashed out at closing, while unvested awards, depending on their terms, could be subject to accelerated vesting, cancellation in exchange for cash payments to be made over the remaining vesting schedule of the award or possibly cancellation for no consideration. Alternatively, equity awards may be assumed or substituted for by the acquiring company, rather than being converted into the right to receive a cash payment. How equity awards are treated in a transaction will often depend on the economic impact and goals of the parties, the terms of the awards, including any contractual right to accelerated vesting, the tax consequences of the awards, and various other legal, tax and accounting considerations. In addition, a buyer in a tech transaction will often provide continuing or newly hired employees with new equity award grants to acquire equity in the buyer and, in many deals, the buyer will commit to make these go-forward equity grants at closing as part of a retention package for employees.

Retention / Transaction Bonus Programs It is not uncommon for tech companies to provide key employees with participation in a retention or transaction bonus program in anticipation of a sale that is designed to incentivize and retain employees through the closing of the sale, or, in some cases, provide transition services for a short period of time post-closing. From a buyer's perspective, understanding the scope and terms of the bonus awards, along with the economic impact, is key to the transaction.

Severance Protection Many executives and key employees may be entitled to severance protection in the case of an involuntary termination of employment, i.e. a termination by the company without cause or a resignation by the executive for good reason. Severance benefits may be found in individual employment agreements, severance or change in control agreements or severance policies, whether formal or informal, and may include salary continuation, accelerated vesting of equity awards, pro-rata payout of annual bonus and company-subsidized health coverage under COBRA (The Consolidated Omnibus Budget Reconciliation Act). It is very important to understand what events may trigger entitlement to severance, including in connection with a potential transaction, and the type of severance that may become payable.

Section 280G Golden Parachute Payments Under the golden parachute rules of Internal Revenue Code Section 280G, disqualified individuals may be subject to a 20% excise tax on excess "parachute payments," which generally refer to payments (such as acceleration of unvested equity awards, transaction bonuses and severance benefits) that are contingent on a change in control of a corporation, while the company or other payor entity may lose a tax deduction for such excess parachute payments. If the corporation to be acquired is privately held, then it may be possible to rely on the private company shareholder approval exemption under Section 280G, which generally requires more than 75% approval by the shareholders of the payments, including a waiver by the disqualified individual of the payments to make them contingent on obtaining shareholder approval, in order to avoid the excise tax and loss of tax deduction.

23. Briefly describe any recommendations for dispute resolution mechanisms for M&A transactions in your jurisdiction and highlight any common issues that arise in the context of an acquisition of a technology company.

Litigation is the primary dispute resolution mechanism for U.S. M&A. Most agreements specify that these disputes will be resolved in the courts of Delaware or New York because of their well-developed case law. Arbitration is also sometimes used for dispute resolution. In arbitration, parties typically use rules from institutions like the American Arbitration Association or Judicial Arbitration and Mediation Services.

24. Briefly describe any special corporate or stamping formalities that transaction parties should make sure to plan for in your jurisdiction (notarization, etc.).

Compared to other countries, special corporate and stamping formalities are efficient in the U.S. Physical signatures and stamps are not required for most transactional agreements. Under the ESIGN Act and state laws, electronic signatures are widely accepted and commonly used across all M&A deals in the U.S. As a result, deals can be closed remotely without the need for hard copies and in-person meetings.

Notarization requirements are rare in the U.S. Most agreements do not need to be notarized to be effective. However, some filings and affidavits submitted to government agencies may require notarization. Even if notarization is required, online notarization is increasingly accepted, especially in Delaware, where most VC-backed Start-ups are incorporated. Most filings in Delaware are completed electronically, and they also offer same-day and expedited processing.

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