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What Attys Must Know About Tech M&A For Non-Tech Clients

By **Benjamin Horney**

Law360 (November 9, 2018, 3:22 PM EST) -- As technology continues to become ingrained in all aspects of society, companies not considered to be part of the tech sector are increasingly looking to bolster their businesses through tech mergers and acquisitions, and attorneys well-versed in all things tech will be highly sought after to advise on the unique challenges that can arise in such deals.

In total, non-tech buyers have spent more than \$40 billion on tech M&A in each of the last three years, according to Morrison & Foerster LLP's most recent Tech M&A Leaders' Survey, released at the end of October. Previously, non-tech buyers had not spent more than \$35 billion on tech M&A in a single year since before the dot-com bubble in 2000, according to the report.

The numbers don't lie. There has been a clear shifting of the landscape, according to Hogan Lovells corporate partner Rick Climan, who said that while 15 years ago the likeliest buyer of a U.S. technology company was another technology company, that is no longer necessarily the case.

"[Back then], the buyers typically stayed in their own lanes — software companies bought other software companies, hardware companies bought other hardware companies, e-commerce companies bought other e-commerce companies, and so on," he said. "Today, the picture is different. The lines separating tech sector verticals have become blurred, almost to the point of disappearing. And the likely buyers for U.S. tech companies now include non-tech companies."

While this trend currently seems to be most prominent when it comes to U.S.-based tech companies, there's no hiding from the increasing importance of technology for all businesses, no matter where they are headquartered. Thus, all M&A attorneys should be brushing up on the unique and challenging aspects of these types of deals so they can capably guide their non-tech clients when called to help with a tech transaction.

Part of the role of an attorney is to conduct thorough due diligence, which involves looking at the target's patent portfolio and figuring out what intellectual property is actually owned by the target versus what is merely licensed, as well as determining who specifically developed that IP, explained Jonathan Bender, a corporate partner at Wilk Auslander LLP.

"To that end, there have now sprung up whole practice groups at law firms that just do IP due diligence," Bender said. "That's a function, I think, of this trend that we're seeing."

Due diligence is obviously an important part of any M&A deal, but when a non-tech buyer is looking to buy a tech company, there can be concerns about letting the suitor see how the sausage is made.

"That is a challenge in some respects if the target business is trade secret-driven," said Atif Azher, a corporate partner with Simpson Thacher & Bartlett LLP. "There can be a desire from tech, and many other types of companies, not to share their secret sauce."

With that in mind, it's no surprise that putting together a strong confidentiality agreement that allows both sides to feel comfortable is of the utmost importance.

"It's very critical for the seller, when they enter into these negotiations, to have a robust

confidentiality agreement," Bender said.

Confidentiality agreements can be used to address a number of major issues, and they can state that the prospective buyer cannot use or disclose any information gleaned from the due diligence process. Among the concerns that a target will have is whether the suitor just wants to get a look at the technology in order to determine if it can get access to similar tech without having to do an M&A transaction. There is also the worry that a suitor might try to poach the people who are most important to the technology in question.

"It could be that you realize you really only need that one developer, and if we get this one guy then he could build the software for us and we don't need to buy the whole company," Bender said. "You can build provisions into the confidentiality agreement that will include nonsolicitation of employees."

That potential issue speaks to another one of the major matters attorneys will face with these types of deals. Often with technology companies, the most important assets are actually the people who have developed the tech, and if the amount of money those people stand to receive in a deal is high enough, they may not be motivated to continue trying to make technological breakthroughs under their new ownership.

"A technology company's most highly prized assets — its technology and its HR assets, including its talented engineers and scientists — don't show up on a balance sheet," Climan said.

Thus, attorneys must work with clients to find ways to entice those talented people to keep on chugging once a deal has been completed.

"How do you keep those people engaged when they just made a large amount of money?" said Steve Camahort, a corporate partner with Paul Hastings LLP.

In order to convince those key people to stay aboard, and to keep them motivated going forward, deal agreements can be structured to provide them with things like equity options or grants, Azher said.

"You're wanting to incentivize them," he said. "It's a tug of war over how much equity you want to give those people and how you want to structure it. There's lots of discussion and structuring around that, as sometimes there are key people in foreign jurisdictions that are subject to different tax regimes. I've seen some pretty complicated arrangements put in place to accommodate various tax needs of target company executives and key employees."

It's certainly crucial for attorneys to have the ability to negotiate the specifics of a deal agreement, but it's also integral that lawyers stay on top of the latest trends in the tech space in order to educate themselves and clients, and that lawyers feel comfortable asking questions when they don't know the answer to something.

Simpson Thacher doesn't have a specific policy in place, but the firm does have training programs to educate lawyers on the specifics of how to handle these types of deals. In addition, the firm's general culture and lockstep compensation system encourages attorneys to feel comfortable asking their colleagues who are experts in particular industries, such as technology, for assistance on a deal if need be.

"Say I'm doing an oil and gas deal; I wouldn't be foolish enough to say, 'I'm going to do this by myself,'" Azher explained. "I would reach out to my partners who are experts, such as those in Houston, and ask if they can take it on or otherwise help me out."

--Editing by Kelly Duncan and Alanna Weissman.