



Boston Executive Briefing Series

Preparing Your Company for
Successful Business Transactions

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Introduction

- Types of Transactions
 - M&A
 - License
 - Strategic Alliance
- Types of Due Diligence
 - Buyer side v. seller side M&A
 - Patentability
 - Freedom to operate

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Freedom to Operate

- Purpose: to determine that no third party IP can dominate the planned activities of the parties.
 - Technology area
 - Geography

Search for and analyze third party IP *before* beginning the negotiations; have a plan because these can kill a deal.

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Market Exclusivity

- Patents
- Trademarks & copyrights
- Know how (trade secrets)
- Exclusive rights (licenses)

A dominating position is best, but as long as the key products and processes are protected, there is room for negotiation.

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Optimizing IP

- License and collaborations
 - Understand the IP rights likely to be created, and try and reserve these prior to entering into any deal.
- Making attractive for a sale
 - Create IP that results in FTO issues for the potential buyer.
- Considerations for buyer
 - Does the IP give me a blocking or dominating position?

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Take the Other Side's Perspective

- Polish the “crown jewels”
- Eliminate items that could be “due diligence outs”
- Make the due diligence process a quick, confidence-builder

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Anticipate Reps and Warranties

- Assets – Title and liens
- Liabilities – product warranty, tax, environmental, employment
- Jump start your disclosure schedules
- Insurance for risk management

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Everyone Has Housekeeping

- Corporate records
- Drafts and execution copies
- Transaction deliverables
- Employment issues and invention assignments

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UNION issues

- Purchaser's Obligations with respect to Predecessor Union
- Impact of Different Types of CBA provisions
 - Successors and assigns clauses
 - Arbitration Clauses
 - Withdrawal liability
- Grievances and unfair labor practices
- WARN Act compliance

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Statutes and Employment Issues

- FLSA, and other wage/hour matters
- Workers Compensation
- Employment Litigation
- Affirmative Action Plan and Diversity Issues
- Independent Contractor Agreements
- Health and Welfare Plans
 - How deal structure affects benefit plans
 - Severance programs
 - Tax qualified retirement plans

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Employment Contracts

- Employment Agreement
- Employment Agreement w/Non-Compete Clause
- Sales Rep Agreement
- Consulting Agreement
- Subcontractor Agreement
- Business Consultant Agreement
- Independent Contractor Agreement
- Employee files and doc retention

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Litigation Issues Generally Detract from Deal Making

- Litigation issues will likely affect the deal in a negative way. Fix these before beginning negotiation discussions.
 - Shareholder disagreements
 - HR problems
 - EHS concerns
 - SEC/FDA and administrative proceedings
 - Insurance disputes

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Closing the Deal

- Pulling it all together in the contract
- Moving forward: executing the business plan; proceeding with integration
- Post closing

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Concluding remarks

- Successful deal making requires an understanding of the business reasons for the deal.
- IP should be reviewed to remove problems, and to create assets that might enhance value.
- Company operations should be reviewed to remove problems involving HR, record keeping, EHS.

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