

Values and Trends from a Company Perspective

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Matthew Peters
Technology Group Leader, Vancouver
McCarthy Tétrault LLP
604.643.7162
mpeters@mccarthy.ca

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Overview

- What Companies Are Doing To Get Ready
- Negative Impacting Issues
- Some Deal Trends and Issues
- Specific Cross Border Issues

What Companies Are Doing To Get Ready

- Developing a clear exit strategy and then executing on it
- Managing dilution
 - Bootstrapping continues to be strong trend
 - Early stage venture debt and facilities are more readily available
 - Government funding (e.g. SR&ED)
 - Appropriate ESOP pool sizes
- Getting smaller shareholders lined up (e.g. voting trusts)

What Companies Are Doing To Get Ready

- Cleaning up the company
 - Getting IP sorted out
 - Getting employee and consultant agreements in place
 - Finding all of the company's agreements
- Preparing the team
 - Developing a more experienced board and management team
 - Developing relationships (strategic and professional)
- Avoiding excessive valuations from financings
- Making sure that the company has options

Negative Impacting Issues

- Complex capital structures
- Litigation risk
- Open source and patent concerns
- Shareholders that have veto rights
- Exclusive rights granted (IP, markets, customers etc.)
- Flight risk for key talent
- Management does not allocate sufficient resources to the process
- Inexperienced professional advisors
- Insufficient time allowed for the deal

Some Deal Trends and Issues

- Some issues that buyers are focussing more attention on
 - Open source
 - Privacy
 - Intellectual property (particularly patents)
 - Accounting related issues including revenue recognition, transfer pricing, SOX compliance etc.
 - Exclusive rights
 - Talent availability

Some Deal Trends and Issues

- Some deal pitfalls
 - Competition issues
 - Unclear earn out or price adjustment provisions
 - Tax treatment of non-competition payments
 - Earn out taxation issues (i.e. matching taxes with payments)
 - Business terms that have significant tax effects

Specific Cross Border Issues

- These deals are more complex and have more issues (e.g. tax, regulatory, cultural protections, cultural differences)
- Important to manage the “tax tail wagging the dog”
- If the purchase price is not cash or freely tradable shares then the Canadian Target shareholders will generally require an exchangeable share structure

Specific Cross Border Issues

- Key to structuring a cross-border transaction is to achieve business goals in a tax efficient manner
- Business drivers
 - Will the consideration be liquid
 - Will assets be migrated
 - Will operations be migrated

Specific Cross Border Issues

- Some acquisition structures
 - Intermediate Canadian acquisition corporation
 - IP Migration pre-closing or post-closing
 - Continuation/Domestication
 - Exchangeable share structure (including with ULC)
- Some issues
 - Loss of CCPC status
 - Foreign Investment restrictions (e.g. video games are Canadian culture)
 - Committee on Foreign Investments in the U.S. (CFIUS) if a US acquisition

Contact

For further questions or a copy of this presentation:

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