WeirFoulds LLP

Risk Management:

Mergers and acquisitions and other major business transactions are complex and involve myriad issues. As transactions evolve, the pace of decision-making can become fast and furious. WeirFoulds LLP partners Ralph Kroman and John Wilkinson test your decision-making and legal risk management skills.

1 You are in-house counsel to a Canadian company. A "deal-making" meeting is proposed between your team and the other party's team where your company is to disclose confidential information. A confidentiality agreement has been signed. Is there anything further you can do to protect your company's disclosure of confidential information at the meeting?

a) Yes
b) No

2 You are in-house counsel and your company needs to sign up a supply contract for a technology critical to your business. One of the things on which you focus is the indemnities from the supplier and, after reviewing them, you conclude they are satisfactory and include a full indemnity for intellectual property infringements. What other provision do you need to review in order to ensure the indemnity is effective?

Your answer: _____

3 You are in-house counsel at a business where personal information is the primary asset. Another business approaches your company on a confidential basis with a view to conducting due diligence in relation to a potential purchase of your company's business assets. A letter of intent is proposed. Should you recommend that there be any restrictions in the letter of intent related to the other company's due diligence regarding your company's personal information asset?

a) Yes
b) No

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1 (A) YES.
It is a good idea to review the definition of "confidential information" in the agreement in order to determine whether any conditions must be met in order to qualify information disclosed at the meeting as confidential information. For example, some agreements provide information disclosed orally must be confirmed in writing within a certain number of days after the date of disclosure, and information which is disclosed in writing must be marked as confidential. It is a good practice in any event that critical confidential information be marked with a statement such as, "These materials are owned by and are confidential information of ABC Corp.; they may not be copied or used without the prior consent of ABC Corp." Complete and accurate records of the confidential information handed to the other party should also be maintained.

2 LIMITATIONS OF LIABILITY AND SURVIVAL.
Many — and probably most — supply contracts contain limitations of liability that not only exclude certain types of damages such as consequential damages, but also contain an overall "cap" on liability — for example, one month's fees under the contract. Generally speaking, you do not want to be placed in a position where indemnities such as intellectual property indemnities are subject to all of these limitations and therefore it is wise to negotiate a "carve-out." As well, you should review the survival clause in order to determine whether or how long the indemnity lasts after the expiration or termination of the contract.

3 (A) YES.
The statute that is most likely relevant — the federal Personal Information Protection and Electronic Documents Act — has a significant omission: there is no provision allowing your company to disclose its personal information asset to the other company unless it obtains the consent of each of the individuals to whom the personal information relates. Note that some provinces have legislation substantially similar to PIPEDA which addresses this omission in some circumstances, and that personal *health* information may be subject to special rules.

Accordingly, in the letter of intent, when addressing due diligence, you may provide that your company will only disclose to the potential buyer an "anonymized" version of personal information, i.e. completely stripped of identifying features. Or your company may offer a synopsis of the nature and volume of the personal information — although warranties regarding the quality of the personal information may be required in the definitive agreement regarding the ultimate transaction.

However, assuming the transaction does proceed, issues related to the transfer of personal information do not end with due diligence, i.e. some individuals may not want their personal information transferred as part of the transaction. Should an opt-out be offered? Would this be practical? A forward-thinking solution to such issues is to make arrangements in advance of a potential transaction to build a method into your company's personal information documentation and procedures by which your company obtains consent from the relevant individuals to the disclosure of such information in the context of a potential or actual transfer of your company's business. Note that validity of consents is sometimes an issue, i.e. consents from minors. Even if you have obtained such consents, the letter of intent must still include enforceable provisions regarding safeguarding personal information disclosed during due diligence — limiting use, preventing further disclosure, providing for return or destruction in the event that the transaction does not close, and establishing consequences for breach of the restrictions.

YOUR RANKING?

- **One or fewer correct:** *Might be time to brush up.*
- **Two correct:** *Good job, but not perfect.*
- **Three correct:** *Most impressive.*