

## Seller Risk Management Strategies During M&A Activities

By Brian Von Hatten

Depending on the structure of a merger or asset purchase agreement, a seller may inadvertently violate the terms of a license agreement or take on liability to a buyer or software publisher when dealing with software licensing. Software licensing agreements often have provisions that either prevent assignment or transfer of the license completely or at least require the transferor to seek permission from the publisher before any transfer takes place.<sup>1</sup> Sellers may be able to limit their exposure by implementing the risk mitigation strategies below.

- o Document software deployments and entitlements as of the closing date
- o Add software asset schedules to transaction documents
- o Avoid broad representations and warranties concerning ownership
- o Require buyer to assume all liabilities arising after closing
- o Identify which licenses can be transferred as of right
- o Seek permission from the licensor when available
- o Limit holdbacks and price adjustments

These types of transactions are usually complex and often expose the entities to significant financial exposure. Companies needing assistance with these agreements during merger activities should contact counsel experienced in software licensing as a preliminary part of the transaction.



About the author Brian Von Hatten:

Brian represents many large and mid-market organizations on matters related to transactions, software licensing, and disputes. Brian's focus includes substantial attention to complex information technology issues for companies of all sizes.

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<sup>1</sup> For an analysis on what happens when the license agreement is silent see the following : <http://www.scottandscottllp.com/main/blogentry.aspx?id=3304>