



The Importance of LOIs in M&A Transactions

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Presenters



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Craig advises clients ranging from startups to mature companies in mergers and acquisitions, corporate governance, and general business matters. He also assists with commercial contracts, governance matters, and strategic transactions.



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Cameron guides small and large private companies through all stages of their business lifecycle. Cameron assists his clients with matters ranging from entity selection and formation, corporate governance, commercial contract review and negotiation, and mergers and acquisitions, joint ventures, and other complex business transactions.

Purpose

Letter of Intent – what is it?

- Written, typically nonbinding document (with certain binding sections) that outlines an agreement in principle between two or more parties

Typically includes:

- Names of parties
- Description of transaction
- Proposed terms
- Timeline for completion of transaction
- Exclusivity
- Confidentiality clause

“Dating versus Marriage”

Critical to have an NDA in place prior to this stage of transaction

Two Examples

Heavy Negotiation

- Complex business terms (NWC, earn-out)
- Multiple drafts
- Expensive, but may be worth the investment while negotiating definitive documents

Low Priority

- Unsophisticated parties and opposing counsel
- LOI was not prioritized
- First purchase agreement – unworkable
- Second purchase agreement – workable, but many issues

Business Terms

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- Nature of transaction (equity, assets, merger)
 - Tax considerations (338(h)(10)/336(e), F reorg)
- Consideration (cash at closing, holdback, escrow, rollover equity)
- Post-closing adjustments, earn-out, etc.
- Indemnification (cap/basket, survival)
- Restrictive covenants
- R&W Insurance
- Transaction-specific terms (client input)

Legal Terms

Legal Terms

- Confidentiality
- Exclusivity
- Typical legal terms (definitive agreements, R&W, closing conditions, covenants, diligence, governing law, fees and expenses)
- Nonbinding versus binding
- Expiration Date
- Atypical legal terms (“customary closing conditions as would be typical for a transaction of this type and size”)

Finer Points

Get involved early (educate your clients)

- “Play the hand you’re dealt”

Binding versus nonbinding

- Term
- Exclusivity
- Confidentiality
- Fees & Expenses
- Boilerplate (amendments, notice, etc.)

Questions?