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# Mergers & Acquisitions Process Overview: Part 2

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The Mergers & Acquisitions Process Overview Series is a sequence of five articles about the purchase and sale process. It is intended to provide business owners with a broad overview of the transaction process and answer some of the questions that are frequently asked.

In Part 1 of this Mergers & Acquisition Series we generally discussed the triggers for buyers and sellers and the process by which they come together. **In this Part 2 we will discuss the letter of intent (LOI).**

**Letters of intent, or term sheets, or memorandums of understanding** come with a variety of names, but whatever it happens to be called in your transaction, it should generally include the following:

- Parties.The seller and buyer should be identified and owners included.
- Binding or Non-Binding. This sets forth the parties' understanding as to whether the letter of intent will contractually bind the parties to proceed with the intended transaction based on the outline in the letter of intent. In general, because the parties do not yet have a full understanding or appreciation of each other, non-binding is preferred. Either party may discover something about the other that may make one, or the other, or both, want to call the whole thing off.
- Deal Structure. This provides the framework of the transaction: asset purchase, stock or equity purchase, merger, other transaction and any tax elections associated with a given transaction and perhaps any specific assets or divisions or affiliates to be excluded.
- Purchase Price and Payment. This sets forth the cash and/or equity consideration, payment at closing, earn-out payments and conditions to trigger the deferred payments.
- Employment of Owners
- Employment of Key Personnel

- Restrictive Covenants (non-compete and/or non-solicitation) and Duration
- Conditions Precedent. These may include buyer financing conditions, requirements for seller subordination to buyer's lender(s); divestiture of excluded assets or affiliated entities.
- Target Close Date and General Conditions to Closing. Common conditions are approvals from parties' shareholders or directors; undertaking by seller to cooperate with buyer's representatives in conducting due diligence review of seller.
- Exclusivity. The buyer will typically require the seller to stop shopping a sale while the buyer completes its due diligence and works toward closing. This prevents the seller from using the buyer's terms to shop for a better deal and usually comes with a break-up fee if the seller engages in such activity.
- Confidentiality. Although there should be a non-disclosure agreement in place prior to the buyer receiving any specific information as to the seller, each of the buyer and seller will want to maintain the confidentiality of the transaction until they are each prepared to announce it at the time and manner that will be most advantageous and no one wants to announce a deal that for some reason does not later close.
- Expenses. Generally, the LOI clarifies that each party will be responsible for its respective fees, costs and expenses associated with the transaction.
- Special Circumstances. Items that relate to the transaction that deserve a specific statement as to the parties' expectation as to treatment [e.g. payment of transfer taxes; requirement for extended reporting insurance (tail coverage)].
- Definitive Agreements. Typically, the LOI provides that the buyer will prepare the purchase agreements.
- Seller's Conduct Pending Closing. The LOI will require the seller to conduct its business in the usual and customary manner through the closing. The seller does not want to make any dramatic changes to its business model if the sale doesn't close and the buyer doesn't want any changes that could negatively impact the economic model upon which it determined the purchase price and transaction terms.
- Governing Law. The buyer and seller may be headquartered in different states and the LOI will generally provide which law will govern not only the LOI, but also the transaction.

**Once the terms of the LOI have been agreed upon and it is executed by the parties, the buyer will proceed with its due diligence review of the seller's business.**

**We will examine that stage of the transaction process in Part 3.**

**If you are considering a purchase or sale we would be happy to work with you in the process. Please contact Bill Helbling or call us at 814-459-2800.**

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