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Deal Making 101: How to Lock in the Key Terms of Your Deal, While Retaining Flexibility – Is the Back of a Napkin Good Enough?

This program will provide key insights on Letters of Intent, Memoranda of Understanding, and Term Sheets to help you better utilize these preliminary documents to lock in the key terms of your next business deal.

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Objectives of Program

- (a) Provide practical insights into current practices regarding Letters of Intent (LOI's), Memoranda of Understanding (MOU's), and Term Sheets; and
- (b) Offer tips and tools that can be immediately put into practice when you return to your offices after our program today.

Summary of Program

- **(1) Basics on LOIs/MOU's/Term Sheets**
- **(2) Purpose of These Interim Documents**
- **(3) Form of Documents**
- **(4) Legal Treatment of LOI's/MOU's/TS**
- **(5) Questions and Answers**
- **(6) Conclusion**

The Basics: Legal Documents

- **Different types of documents:**
 - **Letter of Intent (LOI)**
 - **Memorandum of Understanding (MOU)**
 - **Term Sheet**

The Basics: Purpose of LOI/MOU/TS

- 1. To set forth the parties' mutual interim understandings in connection with an impending business deal. The forms may vary slightly, but the objective for each is the same.**
- 2. To lock in key terms of the deal**

Types of Transactions

- **Bank Loan Commitment Letters**
- **Investment**
- **Merger or acquisition (stock or asset)**
- **Joint ventures**
- **Commercial Leases**
- **Real Estate Development Projects**
- **Sales/distribution**
- **Marketing**
- **Consulting and Employment**

Why Enter into LOI/MOU/Term Sheet

- To advance contract negotiations
- To form basis of parties' relationships
- To lock in pricing; valuation; opportunity; and other points
- For clarity - are all parties speaking the same language; understand the other?
- To obtain mental commitments to “lock” in positions in later negotiations

What Form is Best?

- **Signed**
- **Unsigned**
- **Drafted by Attorneys**
- **Drafted by Business people**
- **Is the back of a napkin enough?**
- **Certain industries have accepted forms (e.g., investments - Term Sheet)**

Binding or Non-Binding?

- Fully binding or Partially binding
- Is there consideration?
- What side are we on? Buyer; Seller; Money; power
- Does LOI contemplate execution of any further agreements or actions (e.g., due diligence; definitive agreements)?
- Include explicit statement that all or part is binding or non-binding - subject to further conditions

Commonly Binding Provisions

- **Confidentiality**
- **No Shop**
- **Effective Term**
- **Deadline for execution of definitive agreement(s)**
- **Parties' responsibilities and contributions**
- **Valuations**

Commonly Binding Provisions (cont'd)

- **List of Assets that form basis of business deal (to list; or not list assets?)**
- **Break up fee - if definitive agreements not executed in certain time?**
- **Non-competition restrictions**

Effective Term of LOI/MOU/Term Sheet

- **The LOI should have a short life**
- **Should allow enough time to draft and negotiate the definitive agreements**
- **Short term will motivate parties to work hard in order to meet upcoming closing date.**
- **Longer term will affect the parties' motivation and could harm one party**

Legal Treatment of LOI/MOU/TS

- **An agreement -- enforceable?**
- **An “agreement to agree” - not enforceable or enforceable in part only?**
- **Definiteness is the key**
- **Are there any missing fundamental terms without which there can be no agreement? Price; quantity; etc.**
- **Is there a meeting of the minds?**

Legal Treatment of LOI/MOU/TS (cont'd)

- **Are there conditions precedent to definitive deal?**
 - Due diligence; conditions; occurrence of an event
- **Peppercorn or promise to do or not do something?**

Top 5 Tips

- 1. Remember the General Purpose of LOI's
- Enable the parties to have a written expression of interim understandings on the material issues
- Help to focus the parties to be “on the same page”
- Allow parties to move to the next stage of the negotiations

Top 5 Tips

- **2. Avoid Binding LOI's - Stick with Partially Binding LOI's**
- **Avoid making binding commitments in the LOI, except with regard to confidentiality and exclusivity period**
- **Buyers/ Investors may insist on an interim exclusivity period, such as a “no shop”, “standstill” or other provision, while they complete due diligence, and contract negotiations**

Top 5 Tips

- 3. Avoid Overly Aggressive Timelines
- One month to complete deal is almost never enough time and is unrealistic
- 2-3 months is common
- Up to 6 months for certain deals

Top 5 Tips

- 4. Focus on the Big Picture
- Use the LOI to set forth the agreed upon key issues, and a non-binding road map for the entire transaction
- Leave the focus on detail to later stages of the negotiations and to the definitive agreement

Top 5 Tips

- 5. Limit LOI Closing Conditions
- Try to limit closing conditions to:
 - Satisfactory completion of financial, legal and technical due diligence; and
 - Execution of definitive agreements

Top 5 Tips (Bonus)

Act in Good Faith

- Once the LOI has been signed, act in good faith in order to comply with the agreed guidelines to complete negotiations and closing of the definitive agreement
- In certain states, the buyer/ investor can sue if the other party acted in bad faith in withdrawing from the deal

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Thank You

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