

LETTERS OF INTENT IN M&A TRANSACTIONS

Letters of intent often are used in complex transactions when the parties want to tie down the principal terms of the deal early in the negotiations. A letter of intent (sometimes referred to as a memorandum of intent or a term sheet) is simply a writing signed by all parties to a proposed transaction that states general agreement to one or more key terms, such as the price and terms of sale. Letters of intent contemplate the negotiation and signing of a final, "definitive agreement" containing all the terms of the transaction. Most letters of intent are intended to be non-binding, although they may include some terms that the parties want to bind them even if the definitive agreement is not signed and the deal does not close.

Letters of intent are not mandatory, and there is no reason why the parties cannot proceed directly to the final agreement. However, letters of intent can help streamline negotiations where the proposed transaction is complex, where the principal terms have not been agreed to, or where certain issues need to be resolved early in the negotiations. In these situations it may be beneficial to obtain the parties' written agreement on some of the "deal-breaker" issues before incurring the cost and expense of preparing and exchanging the final agreements. For example, if the parties cannot agree on price, then there is no need to spend time or effort on negotiating representations and warranties.

Given the informal nature of letters of intent, the parties themselves often attempt to draft them without the assistance of legal counsel. We recommend that legal counsel at least review a letter of intent before signing, however. As discussed below, letters of intent can create binding obligations beyond a party's intentions, and review by legal counsel can help avoid this surprise.

The parties to a proposed transaction usually intend that their letter of intent will be non-binding and merely a guide for further negotiations that might lead to a final agreement and the closing of the transaction. Creating an unintended binding obligation is the major risk of using a letter of intent. Because of sloppy drafting or the actions of the parties after signing the letter of intent, a court might find levels of enforceability that the parties did not intend.

A letter of intent can be a valuable document to streamline negotiations by bringing the parties into agreement on the major terms of the deal. A letter of intent is not necessary in an M&A transaction, and the parties should consider whether it might be more efficient to simply proceed directly to the final agreement. However, a letter of intent can be especially valuable in complex transactions where it is important for the parties to determine early in the negotiations whether they agree on the transaction's price and fundamental structure so that time and effort is not wasted in drafting lengthy documents. A letter of intent can contain both binding and non-binding provisions. However, unless it

is carefully drafted, a letter of intent also can have the consequence of creating binding obligations not intended by all the parties.

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- Steven D. Siner