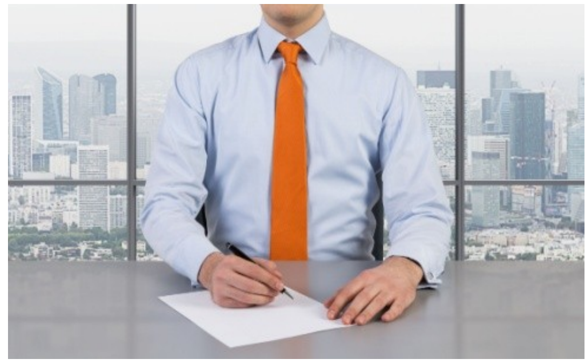
Letters of Intent (LOI) – Buyer's Exclusivity



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By Michael N. Mercurio

I've reviewed many LOIs over the years – some we've prepared and others the client prepared. I've found that too many people view LOIs as form documents containing commercial terms. Yes, LOIs are vital documents establishing the commercial terms of a transaction. However, LOIs should not be considered "throwaway" forms in the M&A process. I think the lax attitudes relate to the non-binding nature of most terms in the LOI. Yet, there should be specific binding terms in every LOI. For a buyer, one important binding term is the exclusivity provision. Most recently, I needed to enforce this provision due to a seller's breach.

My client invested much of their time and money evaluating a transaction and documenting the same (legal, accounting, and banker time). The exclusivity provision protects a buyer from a seller "two-timing" them by not committing fully to the contemplated transaction and not negotiating in good faith. In my instance, the seller committed to another transaction during my client's exclusivity period, leaving my client with much frustration and wasted costs. Buyers rightly demand a fair time frame to evaluate and work with a seller to consummate a transaction. Buyers invest substantial front-end costs in this regard. Fairtrade is for the seller to commit to an exclusivity period (30, 60, 90 days) to allow the parties to finalize a transaction in good faith. My client had an exclusivity period with "teeth" that allowed him to recoup these costs – and the seller did reimburse. But buyers beware. Without an adequate exclusivity provision, among other protective provisions, much time and money can be lost when a seller changes course.