

## M&A Nugget: Letter of Intent should be neither a Gimme nor an Obstacle

December 18, 2024

By Glenn D. Solomon



The letter of intent is the first significant document signed by the target and potential acquiror in a merger transaction. Many times over the years, clients have first contacted me after signing a letter of intent to sell or purchase a business. That is usually a mistake.

The letter of intent should set forth the parties' expectations of the business deal and the most core legal issues. Accomplishing that, while not allowing the letter of intent to bog down the progress of the deal, is a fine balance and takes professionals who have been through the process many years.

Some clients hurry through a letter of intent because they are under a misconception that the letter of intent is non-binding. However, the letter of intent is in fact a legally binding document in part.

Although most letters of intent do not create a legal obligation to close the transaction, letters of intent do typically contain clauses that bind the seller and the purchaser, including, a) a no-shop clause prohibiting the seller from seeking or negotiating with other buyers; b) a confidentiality provision; c) a statement that from the signing of the letter of intent through the termination of the letter of intent, the seller will operate in the ordinary course of business; d) the date the letter of intent expires; and e) a statement of which State's law governs the letter of intent. The primary purposes of these binding clauses are 1) to ensure the buyer who will be expending time, money and resources investigating the seller, that the seller will operate ordinarily and not seek to negotiate against the buyer, and 2) to give the seller with comfort that its willingness to sell its business will remain confidential and that there will be a date to move on if the parties agree on the terms of a definitive agreement.

Since the letter of intent sets the parties' expectation of the business terms, a rushed letter of intent can miss the boat on key business terms that, if thought of later, are difficult to incorporate into the deal. While the letter of intent must be dealt with expeditiously to move on to the next steps as quickly as possible, one side will be very unhappy later if a key business term is missed.