

M&A Nuggets: Exclusivity

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One important component of the letter of intent for the sale and purchase of a business is the exclusivity paragraph. In that paragraph, the seller agrees to deal only with the interested purchaser for a specified period of time. This exclusivity is important to purchasers, because they will be devoting significant time, resources and money to investigate the seller, conduct due diligence and determine the final terms of the transaction to present to the seller. The exclusivity obligation is therefore almost always a requirement. However, sellers should be wary that the exclusivity paragraph is not too restrictive. The exclusivity language should always contain the period of time the seller agrees to negotiate only with the interested purchaser. That period of time needs to be thoughtfully considered. A seller's business is not on the market during the exclusivity period. Too long of a period could result in missed opportunities if the deal contemplated by the letter of intent falls apart. Exclusivity periods of ninety days are common. The first drafts of exclusivity paragraphs presented by buyers usually contain a requirement that the seller notify the buyer of any other offers received, the names of the party submitting the offer and the terms of the offer. The problem with this language is that offers are often submitted on a confidential basis. So, while it is not problematic for a seller to notify the other party to the letter of intent that another offer has been received, the name and terms of the offer should be not be disclosed and the exclusivity paragraph should be modified accordingly. The bottom line here is that an exclusivity paragraph in a letter of intent is necessary, but it should be modified to accommodate the needs of the buyer while not unduly restricting the seller.

**If you have any questions about this or any other M&A issue,
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