

M&A Nuggets: The Due Diligence Barrage - How to React

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After the letter of intent for the sale and purchase of a business is signed, the potential purchaser will then deliver its due diligence list to the target company. The due diligence list can be voluminous. It is not unusual for a list to contain twenty pages with more than 200 specific requests. The topics covered include many areas, from financial to tax to corporate and operations. The target's owner may be inclined to attempt to handle the due diligence list on its own. It is crucial, however, that the target's advisors be brought in upon receipt of the due diligence list. Here is why:

- Due diligence lists often are a purchaser's attempt to "shoot for the moon", requesting details that may not be needed for time periods that may not be needed. In fact, the due diligence list is negotiable. Your advisors can guide you on which items the potential purchaser should be asked to remove from the list;
- For the reasons discussed below, it is important that an organized system be created by which each request and answer to it is linked. Your advisors can assist you to set up that system;
- Documents provided in response to the due diligence requests usually contain information that must later be disclosed in the representations and warranties section of the purchase agreement. It is important for your advisors to be able to determine early on what disclosures in the purchase agreement will need to be made; and
- In that regard, documents to be provided in due diligence may contain a surprise or two, since many of the documents may be old and/or never have been reviewed. For example, in one transaction I handled in 2019, one of the target's vendor contracts contained a right of first refusal in the vendor to purchase the target. These kinds of surprises need to be learned about and dealt with soon in the sale process.

By asking for the assistance of your advisors early on, the due diligence process can be made much more manageable, resulting in a substantial savings of time and money.

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