



Key Considerations in Responding to an Unsolicited Letter of Intent

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Considerations "Around" the LOI:

1. Leverage Influences Everything. Private, middle market M&A transactions are not one-size-fits-all. Nearly everything is negotiable, and leverage influences all aspects of those negotiations. Thus, securing (and maintaining!) leverage is often key to bringing a deal to a successful close. Consider the factors that affect the positive and negative leverage that each party may have (including time, competition, necessity, and desire) and then focus on (i) getting information about the other side and (ii) controlling information about your side. Don't underestimate the importance of maintaining credibility in this process (play your hand as well as you can, just don't overplay it).

2. Who's On the Team? Representing sellers in private M&A transactions is a team sport. In general, no single outside advisor can provide a business owner with all of the information needed to properly assess an unsolicited LOI. Encourage owners to bring their trusted outside advisors together for a broad range of perspectives, don't be afraid to identify missing subject matter experts who should also be consulted, and then look for additional opportunities to foster teamwork as the deal progresses. Some team members may provide very valuable specific information on the other party or market data relevant to your transaction.

3. Who's Under the Tent (and When)? Managers and employees are often central to the success of a privately held business, and they most likely possess the very information that will be sought during the diligence process. It is therefore surprising how often business owners overlook the importance of having a properly formulated internal communications plan to address a proposed M&A transaction. Immediately before or (heaven forbid) after the definitive agreement is signed is not an ideal time to begin working on this. Encourage owners to be proactive and formulate an internal communications plan as early in the process as possible (even if they do not intend to communicate until the deal is done), and make sure that process is consistent with the talking points that will be used with non-employees (customers, vendors, etc.) later on.

Considerations "Within" the LOI:

4. Structure (Also) Influences Everything. Deal structure affects nearly every aspect of a private M&A transaction – from due diligence, to negotiating a definitive agreement, to obtaining third party consents, to calculating after-tax proceeds. If the parties don't have finality regarding structure at the LOI stage, then a seller should be prepared to tie a transaction to the bottom line purchase price and preserve an argument for gross-ups if the buyer ultimately insists on a less tax efficient structure.

5. Non-Binding LOIs Usually Aren't (or: It's OK to Hate Lawyers). Often the parties want to avoid getting bogged down in negotiating an LOI and proceed to negotiating the definitive documents. Usually (though not always) this is a mistake – particularly for seller – and it may lead the parties to hurry into a "non-binding" LOI (trusting that a document labelled "non-binding" couldn't possibly cause too many legal problems). However, nearly all non-binding LOIs include binding provisions, and courts may interpret an LOI to include implied (i.e., unwritten) obligations. Pay special attention to carefully articulating which provisions are legally binding (most should not be, but some definitely should), and avoid traps for the unwary (e.g., obligations to pick up buyer's costs, unlimited exclusivity obligations, failure to address confidential information).

6. General vs. Specific Terms (or: If It's Important or Unusual, Argue About It Now). Given the distraction, cost, and possible unintended consequences arising from the M&A process, sellers should nail down key deal points before embarking on a process. A good test: what points are needed to avoid each party wasting time? Also, a seller's leverage will typically be at its strongest up through this point, so this provides a great opportunity to learn as much information as possible about buyer's thesis for the acquisition and possible leverage points.

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