



A Letter of Intent

It gives both parties confidence in a possible deal

by: Robert C. Goldberg, BTA General Counsel

As acquisitions continue in our industry, it is common for me to receive calls about a dealer receiving a letter of intent, term sheet, memorandum of understanding or an offer letter for the purchase of his (or her) business. Often, these documents have been signed by both parties with the seller stating it is non-binding. Letters of intent have both binding and non-binding provisions and should be reviewed carefully prior to execution. The terms should be specific and clear.

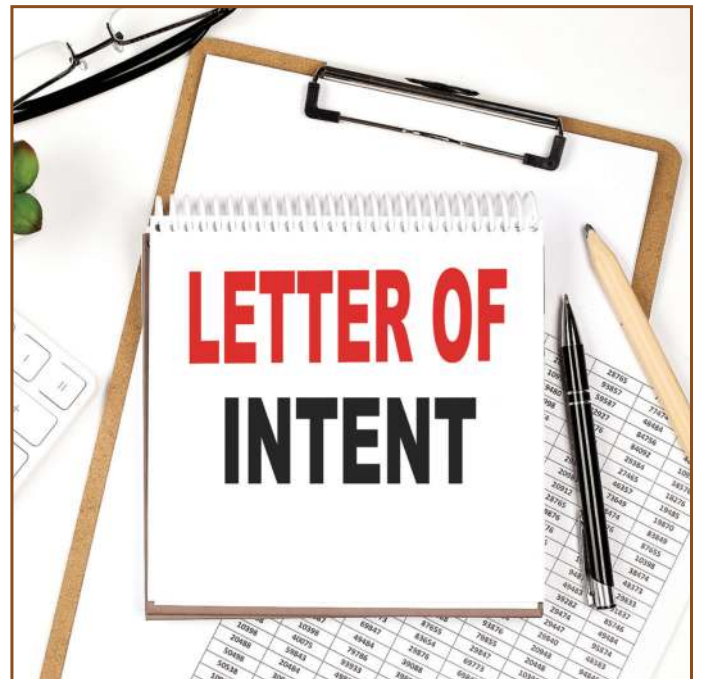
A letter of intent is a document given by one party in a commercial negotiation to another to help facilitate business discussions. The letter will usually set out the agreed key commercial points that will form the basis for negotiations and a time scale for entering into a formal agreement. The letter is generally not legally binding, however, some provisions (like a “no-shop” clause) are binding.

The purpose of a letter of intent is to give both parties confidence that a deal is possible and that continuing negotiations are worth the time and expense. Without a letter of intent, you may find that you and the other party spend a lot of time and money, but cannot conclude a deal due to disagreement on a key point. A letter of intent is designed to avoid this by flushing out potential disagreements on key points (if any) at an early stage.

Equally, if you are unable to agree to a letter of intent with the other party, you should probably stop any further discussions as you are unlikely to be able to negotiate a final agreement. If the parties are fortunate to agree on key terms, then often a letter of intent is not entered, and the parties move forward with a stock sale or asset purchase.

You should consider using a letter of intent if you would like to formalize your discussions with another party, with the goal of entering into a binding agreement. Bear in mind that before disclosing any business information during negotiations, you must demand the other party sign a mutual non-disclosure agreement. A non-disclosure agreement will protect confidential information, establish the use of confidential information, reveal who may examine the information, and establish how and when a party can demand destruction and/or return of all confidential information.

A letter of intent should set out the understanding of the parties as to the key terms they will be negotiating and how they intend for those negotiations to proceed. This includes terms such as the time within which they intend to reach a formal agreement, any preconditions to the agreement and



an overview of the key commercial terms. Industry letters of intent typically set forth the purchase price, amount paid at closing, any earnout, the period to conduct due diligence, information to be reviewed during due diligence, contract review, lease or real estate involved, third-party consents required, tax matters, governing law and confidentiality.

The purpose of the letter is simply to give both parties confidence that a deal is possible and that continuing with their negotiations is worth the time and expense that each party will spend. Letters of intent are, however, considered to be “morally” binding, as they set out the parties’ intentions to reach a legally binding agreement and provide a focus for discussions. Reneging on, or trying to renegotiate, the terms of the letter of intent can adversely affect your relationship with the other party and likely kill the opportunity. The sale or purchase of a business is a significant transaction that must be carefully planned from the non-disclosure agreement to the closing, so be sure you are doing it properly. ■

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