



## Letters of Intent: How to Use Them in Business Transactions

Letters of Intent (LOIs) are often used to initiate business transactions such as the purchase or sale of businesses and commercial real estate leases and sales. LOIs are an effective tool to help the parties flesh out key terms of an anticipated transaction to be sure there is a sufficient "meeting of the minds" to justify expending the time and money to conduct due diligence and create detailed transaction documentation. But, what does signing an LOI actually obligate the parties to do? And, more importantly, what happens if one or both of the parties decide not to proceed with the transaction? As is often the answer: it depends. However, there are some general considerations that apply in most situations.

### What do LOIs Look Like?

LOIs take many forms and should be adapted to the nature of the transaction. Some LOIs are as brief as a page or less, and some 25 or more pages, but the typical LOI is about 2-4 pages. The underlying premise of virtually all LOIs is that the parties are not obligated to enter into and consummate the contemplated transaction, but they agree to negotiate further in good faith with the intent of ultimately entering into a binding agreement.

### Binding Agreements

Accordingly, virtually all LOIs specifically state that they are non-binding and that the transaction and obligations of the parties are contingent upon their agreement to and execution of an appropriate, definitive binding agreement or agreements. Depending on the nature of the transaction, the LOI may contain additional contingencies, for example, obtaining necessary approval from a government agency or a third party whose consent is necessary for the transaction to occur.

### Confidentiality and Disclosure

A very important aspect of any pre-transaction discussions and exchange of information is to protect any confidential business information from disclosure and/or use by the other party. Separate from the non-binding nature of the parties' agreement to negotiate the transaction, many LOIs also contain certain provisions which are binding between the parties. For example, best practice usually dictates that an LOI contain binding provisions regarding the parties' obligations of confidentiality, protection of their proprietary information, the obligation to deal with each other exclusively during the period of the LOI, and



similar provisions. Due to the non-binding nature of the LOI, however, and depending on the specific transaction, it may be advisable to have any non-disclosure and proprietary protection provisions in a separate agreement that can be enforced outside the LOI.

### Termination

LOIs should also contain provisions regarding their

termination. In addition to allowing the parties to terminate by mutual agreement, the LOI should contain a date certain at which it will terminate if the parties have been unable to agree upon and enter into the necessary binding agreements. Upon termination for failure to reach a binding agreement, the parties should have no further obligation with respect to the contemplated transaction, however, in the event they are contained in the same agreement, the binding obligations regarding confidentiality and use of proprietary information should survive that termination.

If you have any questions about pre-transaction documents, please contact any of CPM's business attorneys to ensure that you and your business are adequately protected.