

Mergers and Acquisitions 101

Start to Finish

- Non-Disclosure Agreement
- Term Sheet
- Due Diligence
- Purchase Agreement Strategies
- Ancillary Agreements
- Exhibits & Schedules
- Closing

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information
- Ensure the coverage of Directors, Employees, Affiliates, etc. is covered

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information
- Ensure the coverage of Directors, Employees, Affiliates, etc. is covered.
- Disclosure limited to “Need To Know” individuals.

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information
- Ensure the coverage of Directors, Employees, Affiliates, etc. is covered
- Disclosure limited to “Need To Know” individuals
- May want to include a requirement to identify by name who has access to sensitive materials

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information
- Ensure the coverage of Directors, Employees, Affiliates, etc. is covered
- Disclosure limited to “Need To Know” individuals
- May want to include a requirement to identify by name who has access to sensitive materials
- **Clause requiring destruction of Confidential Information upon request**

Non-Disclosure Agreement

- Mutual NDA – use industry standard “even-handed” form
 - Fewer revisions & establishes trust
- Should include strict limitations on use of Confidential Information
- Ensure the coverage of Directors, Employees, Affiliates, etc. is covered
- Disclosure limited to “Need To Know” individuals
- May want to include a requirement to identify by name who has access to sensitive materials
- Clause requiring destruction of Confidential Information upon request
- Confidentiality provisions should last 3-5 years, except for trade secrets which survive until information is no longer a trade secret

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation
- Audited Financials

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation
- Audited Financials
- Limit Disclosures; particularly client names and trade secrets

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation
- Audited Financials
- Limit Disclosures; particularly client names and trade secrets

Buyer

- Focus on key value indicators

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation
- Audited Financials
- Limit Disclosures; particularly client names and trade secrets

- BUYER
- Focus on key value indicators
- Focus on big risk

Letter of Intent – Term Sheet

- What should be disclosed at this stage?

Seller

- Prepared Presentation
- Audited Financials
- Limit Disclosures; particularly client names and trade secrets

- BUYER
- Focus on key value indicators
- Focus on big risk
- Dig into areas of concern

Term Sheet – Specific Terms

- General
- Identify Key Terms, Deal Structure (Asset Purchase or Stock Sale/Swap), Scope of Due Diligence

Term Sheet – Specific Terms

- General
- Identify Key Terms, Deal Structure (Asset Purchase or Stock Sale/Swap), Scope of Due Diligence
- “No Shop” provision for a period?

Term Sheet – Specific Terms

- General
- Identify Key Terms, Deal Structure (Asset Purchase or Stock Sale/Swap), Scope of Due Diligence
- “No Shop” provision for a period?
- Non-binding except for confidentiality and “No Shop” provisions (if applicable).

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee
- Earnout parameters

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee
- Earnout parameters
- Employment terms for “key employees” and who are “key employees”

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee
- Earnout parameters
- Employment terms for “key employees” and who are “key employees”
- Restrictive covenants

Term Sheet – Specific Terms

- Specific Terms in the Term Sheet
- Purchase price, type of consideration and timing
- “Acqui-hire”, Asset Purchase vs. Stock Purchase
- Binding, non-binding, exclusivity, breakup fee
- Earnout parameters
- Employment terms for “key employees” and who are “key employees”
- Restrictive covenants
- Typically, the Seller wants more specificity and the Buyer less specificity

Due Diligence

- Seller & Seller's Attorney
- Awareness of facts and ability to defend them;
persuade Buyer to close the deal without changing
the terms set forth in the Term Sheet

Due Diligence

- Seller & Seller's Attorney
- Awareness of facts and ability to defend them; persuade Buyer to close the deal without changing the terms set forth in the Term Sheet
- Limit time and effort to respond to due diligence (this is typically the most expensive part of an acquisition)

Due Diligence

- Seller & Seller's Attorney
- Awareness of facts and ability to defend them; persuade Buyer to close the deal without changing the terms set forth in the Term Sheet
- Limit time and effort to respond to due diligence (this is typically the most expensive part of an acquisition)
- Buyer & Buyer's Attorney
- Confirm the facts and value of the target company

Due Diligence

- Seller & Seller's Attorney
- Awareness of facts and ability to defend them; persuade Buyer to close the deal without changing the terms set forth in the Term Sheet
- Limit time and effort to respond to due diligence (this is typically the most expensive part of an acquisition)
- Buyer & Buyer's Attorney
- Confirm the facts and value of the target company
- Identify areas of concern and risk

Due Diligence

- Seller & Seller's Attorney
- Awareness of facts and ability to defend them; persuade Buyer to close the deal without changing the terms set forth in the Term Sheet
- Limit time and effort to respond to due diligence (this is typically the most expensive part of an acquisition)
- Buyer & Buyer's Attorney
- Confirm the facts and value of the target company.
- Identify areas of concern and risk
- Identify and quantify legal and commercial risk and corresponding reduction in value

Due Diligence Strategies - General

- General
- Use a virtual data room (e.g. Dropbox)

Due Diligence Strategies - General

- Use a virtual data room (e.g. Dropbox)
- Establish points of contact (lesser number is better)

Due Diligence Strategies – Seller

- Start populating the data room when contemplating a sale, not when the Term Sheet is signed

Due Diligence Strategies – Seller

- Start populating the data room when contemplating a sale, not when the Term Sheet is signed
- Review data room and identify potential issues. Correct issues or prepare defenses to objections

Due Diligence Strategies – Seller

- Start populating the data room when contemplating a sale, not when the Term Sheet is signed
- Review data room and identify potential issues. Correct issues or prepare defenses to objections
- Negotiate time and scope limitations in the Term Sheet

Due Diligence Strategies – Seller

- Start populating the data room when contemplating a sale, not when the Term Sheet is signed
- Review data room and identify potential issues. Correct issues or prepare defenses to objections
- Negotiate time and scope limitations in the Term Sheet
- Consider golden parachute payments

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists
- Identify commercial, financial & legal risk factors that devalue the target company

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists
- Identify commercial, financial & legal risk factors that devalue the target company
- Compliance with laws

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists
- Identify commercial, financial & legal risk factors that devalue the target company
- Compliance with laws
- Source Code Scan

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists
- Identify commercial, financial & legal risk factors that devalue the target company
- Compliance with laws
- Source Code Scan
- Drill down on potential issues

Due Diligence Strategies – Buyer

- Use technical, financial and legal specialists
- Identify commercial, financial & legal risk factors that devalue the target company
- Compliance with laws
- Source Code Scan
- Drill down on potential issues
- Determine indemnification obligations and holdbacks.

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps
- Clarity in drafting holdback releases and use objective measurements

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps
- Clarity in drafting holdback releases and use objective measurements.
- **Closing conditions**

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps
- Clarity in drafting holdback releases and use objective measurements.
- Closing conditions
- **Choice of law and venue (Delaware)**

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps
- Clarity in drafting holdback releases and use objective measurements.
- Closing conditions
- Choice of law and venue (Delaware)
- “Anti-sandbagging” clause

Purchase Agreement Strategies

- Clearly identify the parties (the buying entity may be a subsidiary of the “buyer”)
- Draft & revise for simplicity and clarity, so that third parties (judge, etc.) can easily understand the document
- Use affirmative language to require performance in a short time frame
- Indemnity deductibles, buckets and caps
- Clarity in drafting holdback releases and use objective measurements.
- Closing conditions
- Choice of law and venue (Delaware)
- “Anti-sandbagging” clause
- Is a “Sellers’ Representative needed?”

Exhibits & Other Items

- Loan Payoffs
- Approvals (Stockholder and contract assignments)
- Determine Closing Date
- Wire Instructions
- Co-ordinate signing process
- Closing call

Ancillary Agreements

- Employment Agreements
- Non-Compete Agreements
- Releases
- Management Incentive Plan

Exhibits

- Certificate of Merger
- Escrow Agreement
- Legal Opinion
- CEO Certificate
- Secretary Certificate
- Form of Letters of Transmittal for Preferred Stockholders and Common Stockholders

Schedules

- Participating Stockholders
- Company Permitted Liens
- Key Employees
- Payments of Indebtedness
- Payments of Transaction Expenses
- No Conflicts
- Directors and Officers
- Foreign Qualifications
- Capitalization
- Convertible Securities, Options, Warrants, Etc.
- Voting Agreements, Etc.
- Options, Warrants and Other Rights

Schedules (continued)

- Financial Statements
- Contracts - Terminated
- Contracts - Continuation in Full Force
- Leased Real Property
- Company Intellectual Property Matters
- Company Owned Intellectual Property
- Intellectual Property Licenses
- Infringement
- Litigation
- Government Funding
- Open Source Matters
- Conduct of Business