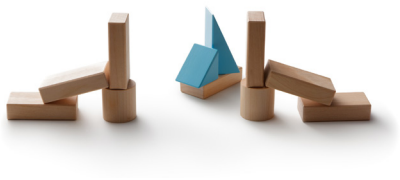
# M&A Building Blocks



## Confidentiality Agreements

Before a potential buyer is willing to make an offer, even a non-binding offer, to acquire a company, the buyer will often want to have an opportunity to complete at least preliminary due diligence regarding the target to enable it to evaluate the opportunity and set a price. To provide the parties with some basis as to the use of, and access to, non-public information, the parties will generally enter into a confidentiality (or non-disclosure agreement) ("CA"). In addition, in order to retain control of the process, most targets will insist that the CA include a standstill provision that would generally prohibit the buyer from making a hostile or unsolicited bid for the target for an agreed upon period of time.

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# Key Issues/Process Points

While each CA will be specific to the parties involved and the particular transaction, the following are the more common terms typically included in a CA[1].

## 1 Receiving Party

The receiving party includes the buyer, its affiliates and its representatives, and the buyer is responsible for a breach by any of such parties.

## 2 Confidential Information

"Confidential Information" includes the following, whether furnished orally, electronically or in writing:

- information relating to the target's business and technical matters
- reports, summaries, compilations and other material derived from such information or at site visits
- information relating to the transaction, including communications, discussions and negotiations between the parties.

**However**, Confidential Information usually excludes information which:

- is or becomes generally available to the public
- was or becomes available from a source other than target
- is independently developed by, or was already in the hands of, the buyer
- is required by law to be disclosed.

## 3 Protective Measures and Degree of Care

There are a variety of standards for the degree of care a buyer must take to protect information, including holding the information "in trust", holding it "strictly confidential", using "reasonable precautions", using the same degree of care as if it were its own information, or industry standard. Buyers should not agree to such a high standard that it cannot actually be met practically, or at all.

## 4 Restricted/Permitted Use Clauses

CAs restrict the use of confidential information other than for the specific purpose set out in the CA. Targets want the purpose to be narrow and the restrictions broad, whereas buyers do not want to the restrictions on use to be so broad as to prevent acquisitions even after the standstill period expires.

## 5 Return of Information

At the end of the term, the receiving party must return or destroy information received. This can lead to issues relating to the destruction of evaluation materials, materials stored in electronic files and documents retained under solicitor-client privilege.

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1 Note that contrary to the common belief that the CA is meant to protect only the target, it is important for buyers to enter into CAs as well as there is a legal obligation at common law to protect confidential information, which obligation is potentially unlimited. Therefore buyers should also want the certainty that a written agreement provides.

## 6 Standstill Clauses

As a condition to providing information, public company targets often require that buyers agree to a standstill clause to protect against such information being used to make an unsolicited take-over bid. The following are provisions that often get negotiated:

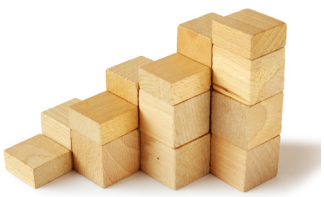
- Limitations on Buyer: During the standstill period, the buyer cannot:
  - purchase securities or assets of target
  - enter into or negotiate a merger
  - solicit proxies or seek to influence or control management, board or policies
  - make public statements as to intent to undertake any of the foregoing.
- Requirement to Provide Information: While not common, buyers should consider including a clause that the standstill will only be operative if the target actually provides confidential information.
- Length of Standstill: 6-18 months is typical.
- Exceptions to Standstill: *De minimus* acquisitions of securities and/or confidential proposals to the board of directors are sometimes permitted.
- Springing Standstill: Almost all definitive agreements governing the acquisition of a target include a fiduciary out that enables a target to terminate the agreement in favour of a "superior proposal" provided that certain conditions are met. However, many agreements prohibit the target from releasing parties from standstills, which could have the effect of limiting the pool of potential parties that could make a superior proposal. In anticipation of such provisions, targets will often include a clause in a standstill provision that "springs" the other party to the CA from the standstill if the target publicly announces that it has entered into a definitive agreement for the acquisition of the target or supports a bid for it. Some buyers will negotiate a standstill that also springs if any offer is publicly made for target, regardless of whether such offer is supported by the board of directors of target. Targets may want to resist this it could result in target losing control of the bidding process.

## 7 Non-Solicitation Clauses

A target may require a buyer to agree not to solicit its employees, customers or suppliers for a period that is usually between 12-24 months.

## 8 Area of Interest

A resource issuer may include a provision that prevents the buyer from acquiring mineral or petroleum tenure within an agreed vicinity of the target's property.



# Letters of Intent

If, after completing some or all of its due diligence, the buyer continues to be interested in pursuing a potential acquisition of the target, the buyer will often present the target with a letter of intent ("LOI"). An LOI may be helpful as it can, among other things, signal a commitment of the parties that will help build momentum by focusing parties on the "big picture" and key issues.

## 1 Binding v. Non-Binding Provisions

LOI's are often divided into two parts, non-binding provisions that set out proposed deal terms that will form the basis of the definitive agreement, such as price, deal protections and deal structure, and binding provisions that deal with the process to get to a definitive agreement or matters that survive if no agreement is reached, such as exclusivity, confidentiality and costs. The parties will want to carefully consider which portions of the LOI are binding in order to ensure that premature disclosure of the transaction is not required. Set out below are the provisions that are typically binding and non-binding in an LOI:

- binding provisions:
  - confidentiality and disclosure
  - access to diligence information
  - exclusivity
  - expenses
  - term, survival
  - miscellaneous provisions such as governing law
- non-binding:
  - price and payment terms
  - composition of management and the board post-closing
  - transaction structure, including treatment of options, warrants and debt
  - summary of key deal protections, including quantum of break fee
  - termination events
  - requirement for shareholder approval
  - conditions to closing
  - drafting of definitive agreement and timing
  - completion of diligence

## 2 Exclusivity

Exclusivity provisions, which are sometimes in a separate agreement, prohibit the target from negotiating or communicating with other potential purchasers for an agreed upon amount of time. Upon agreeing to exclusivity, the target is typically required to terminate discussions with other parties and cease their data-room access. Exclusivity periods generally range from 7-30 days depending on the complexity of the target's business and assets and diligence done to date. An exclusivity provision is similar to a non-solicitation clause in a definitive agreement, however, typically there is no fiduciary out to accept or deal with competing offers.

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