



Companies should not think that the "transaction" is done when a LOI is signed. Read more to find out how can a seller handle the critical period between the LOI and Closing.

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MobileSolve is a boutique investment bank providing M&A, capital raising and financial advisory services to companies in the Telecom, Wireless, Internet, Networking and Semiconductor industries.*

Each month we present a short article on an industry or transaction topic of current interest, and notable transactions in our industries completed during the prior month.

This month's newsletter explains how to carefully manage the time period between signing a LOI and Closing of the transaction. We welcome your questions or comments.

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DON'T BLOW THE CLOSING

By [Steve Gaynor](#) and [Neeraj Baghel](#)

The process of selling a company in a favorable transaction is often arduous and time consuming. Thus it may be natural that some sellers consider the deal done when the letter of intent ("LOI") is signed. After all, the LOI contains the major terms of the parties' agreement, and the only key tasks remaining are a bit of due diligence and drafting standard legal documents; right? Well, wrong, the several weeks between signing the LOI and the closing must be carefully managed to mitigate the many risks that can scupper a deal.

The Letter of Intent

The LOI is typically a short agreement fashioned as a letter from the buyer to the seller in which the buyer states its intention to conclude a definitive agreement with the seller for the acquisition of the seller's business. It represents the preliminary understanding of the parties regarding the proposed sale, and generally includes certain material terms and conditions upon which the business will be acquired.

As a statement of intention, the letter contains many but not all of the essential terms of the transaction. It is also usually not legally binding, except perhaps for certain terms such as non-disclosure of the pending transaction, and how expenses are to be handled.

It is important to make sure the parties share a common understanding of all elements of the letter of intent, and that the LOI has a reasonable amount of detail. Misunderstandings and miscommunications will blow-up a deal very quickly if the parties have different interpretations of the terms.

Although the LOI appears to describe an acquisition agreement replete with structure, price, consideration and other key terms, there is no requirement that the deal be completed, and is actually not completed until the definitive agreements are signed and all closing conditions are met. To complete the transaction, the seller should

carefully manage the activities that occur between the LOI and the closing. Chief among them are conducting the due diligence, managing the business and completing the final documentation and closing.

Conducting the Due Diligence

The term "due diligence" originally arose in the securities laws of the United States; specifically, in the Securities Act of 1933, which generally governs initial equity offerings. It is a defense used by broker-dealers when accused of inadequate disclosure to investors of material information with respect to the purchase of securities by those investors from the broker-dealer. If a court found the broker-dealer exercised "due diligence" in its investigation into the company whose equity they were selling, and disclosed to the investor the results of their investigation, then they would not be held liable for the information the broker-dealer failed to discover and disclose.

As used today, "due diligence" has come to mean any investigation of a company, especially when related to the sale of securities. In the context of an acquisition, it is an opportunity before completing the transaction for a buyer to:

- Confirm the business is actually as was represented by the seller, and the transaction will meet its goals;
- Identify possible problems in the business or post-acquisition integration; and
- Gather information useful in completing the transaction, such as an accounting valuation of the assets, necessary representations and warranties, or points for negotiation in the definitive agreements.

The buyer will require wide-ranging information about the company's financial results, human resources, major contracts, legal status, etc. It is usually provided through a secure data room where access, time spent and downloads can be tracked. The information should be well-organized, complete and supportive of the favorable image of the Company given to the Buyer.

Expect the Buyer will closely examine the Company's financial performance in the Income and Cash Flow Statements, and its current financial status in the Balance Sheet. Sometimes such a review is called a "quality of earnings" accounting due diligence. It is meant to uncover any previously unknown extraordinary items and adjustments that should be made to enhance the accuracy, in the Buyer's view, of the financial statements, or to bring certain assets and liabilities to market value.

Making such adjustments is a normal part of the due diligence process. The Seller should be prepared in advance for potential adjustments by having its Advisor perform a similar analysis before the Buyer does. By doing so, the Seller will appear competent, in command of the financial information, and cooperative to the Buyer. It will also have ready its arguments against any unfavorable adjustments that will preserve the value of the deal.

Managing the Business

Ensuring that the business remains on track and achieving its projections is critical during the period from LOI to closing. To a Buyer, there is little more reassuring than having the final financial results before the closing come in as expected, or better, ahead of plan. While it is tempting for the Seller to get heavily involved in the transaction, it should above all not risk being distracted and having the business suffer as a result.

If the financial results fail to meet plan, the buyer will focus on trying to figure out if the miss is a short-term blip or reflects a fundamental adverse shift in the business. Either way, the Seller is left exposed to a possible adjustment of the price, escrow, indemnity, earn-out and other terms that enable the Buyer to reduce its risk.

If something unfavorable happens, the best policy is immediately to inform the buyer. If done well, this will increase the buyer's confidence in the seller and the business. If done poorly or nothing is said, there's a substantial chance the transaction will be lost.

Completing the Documentation

Once the buyer completes the due diligence and related activities, the terms of the LOI may be renegotiated. If the

due diligence period was properly managed, trust was built between the Seller and Buyer, and while there may be differences, a good relationship will resolve any problems and keep the transaction intact. Once the Buyer signs-off on the due diligence and agrees to proceed with the transaction, everyone's efforts move to the documentation where the lawyers play a major role.

Expect the documentation process to take several weeks, and to be complex, usually involving the completion of not only the main purchase document, but ancillary agreements such as employment contracts for management. Because the LOI contains only the major points of a deal, and there is still much to negotiate.

It is important the lawyers understand that while it is indeed their job to mitigate your legal risks, it is also necessary they adopt the view that they should be cooperative with the Buyer and its counsel, and creative in finding solutions to problems that arise. And while the business decisions are yours, you will want to weigh in also on significant legal issues that affect your legal risks and how much risk you are willing to accept to complete the transaction. In other words, stay in control of the transaction.

Closing the Transaction

Even after the definitive documentation is signed, the deal is not complete until it is closed. The closing can sometimes be several weeks following document execution while items such as third party consents are obtained.

This interim period can be difficult for both parties, as the closing is close, but both sides are drained and face risks that the transaction cannot be consummated, possibly for reasons outside their control, like market volatility. To respond to these risks, the purchase agreement may have adjustments to the price or escrow. In addition, it is certain to have a material adverse change clause, commonly referred to as the "MAC."

The MAC is a contractual trigger that releases a party from its obligation to complete a transaction where a "material adverse change" affects the business of one of the parties. As used in practice, a buyer can use it to renegotiate or walk away from a deal where the Seller's "business, operations or financial condition" (as the phrase is usually constructed) is significantly impaired prior to closing.

Activating the MAC requires meeting the agreed definition of "material adverse change." Not surprisingly, the definition is often hotly negotiated. MACs can be drafted broadly to give buyers an easy escape route, or narrowly to drag them along to closing. Obviously a Seller in the final weeks to closing must understand what might trigger the MAC, and take steps to avoid doing so.

In conclusion, a Seller should not assume, as some perilously do, that the deal is "done" when the LOI is signed, and the remainder of the transaction process involves mere legal documentation. During the period between the LOI and closing, it is important for the Seller to build trust with the Buyer, to present himself and the business as informed and organized, and to keep the business running well, lest suffer the consequences of a price or escrow adjustment, or worse, a broken deal.

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Transactions

The following are notable M&A transactions and capital financings announced or completed in the last month.

Notable M&A Transactions

Target	Target Industry	Acquirer	Transaction Value (in \$ millions)	Transaction Highlights
Altera	Semiconductor	Intel	15,358	Intel acquired Altera, a global semiconductor company
Cypress Semiconductor	Semiconductor	Parade Technologies	100	Parade acquired Cypress Semiconductor which offers Programmable System-on-Chip families and derivatives such as CapSense touch sensing and TrueTouch solutions for touchscreens
mPortal	Mobile Content	Broadsoft	-	Broadsoft acquired mPortal, publisher of mobile content and applications for MNOs, MVNOs, cable operators, content providers, and business enterprises.
Nujira	Semiconductors	Qualcomm	-	Qualcomm plans to acquire Nujira, a provider Envelope Tracking (ET) technology and solutions for powering 4G cellular terminals, base stations and digital broadcast transmitters.
Xerces Technologies	Mobile Gaming	JetSynthesys	-	The acquisition allows JetSynthesys Pvt Ltd to strengthen its digital gaming portfolio services.

Notable Capital Financings

Company Name	Industry	Amount Raised (in \$ millions)	Total Amount Raised (in \$ millions)	Business Description
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ATX Innovation	Mobile Payments	22	36	ATX Innovation, Inc. develops a mobile application for the payment of bills.
Automatic Labs	Connected Cars	24	24	Automatic Labs, Inc. develops software applications. It turns almost any car into a connected car and by pairing Automatic's award-winning connected car adapter and apps for iPhone, Android and web
Bee Cave Games	Mobile Gaming	6	11	Bee Cave Games, Inc. develops and publishes social and mobile games.
Bluebridge Digital	Mobile Apps	2	3	Bluebridge Digital LLC develops mobile tools to help organizations to engage and communicate with audience.
DecaWave	Semiconductors	5	24	DecaWave Ltd. is an Irish fabless semiconductor company which develops integrated circuits for indoor location and communication based on its UWB wireless technology platform.
Ministry of Games	Mobile Gaming	2	2	Ministry of Games Oy designs games. It operates as a mobile development studio.
MoBeam	Mobile Payments	6	20	MoBeam, Inc. develops mobile couponing and ticketing software solutions.
Movik Networks	Mobile Networks	3	44	Movik Networks, Inc. engages in the operation as a network infrastructure company.
Prime Again	Mobile Messaging	1	1	Prime Again develops camera and chat mobile applications
Relay2	Wi-Fi	10	14	Relay2, Inc. engages in the development of Wi-Fi services platform.
SumUp Payments	Mobile Payments	-	20	SumUp Payments Ltd. provides mobile payment solutions through debit and credit cards.
TRX Systems	Location-Based Services	1	3	TRX Systems, Inc. delivers indoor location software and solutions.
Vantrix Corp.	Mobile Video	3	69	Vantrix Corp. provides mobile video mediation and delivery and encompassing solutions for streaming, browsing and messaging.

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