

It's Time to Play "Let's Make A Deal" – Drafting Effective Letters of Intent

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Practice Area: Real Estate & Retail Real Estate

Whether being used as a way to formally open negotiations or as a final summary of agreed upon terms, a well-drafted letter of intent ("LOI") can do wonders to help get you to a completed deal. A LOI will provide both parties with a road map of the deal's most fundamental terms and can also make it easier to gain approvals by providing an easily understood snapshot to those who may not have been involved in the negotiations themselves. A good LOI will also save both parties time and money by providing specific direction to those drafting the final leases, contracts or other binding documentation. Some of the key provisions to include in the LOI are as follows:

Financial Terms/Timelines – The most fundamental terms to include in a LOI are the applicable economic terms and timelines. Whether negotiating a new deal or renewing an existing one, deals are often made or lost based on the rent and term provisions and the more specificity with which these terms can be outlined in the LOI, the better.

Use/Operation Clauses – Defining the intended use, setting operation parameters (such as continuous operations or go-dark clauses), outlining applicable opening requirements, and setting forth exclusive rights are also important terms to include in the LOI if the parties do not have an existing leasing relationship in which these terms have already been defined.

Format – It is also important for the parties to agree on the format to be used for the final documentation up front, so that neither party expends unnecessary time or effort drafting documents that do not get used.

Expiration Date/Timing – Because the LOI is not the final step in the deal, it is important for the parties to consider whether an expiration date should be included in the LOI. This will not only help set expectations as to how long the drafting and final execution stage will take, but it will also give the parties a chance to ensure they are on the same page as to timing issues before much expense has been incurred. For example, a small company might expect to have a deal signed, sealed and delivered a few days after signing a LOI, while it may take larger companies weeks or months to reduce the deal to a full contract and gain all necessary approvals. If the parties are not on the same page on this from the beginning, it can lead to frustrated parties and blown deals.

Binding Effect – One of the most important (and often overlooked) elements in a well-drafted LOI is a clear statement regarding the binding nature of the LOI itself. While LOIs are usually intended to be non-binding deal summaries, if the deal later falls apart, it is not uncommon for the enforceability of these documents to become the subject of litigation or other challenge. Considering this, it is extremely important that the LOI include a specific statement as to the nature of the document. For example, if the LOI is intended to be binding on the parties once signed, a statement to that effect should be included. Alternatively, the LOI should state that the parties do not have a binding contract until a formal written contract is mutually executed if that is the intent.

No matter what format your LOI takes, it is important to use this step as a way to ensure both parties are in agreement on the fundamental deal terms. A clear, concise, and comprehensive LOI can alleviate misunderstandings as the deal advances and help set the stage for a smooth deal closing.

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