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Binding and Non-Binding Provisions in M&A Term Sheets: Practical Drafting Considerations

By Eric Sigman on September 21, 2026

Term sheets and letters of intent are a common early step in mergers and acquisitions transactions. Although these documents are often described as "non-binding," that characterization is usually only partially accurate. In practice, most M&A term sheets contain a mix of non-binding business terms and binding legal obligations. Careful drafting is therefore essential to ensure that the document accurately reflects the parties' intent and does not create unintended contractual commitments.

Overview

For buyers and sellers, the key drafting issue is not whether the term sheet or letter of intent is broadly labeled "binding" or "non-binding," but whether each provision is clearly identified as one or the other. Ambiguity on that point may lead to disputes regarding enforceability, party intent, exclusivity, confidentiality, expense allocation, governing law, and the parties' obligations during negotiations.

Non-Binding Business Terms

The principal economic and commercial terms of an M&A transaction are commonly intended to be non-binding. These provisions may include the proposed purchase price, valuation methodology, transaction structure, payment terms, closing conditions, and other high-level business points. Their purpose is generally to memorialize the parties' preliminary understanding while preserving flexibility as due diligence proceeds and definitive transaction documents are negotiated.

Non-binding provisions can nonetheless have significant practical effect. They establish negotiating expectations, provide a framework for diligence and documentation, and may influence the parties' conduct. As a result, a party may generally walk away from the proposed transaction without liability only if it does so consistently with any binding obligations and agreed procedural commitments contained in the term sheet, letter of intent, or related agreements.

A well-drafted letter of intent should expressly distinguish between binding and non-binding provisions. This may be accomplished by identifying the binding provisions in a separate section, listing them with specificity, or stating clearly which provisions are intended to create enforceable obligations. Clear drafting reduces the risk that a court will infer binding effect from language or conduct that the parties did not intend to be legally operative.

Binding Provisions Requiring Particular Attention

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Even when the principal transaction terms are non-binding, certain provisions are commonly intended to be binding and enforceable upon execution. These provisions often include exclusivity or no-shop covenants, confidentiality obligations, expense reimbursement or cost-allocation provisions, governing law and forum-selection clauses, restrictions on public announcements, access rights for due diligence, and obligations relating to cooperation or information sharing.

Exclusivity provisions are particularly important for buyers. A defined exclusivity period may give a buyer the confidence to invest the time and expense required to conduct due diligence, engage advisors, negotiate definitive documents, and pursue financing or approval processes without concern that the seller is simultaneously negotiating with another potential acquirer. Conversely, sellers should ensure that any exclusivity covenant is appropriately limited in duration and scope.

Governing law and forum-selection provisions also warrant close attention. If a dispute arises, these provisions determine which jurisdiction's law will apply and where the dispute may be heard. They may also serve as the foundation for corresponding provisions in the definitive acquisition agreement. Similarly, where the parties have entered into a separate non-disclosure agreement, the letter of intent should specify whether its confidentiality provisions supplement, control over, or are superseded by the existing agreement.

These binding provisions allocate interim risk and regulate the parties' conduct during the period before signing or closing. A breach may give rise to contractual remedies or other legal exposure even if the parties never execute a definitive acquisition agreement or consummate the proposed transaction.

Good-Faith Negotiation Obligations

Parties should also consider whether the term sheet or letter of intent creates an obligation to negotiate in good faith. Although such an obligation generally does not require either party to close the transaction, it may require meaningful participation in the negotiation process, compliance with agreed procedural commitments, and a good-faith basis for terminating negotiations or revisiting previously stated deal terms. Depending on the governing law and the parties' conduct, courts may look beyond the "non-binding" label and examine whether an enforceable duty arose from the document as a whole.

This issue is especially significant in M&A transactions where exclusivity periods, compressed diligence timelines, transaction momentum, and access to sensitive information may materially affect the parties' leverage and available alternatives.

Takeaway

Term sheets and letters of intent should be drafted with precision and with careful attention to enforceability. Buyers and sellers should avoid relying on broad labels and instead specify, provision by provision, which terms are intended to be binding and which are not. Clear drafting, consistent conduct, and coordination with related agreements—such as non-disclosure agreements—can help preserve transactional flexibility while reducing the risk of unintended obligations, negotiation disputes, and avoidable litigation.

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