CARLTON FIELDS

Cross-Border Transactions and Letters of Intent

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Many issues applicable to domestic mergers and acquisition transactions are also relevant in cross-border mergers and acquisitions. If you are a U.S. company buying or selling a company abroad, you will likely have both U.S. counsel and local counsel. Ideally, local counsel is retained and managed by your U.S. counsel so the attorneys can work together seamlessly and efficiently for the duration of the transaction and on issues that invariably arise post-closing. At the inception of the transaction, the principal business terms will be memorialized in a letter of intent. The exclusivity provision, a very important letter of intent component, is often not given the significance it deserves. As deals heat up, particularly in certain industries, there is often ample competition for the same targets. Therefore, from a buyer perspective, the exclusivity provision becomes very important. An exclusivity provision imposes an obligation on the target to not discuss with any other party, or even entertain, a transaction for the sale of equity or assets from the time the letter of intent is signed until the deal closes. In certain industries, suppliers and retailers often include in their supply agreement a right of first refusal for the benefit of the suppliers in the event that retailers want to sell a majority of their equity or substantially all of their assets. Although enforceability of these provisions may be questionable from a restraint of trade perspective and may depend largely on how the right of first refusal is drafted, the last thing buyers want when embarking on an acquisition is to get involved in potential litigation. Therefore, a right of first refusal may chill potential buyers. At a minimum, a buyer must wait the requisite period of time during which the third party may exercise or decline its right of first refusal. Ideally, the buyer should review the right of first refusal language to understand it and ensure it is triggered by the transaction. If it is, the exclusivity provision should specifically carve out a target's ability to give the third party its right to exercise a right of first refusal. Another issue that may arise in this context is that sometimes the target may use a prospective buyer to "shop around" in an attempt to raise the price of the target in the eyes of the entity that has the right of first refusal or other prospective buyers. In this situation, the buyer's internal and external resources and time may be wasted and used by the target to drive up its price. A well-drafted exclusivity provision specifically provides, among other things, that the target will not disclose to third parties, not only the terms of the transaction, but the existence of the letter of intent, the existence of the pending transaction, or the identity of the prospective buyer. An exclusivity provision should also provide that the target must notify the prospective buyer of any

inquiries the target receives after the letter of intent is signed. If the target has shopped around for a buyer prior to entering into the letter of intent, the exclusivity provision should also specify that the target is no longer permitted to communicate with former suitors regarding any possible transaction and is not permitted to disclose the terms of the pending deal or the buyer's identity. Otherwise, these factors may be used by the target or other interested buyers to drive up the price and potentially derail the transaction. The governing law and venue for dispute resolutions for a letter of intent of cross-border transactions should be a U.S. state so the exclusivity provisions can be enforced in U.S. courts.

Related Practices

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