



## Letter of Intent

*June 05, 2012*

Hemenway & Barnes partner Fred Marx co-hosted two recent broadcasts of Radio Entrepreneurs, May 17 and May 18, 2012. He and Jeffrey Davis discussed several entrepreneur-related topics with Boston-area attorneys and other professionals and offered planning tips for families and individuals in business.

### **A brief overview of the Letter of Intent**

During the May 17 program, Mr. Marx walked his listeners through the basics of the Letter of Intent, noting its importance to the deal. "Once a LOI is negotiated and documented," he said, "most transactions close."

That's because, he explained, the LOI allows a prospective buyer and seller to hammer out the fundamentals of a transaction. These include:

- What is the structure of the transaction? This is something that has huge tax implications for both the buyer and the seller.
- Is it an asset acquisition? Merger? A stock purchase?
- How much is the purchase price? What are the parameters, such as so much down and more based on later performance — an earn out?
- Parameters for claims after the deal closes including caps, minimums (so-called baskets or deductibles) and exclusions.

In addition, Mr. Marx offered an experienced insider's perspective on the LOI. For example, he said that while parties often spend a lot of time and energy discussing tough issues such as indemnification protection, it turns out that bona fide claims under an indemnification clause are rare.

### **Most LOI's, however, have some standard, binding elements, such as:**

- **Confidentiality.** It's important to begin the due diligence process with a non-disclosure agreement.
- **Exclusivity.** A lot of time and other resources go into a transaction. It's smart for both parties to assure one another that there is only one potential buyer and one seller for a certain period, usually 60 to 90 days, subject to a mutually agreed extension.





Mr. Marx suggested against asking for a breakup fee at the LOI stage. They are difficult to obtain and harder to enforce. Mr. Marx also said that LOI's also often contain language that relates to employing members of the company's current management. Mr. Marx advised leaving this discussion to after the deal terms are set in the LOI unless they truly are "deal killers."

### Also on the broadcasts

In addition to an overview of the Letter of Intent, Mr. Marx interviewed several local experts:

- Rick Dlugasch and Anthony Librot, CPA's with Waldron H. Rand & Company, P.C.
- Mark Kozol, a tax attorney with Clarke, Snow, & Riley, LLP.
- Rick Breed and Mark Furman, respectively, an estate planner and a litigator with Tarlow, Breed, Hart & Rodgers, P.C.
- Richard Levitan and Ellen Calmas, Neighborhood Pay Services, LLC, a financial service provider for the multifamily housing industry.

The interviews covered a wide range of planning issues, with a particular focus on what investors and others need to know about January 1, 2013. That's when the Bush-era tax cuts are slated to expire and massive, congressionally-mandated spending cuts are scheduled to kick in.

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