



MILGRIM LAW GROUP

Using Letters of Intent in Commercial Real Estate

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What is a Letter of Intent (LOI)?

- An LOI, sometimes also known as a “Term Sheet” is a preliminary agreement, or an “agreement to agree” between two parties which outlines the key deal terms of a contemplated transaction
- Can be used for commercial leases, purchase and sale of businesses or purchase and sale of commercial real estate
- Although either side can prepare an LOI, typically the prospective buyer or tenant (as applicable) may initiate the process by preparing the initial draft of the LOI or by authorizing its broker to prepare the initial draft
- It is a good idea to get your real estate attorney involved early in the process (more on that later)

Why Use an LOI?

- Agreement on the basic terms tends to facilitate agreement on the remaining terms
- The parties (especially the Landlord or Seller) are more likely to feel committed to finalizing a deal if you have already formalized a preliminary agreement
- Saves money in drafting and further back-and-forth negotiations between attorneys – getting an attorney involved early usually reduces costs
- Flushing out “fake” parties – Landlords and Sellers generally prefer to have an LOI to determine whether it is worthwhile to invest the time and money of hiring a lawyer to do a formal purchase agreement. If the parties are unable to agree to the general framework, then there is no need to incur the expenses of drafting a formal agreement

Who Prepares the LOI? What Does it Mean When a Party “Submits” the LOI?

- Either party can prepare, but typically a prospective buyer or tenant (as applicable) initiates the process by preparing the initial draft of the LOI or by authorizing its broker to prepare the initial draft
- Although it is a matter of personal choice, each principal to the transaction should carefully consider involving its real estate attorney as early as possible in the process (more on this below)
- Submission of the LOI signals a genuine interest in buying or leasing the referenced property. Taking the time to prepare and deliver the LOI represents a significant preliminary milestone in a transaction

What is Contained in an LOI?

1. Introductory Paragraph – includes general information such as location of property and names of parties
2. Key Deal Terms – Any terms the parties decide to include in the LOI regarding the proposed transaction (see next slide for examples)
3. Closing Paragraph(s)/Enforceability - Many LOIs conclude with a statement expressing whether all or part of the LOI will be binding or non-binding, that is, legally enforceable or not. For example, the parties may wish to make the confidentiality clause of the LOI binding, or a prospective tenant may require that a landlord's promise to reimburse the prospective tenant for certain design costs be binding

Examples of Key Deal Terms

- Purchase and Sale Terms:
 - Deposits/Purchase Price
 - Title Company (and who is paying for Title Insurance)
 - Due Diligence and Title Review Period
 - Financing Contingency (and/or other Contingencies)
 - Condition of Property
 - Reps and Warranties
 - Costs, Expenses and Prorations
 - Confidentiality
 - Closing

Examples of Key Deal Terms (cont'd)

- Commercial Lease Terms:
 - Security Deposit/Letter of Credit
 - Permitted Use
 - Delivery Date/Rent Commencement Date
 - Condition of Premises on Delivery (LL Work and Tenant Work)
 - Rent (single, double or triple net, etc.)
 - Alterations
 - Option to Purchase
 - Casualty/Condemnation
 - Guarantors

How Should You Analyze an LOI?

- Give the overall document a broad review
 - Are all pages present?
 - Are all exhibits (if any) attached?
 - Are the parties' names correct
 - Dates and signatures
 - Make note of different sections of the document vis a vis your specific client's needs (e.g., is there a provision regarding financing, due diligence or permit contingencies?)
 - Look for “binding language” – ***talk to REAL ESTATE COUNSEL!!!!***

Is an LOI Binding?

- Maybe!!!!
- LOIs can be binding as a whole, or just portions or sections can be binding, or it could be silent
- Look for particular phrases such as:
 - “This binding Letter of Intent is contingent on the following terms and conditions...”
 - “With the exceptions of paragraphs 2, 3 and 12, this Letter of Intent does not create a binding contract and will not be enforceable...”
 - “This Agreement is enforceable as to the sale (or leasing) of the Property”
- DO NOT SIGN IF QUESTIONS!!!!

Tips for Brokers

- Maintain credibility throughout process – try to avoid renegotiation of deal points after execution of an LOI. If you have to renegotiate a term, have a compelling reason for the change (such as discovery of new information, etc.)
- Be very wary of unclear terms – If a provision seems unclear, definitely get clarification on it. This is the time to just that so the parties understand and agreed on the deal
- Do not have your client partially perform under an LOI prior to execution in full and conversation with counsel (may muddy waters as to whether a court finds an LOI binding vs. non-binding)

QUESTIONS?

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